OFFICIAL CODE OF GEORGIA ANNOTATED



VOLUME 20

Title 24. Evidence

2013 Edition

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Georgia
Official code of Georgia
annotated

MERCER UNIVERSITY

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OFFICIAL CODE OF GEORGIA ANNOTATED

With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
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and
The Editorial Staff of LexisNexis®

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Volume 20
2013 Edition

Title 24. Evidence

Including Acts of the 2013 Session of the General Assembly of Georgia
and Annotations taken from the Georgia Reports
and the Georgia Appeals Reports

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2013

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THE STATE OF GEORGIA

OFFICE OF SECRETARY OF STATE

I, Brian P. Kemp, Secretary of State of the State of Georgia, do hereby certify that

the statutory portion of the Official Code of Georgia Annotated contained in this volume is a true and correct copy of such material as enacted by the General Assembly of Georgia; all as same appear of file and record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in the City of Atlanta, this 28th day of June, in the year of our Lord Two Thousand and Thirteen and of the Independence of the United States of America the Two Hundred and Thirty-Seventh.

B. P. K.

Brian P. Kemp, Secretary of State

Preface

This volume cumulates and replaces the the 2012 Interim Edition of Volume 20 of the Official Code of Georgia Annotated. The 2012 Interim Edition may be recycled or, if so desired, retained for historical purposes.

This volume contains all laws specifically codified in Title 24 by the General Assembly through the 2013 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through March 29, 2013. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2012 and 2013 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2012 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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In Addition, This Publication Includes

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Appendix. American Experience Mortality Table; The Commissioners 1958 Standard Ordinary Mortality Table; Annuity Mortality Table for 1949, Ultimate.

Editor's notes. — Ga. L. 2011, p. 99, § 1/HB 24, not codified by the General Assembly, provides that: "It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013, to the extent that such interpretation is consistent with the Constitution of Georgia. Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the federal rules of evidence, the General Assembly considered the decisions of the 11th Circuit Court of Appeals. It is the intent of the General Assembly to revise, modernize, and reenact the general laws of this state relating to evidence while adopting, in large measure, the Federal

Rules of Evidence. The General Assembly is cognizant that there are many issues regarding evidence that are not covered by the Federal Rules of Evidence and in those situations the former provisions of Title 24 have been retained. Unless displaced by the particular provisions of this Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012, be retained."

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Ga. L. 2011, p. 99, § 2/HB 24, and Ga. L. 2012, p. 651, § 2-1/HB 46, effective January 1, 2013, repealed the Code sections formerly codified at this title and enacted the current title. The former title consisted of §§ 24-1-1 through 24-1-5 (Chapter 1); 24-2-1 through 24-2-4 (Chapter 2); 24-3-1 through 24-3-18 (Article 1 of Chapter 3); 24-3-30 through 24-3-38 (Article 2 of Chapter 3); 24-3-50 through 24-3-53 (Article 3 of Chapter 3); 24-4-1 through 24-4-9 (Article 1 of Chapter 4); 24-4-20 through 24-4-27 (Article 2 of Chapter 4); 24-4-40 through 24-4-48 (Article 3 of Chapter 4); 24-4-60 through 24-4-65 (Article 4 of Chapter 4); 24-5-1 through 24-5-5 (Article 1 of Chapter 5); 24-5-20 through 24-5-33 (Article 2 of Chapter 5); 24-6-1 through 24-6-10 (Chapter 6); 24-7-1 through 24-7-9 (Article 1 of Chapter 7); 24-7-20 though 24-7-27 (Article 2 of Chapter 7); 24-8-1 through 24-8-6 (Article 1 of Chapter 8); 24-8-20 through 24-8-30 (Article 2 of Chapter 8); 24-9-1 through 24-9-7 (Article 1 of Chapter 9); 24-9-20 through 24-9-30 (Part 1, Article 2 of Chapter 9); 24-9-40 through 24-9-47 (Part 2, Article 2 of Chapter 9); 24-9-60 through 24-9-70 (Article 3 of Chapter 9); 24-9-80 through 24-9-85 (Article 4 of Chapter 9); 24-9-100 through 24-9-108 (Article 5 of Chapter 9); 24-10-1 through 24-10-7 (Article 1 of Chapter 10); 24-10-20 through 24-1-29 (Part 1, Article 2 of Chapter 10); 24-10-40 through 24-10-45 (Part 2, Article 2 of Chapter 10); 24-10-60 through 24-10-62 (Article 3 of Chapter 10); 24-10-70 through 24-10-76 (Article 4 of Chapter 10); 24-10-90 through 24-10-97 (Article 5 of Chapter 10); 24-10-110 through 24-10-116 (Article 6 of Chapter 10); 24-10-130 through 24-10-139 (Article 7 of Chapter 10); 24-10-150 through 24-10-154 (Article 8 of Chapter 10) and was based on Laws 1792, Cobb's 1851 Digest, p. 353; Laws 1799, Cobb's 1851 Digest, p. 276; Laws 1799, Cobb's 1851 Digest, p. 277; Laws 1799, Cobb's 1851 Digest, p. 463; Laws 1819, Cobb's 1851 Digest, p. 272; Laws 1829, Cobb's 1851 Digest, p. 278; Laws 1830, Cobb's 1851 Digest, p. 273; Laws 1836, Cobb's 1851 Digest, p. 273; Ga. L. 1841, p. 144, § 1; Laws 1841, Cobb's 1851 Digest, p. 465; Laws 1842, Cobb's 1851 Digest, p. 280; Laws 1850, Cobb's 1851 Digest, p. 280; Ga. L. 1855-56, p. 138, § 2; Ga. L. 1855-56, p. 143, § 1; Ga. L. 1855-56, p. 238, §§ 1 — 8; Ga. L. 1855-56, p. 255, § 1; Ga. L. 1858, p. 53, § 1; Ga. L. 1859, p. 18, § 1; Orig. Code 1863, §§ 3035, 3041 — 3044, 3051, 3437 — 3442, 3444, 3446, 3447, 3670 — 3699, 3701 — 3717, 3719, 3720, 3723 — 3731, 3737 — 3740, 3742 — 3745, 3747, 3749, 3753 — 3755, 3757 — 3766, 3768 — 3776, 3784 — 3800, 3888 — 3891, 3894, 3928, 4094; Code 1863, §§ 3721, 3741, 3744, 3745, 3765, 3767, 3768, 3772; 3884 — 3888, 3890, 3891; Ga. L. 1866, p. 138, §§ 1 — 4; Ga. L. 1866, p. 139, § 1; Ga. L. 1868, p. 24, § 1; Code 1868, §§ 3047, 3053 — 3056, 3063, 3446, 3457 — 3464, 3467, 3694 — 3723, 3725 — 3741, 3743 — 3745, 3747 — 3755, 3761 — 3769, 3771 — 3773, 3777 — 3779, 3781 — 3820, 3887, 3901, 3904 — 3911, 3914, 3916, 3951, 4123; Ga. L. 1873, p. 25, § 1; Ga. L. 1873, p. 35, § 1; Code 1873, §§ 3102, 3108, 3109, 3111, 3118, 3508 — 3515, 3517, 3518, 3747 — 3776, 3778 — 3794, 3796 — 3798, 3800 — 3808, 3814 — 3822, 3824, 3826, 3829 — 3833, 3835 — 3845, 3849 — 3876, 3980 — 3987, 3990, 3992, 4027, 4182, 4637; Ga. L. 1874, p. 22, § 1; Ga. L. 1876, p. 101, §§ 1, 2; Ga. L. 1877, p. 21, § 1; Ga. L. 1878-79, p. 53, § 1; Ga. L. 1878-79, p. 66, § 1; Ga. L. 1878-79, p. 151, § 1; Ga. L. 1880-81, p. 78, § 1; Ga. L. 1880-81, p. 121, § 1; Ga. L. 1882-83, p. 96, §§ 1 — 4; Ga. L. 1882-83, p. 106, §§ 1, 2; Ga. L. 1882-83, p. 135, § 1; Code 1882, §§ 3102, 3108 — 3111, 3118, 3508 — 3514, 3515, 3517, 3518, 3747 — 3776, 3778 — 3794, 3796, 3798, 3800 — 3808, 3814 — 3822, 3824, 3826, 3829 — 3832, 3834 —

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Former Code Sections to New Code Sections

This table lists each Code section of former Title 24 (as effective prior to January 1, 2013) and comparable provisions in current Title 24 (as effective on January 1, 2013).

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24-6-4	24-3-4
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24-8-6	24-11-3
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24-8-20	24-11-20
24-8-21	24-11-21
24-8-22	24-11-22
24-8-23	none
24-8-24	24-11-23
24-8-25	24-11-24
24-8-26	24-11-25
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24-9-84.1	24-6-609
24-9-85	none
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24-9-102	24-6-652
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24-9-104	24-6-654
24-9-105	24-6-655
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24-10-22	24-13-23
24-10-23	24-13-24
24-10-24	24-13-25
24-10-25	24-13-26
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Part 2	
24-10-40	none
24-10-41	none
24-10-42	none
24-10-43	none
24-10-44	none
24-10-45	none
Article 3	
24-10-60	24-13-60
24-10-61	24-13-61
24-10-62	24-13-62
Article 4	
24-10-70	none
24-10-71	none
24-10-72	none
24-10-73	none
24-10-74	none
24-10-75	none
Article 5	
24-10-90	24-13-90
24-10-91	24-13-91
24-10-92	24-13-92
24-10-93	24-13-93
24-10-94	24-13-94
24-10-95	24-13-95
24-10-96	24-13-96
24-10-97	24-13-97
Article 6	
24-10-110	none
24-10-111	none
24-10-112	none
24-10-113	none
24-10-114	none
24-10-115	none
24-10-116	none
Article 7	
24-10-130	24-13-130
24-10-131	24-13-131
24-10-132	24-13-132
24-10-133	24-13-133
24-10-134	24-13-134
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New Code Sections to Former Code Sections

This table lists each Code section of Title 24 (as effective on January 1, 2013) and comparable provisions in the former version of Title 24, and in the Federal Rules of Evidence (as effective prior to January 1, 2013).

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24-3-5	24-6-5
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24-4-403	FRE 403, 24-2-1
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24-4-405	FRE 405, 24-2-2
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24-4-411	FRE 411
24-4-412	24-2-3
24-4-413	FRE 413, 24-2-2, U.S.C.R. 31.3
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24-5-505	24-9-27
24-5-506	24-9-20
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24-5-508	24-9-30
24-5-509	none
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24-6-604	FRE 604, 24-9-4
24-6-605	FRE 605
24-6-606	FRE 606
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24-6-608	FRE 608, 24-9-83, 24-9-84
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24-6-651	24-9-101
24-6-652	24-9-102
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24-6-654	24-9-104
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24-7-703	FRE 703, 24-9-67.1(a)
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24-8-804	FRE 804, 24-3-7, 24-3-8, 24-3-10, 24-3-35
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24-11-26	24-8-27
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24-13-4	24-10-4
24-13-5	24-10-5
24-13-6	24-10-6
24-13-7	24-10-7
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24-13-20	24-10-29
24-13-21	24-10-20
24-13-22	24-10-21
24-13-23	24-10-22
24-13-24	24-10-23
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24-13-26	24-10-25
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24-13-28	24-10-27, 24-10-27.1
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24-13-61	24-10-61
24-13-62	24-10-62
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24-13-91	24-10-91
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24-13-94	24-10-94
24-13-95	24-10-95
24-13-96	24-10-96
24-13-97	24-10-97
Article 5	
24-13-110	none
24-13-111	none
24-13-112	none
24-13-113	none
24-13-114	none
24-13-115	none
24-13-116	none
Article 6	
24-13-130	24-10-130
24-13-131	24-10-131
24-13-132	24-10-132
24-13-133	24-10-133
24-13-134	24-10-134
24-13-135	24-10-135
24-13-136	24-10-136
24-13-137	24-10-137
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24-13-151	24-10-151
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24-14-3	24-4-3
24-14-4	24-4-4
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24-14-26	24-4-24
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Law reviews. — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011). For annual survey on evidence law, see 64 Mercer L. Rev. 137 (2012). For article, "Georgia's New Evidence Code: After the Celebration, a Serious Review of Anticipated Subjects of Litigation to be Brought on by the New Legislation," see 64 Mercer L. Rev. 1 (2012). For article, "Williams v. Illinois: Confronting Experts, Science, and the Constitution," see 64 Mercer L. Rev. 805 (2013).

CHAPTER 1

GENERAL PROVISIONS

Article 1

Purpose and Applicability of Rules of Evidence

Sec.
24-1-1. Purpose and construction of the rules of evidence.
24-1-2. Applicability of the rules of evidence.

Article 2

General Evidentiary Matters

24-1-101. Reserved.
Sec.
24-1-102. Reserved.
24-1-103. Rulings on evidence.
24-1-104. Preliminary questions.
24-1-105. Limited admissibility.
24-1-106. Introduction of remaining portions of writings or recorded statements.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011).

ARTICLE 1

PURPOSE AND APPLICABILITY OF RULES OF EVIDENCE

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-1-1. Purpose and construction of the rules of evidence.

The object of all legal investigation is the discovery of truth. Rules of evidence shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. (Code 1981, § 24-1-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Purpose, Fed. R. Evid. 102.

Law reviews. — For article surveying the law in Georgia on admissions, see 8 Mercer L. Rev. 252 (1957). For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Orig. Code 1863, § 3670, former Code 1868, § 3694, former Code 1873, § 3747, former Code 1882, § 3747, former Civil Code 1895, § 5142, former Penal Code 1895, § 982, former Civil Code 1910, § 5728, former Penal

Code 1910, § 1008, former Code 1933, § 38-101, and former O.C.G.A. § 24-1-2 are included in the annotations for this Code section.

Former O.C.G.A. § 24-1-2 capsulized the raison d'etre for the rules which govern trials. It was not limited by the statute's terms to civil trials. Holcomb v. State, 198 Ga. App. 547, 402 S.E.2d 520, cert. denied, 198 Ga. App. 898, 402 S.E.2d 520 (1991) (decided under former O.C.G.A. § 24-1-2).

Balancing of competing rights. — Trial court must weigh in balance the right of the state as society's representative to obtain the truth in the purest and simplest form against the right of a defendant to a trial as free as possible from improper influences. Montgomery v. State, 156 Ga. App. 448, 275 S.E.2d 72 (1980) (decided under former Code 1933, § 38-101).

Basic axiom of justice set forth in the former provisions obtained in all cases except when "it would be more unjust and productive of more evil to hear the truth than to forbear the investigation." Hollins v. State, 133 Ga. App. 183, 210 S.E.2d 354 (1974) (decided under former Code 1933, § 38-101).

Courts allowed broad discretion. — Pursuant to the liberal rule granting the trial courts very broad discretion in permitting parties to offer additional evidence at any stage of the trial, and because leniency in this area was very unlikely to constitute an abuse of the court's discretion, the defendant failed to show that the trial court abused the court's discretion in permitting the state to reopen the evidence after the state had presented the state's case-in-chief and rested. Taylor v. State, 282 Ga. 502, 651 S.E.2d 715 (2007) (decided under former O.C.G.A. § 24-1-2).

Public trial tends to ensure the truth by forcing those who testify to relate their memories without embellishment for fear that there may be those in attendance who could call the testimony into question if not truthful. As one party to the trial, the state is entitled to require common witnesses, both those charged and observers of the charged acts, to present their version of the occurrences in the presence of each other, thereby minimizing witness bias or the possibility of each defendant singly shifting blame to other absent defendants without opportunity of searching inquiry into the truth. Montgomery v. State, 156 Ga. App. 448, 275 S.E.2d 72 (1980) (decided under former O.C.G.A. § 24-1-2).

Narrow construction of the attorney-client privilege, inasmuch as the exercise of the privilege results in the exclusion of evidence, comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is "the object of all legal investigation." Tenet Healthcare Corp. v. Louisiana Forum Corp., 273 Ga. 206, 538 S.E.2d 441 (2000) (decided under former O.C.G.A. § 24-1-2).

Impeachment evidence. — Trial court's refusal to permit the introduction of a complaint in another proceeding to impeach a party was at odds with the principle in former O.C.G.A. § 24-1-2 (see now O.C.G.A. § 24-1-1) that the object of all legal investigation was the discovery of the truth, since the statute authorized the exclusion of relevant impeaching evidence and allowed the credibility of a crucial witness to go unchallenged; clearly, the subordination of the discovery of the truth to a mere procedural device was erroneous. Ballard v. Meyers, 275 Ga. 819, 572 S.E.2d 572 (2002) (decided under former O.C.G.A. § 24-1-2).

Reopening case to admit impeachment evidence. — Trial court did not abuse the court's discretion in reopening the evidence in a defendant's marijuana possession trial to allow the prosecutor to present impeachment witnesses who disproved a defense witness's claim that the witness did not know the defendant by showing that the witness was the defendant's girlfriend and the mother of the defendant's child. Sirmans v. State, 301 Ga. App. 756, 688 S.E.2d 669 (2009) (decided under former O.C.G.A. § 24-1-2).

Admission of doubtful evidence. — State policy was to admit evidence, even if the admissibility of the evidence was doubtful, because it was more dangerous to suppress the truth than to allow a loophole for falsehood. Gibbons v. Maryland Cas. Co., 114 Ga. App. 788, 152

S.E.2d 815 (1966) (decided under former Code 1933, § 38-101).

When the admissibility of evidence is in doubt, the Georgia rule favored admission and submission to the jury with any needed instructions. Georgia Farm Bureau Mut. Ins. Co. v. Latimore, 151 Ga. App. 786, 261 S.E.2d 735 (1979) (decided under former Code 1933, § 38-101).

Summary judgment determines only whether material fact exists. — On summary judgment, a trial court determines only whether a material issue of fact exists, and such determination does not include "the discovery of the truth of such fact" or permit frustration of a plaintiff's constitutional right to a trial by jury "by inferring with the existence of other facts" from predicate evidence. Bruno's Food Stores, Inc. v. Taylor, 228 Ga. App. 439, 491 S.E.2d 881 (1997) (decided under former O.C.G.A. § 24-1-2).

Reception of perjured evidence was never justice, no matter how salutary the end in view. Hollins v. State, 133 Ga. App. 183, 210 S.E.2d 354 (1974) (decided under former Code 1933, § 38-101).

Experiments made in and out of court sometimes make a practical demonstration of the question in issue, and are often the best evidence in elucidating the truth; there should be substantial and reasonable similarity in the facts proved in the case and the facts upon which the experiment is based, but the facts need not be exactly or in every particular similar; if the experiments are sufficiently similar to accomplish the purpose of assisting the jury to intelligently consider the issue of fact presented in regard to the special point in controversy, the evidence is admissible. Miller v. State, 53 Ga. App. 275, 185 S.E. 372 (1936) (decided under former Code 1933, § 38-101).

On cross-examination opposing party was entitled to a thorough and sifting examination of the witness and, when the defendant's alibi witnesses were under cross-examination, the trial court correctly refused to grant a mistrial with reference to an effort to impeach the witnesses as to whether or not the testimony was fabricated before trial since the object of all legal investigation was the discovery of truth. Mitchell v. State, 157 Ga. App. 683, 278 S.E.2d 192 (1981) (decided under former Code 1933, § 38-101).

Refusal to allow a witness to testify is a matter within the discretion of the trial court. Georgia Bldg. Servs., Inc. v. Perry, 193 Ga. App. 288, 387 S.E.2d 898 (1989) (decided under former O.C.G.A. § 24-1-2).

Failure of the trial court to allow a witness to testify in a slip and fall premises liability suit constituted an abuse of discretion requiring reversal and a new trial since the exercise of discretion was based upon a misapprehension of the facts of the case, namely, the trial court's belief that the witnesses' existence had not been revealed to the opposing party. Georgia Bldg. Servs., Inc. v. Perry, 193 Ga. App. 288, 387 S.E.2d 898 (1989) (decided under former O.C.G.A. § 24-1-2).

Blood test admitted in rebuttal. — Ruling of the trial court to allow blood test to be admitted in rebuttal was entirely consistent with the statutorily recognized object of the rules of evidence. Gregg v. State, 216 Ga. App. 135, 453 S.E.2d 499 (1995) (decided under former O.C.G.A. § 24-1-2).

Compliance with a subpoena implicit in a confidential settlement agreement. — Provision that a party to a confidential settlement agreement may nevertheless testify or otherwise comply with a subpoena, court order, or applicable law is an implicit term in such a confidential settlement agreement. Barger v. Garden Way, Inc., 231 Ga. App. 723, 499 S.E.2d 737 (1998) (decided under former O.C.G.A. § 24-1-2).

Trial court erred in concluding that a confidential settlement agreement, even if incorporated as another court's final order, can operate to preclude discovery by Georgia litigants of the parties to that confidential settlement agreement. Barger v. Garden Way, Inc., 231 Ga. App. 723, 499 S.E.2d 737 (1998) (decided under former O.C.G.A. § 24-1-2).

District attorney request for declaratory judgment on admissibility of hearsay evidence. — Supreme Court of Georgia reversed the judgment of the lower courts granting a district attorney a declaratory judgment because the district attorney did not have the right to bring a

declaratory judgment action to obtain review of the probable cause decisions of magistrate judges at preliminary hearings or to challenge the admissibility of hearsay evidence at such hearings. Leitch v. Fleming, 291 Ga. 669, 732 S.E.2d 401 (2012) (decided under former O.C.G.A. § 24-1-2).

RESEARCH REFERENCES

ALR. — Admissibility of experimental evidence to show visibility or line of vision, 78 ALR2d 152.

Admissibility of experimental evidence, skidding tests, or the like, relating to speed or control of motor vehicle, 78 ALR2d 218.

Admissibility of evidence of family circumstances of parties in personal injury actions, 37 ALR3d 1082.

24-1-2. Applicability of the rules of evidence.

(a) The rules of evidence shall apply in all trials by jury in any court in this state.

(b) The rules of evidence shall apply generally to all nonjury trials and other fact-finding proceedings of any court in this state subject to the limitations set forth in subsections (c) and (d) of this Code section.

(c) The rules of evidence, except those with respect to privileges, shall not apply in the following situations:

(1) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Code Section 24-1-104;

(2) Criminal proceedings before grand juries;

(3) Proceedings for extradition or rendition;

(4) Proceedings for revoking parole;

(5) Proceedings for the issuance of warrants for arrest and search warrants except as provided by subsection (b) of Code Section 17-4-40;

(6) Proceedings with respect to release on bond;

(7) Dispositional hearings and custody hearings in juvenile court; or

(8) Contempt proceedings in which the court, pursuant to subsection (a) of Code Section 15-1-4, may act summarily.

(d)(1) In criminal commitment or preliminary hearings in any court, the rules of evidence shall apply except that hearsay shall be admissible.

(2) In in rem forfeiture proceedings, the rules of evidence shall apply except that hearsay shall be admissible in determining probable cause or reasonable cause.

(3) In presentence hearings, the rules of evidence shall apply except that hearsay and character evidence shall be admissible.

(4) In administrative hearings, the rules of evidence as applied in the trial of nonjury civil actions shall be followed, subject to special statutory rules or agency rules as authorized by law.

(e) Except as modified by statute, the common law as expounded by Georgia courts shall continue to be applied to the admission and exclusion of evidence and to procedures at trial. (Code 1981, § 24-1-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Applicability of the rules, Fed. R. Evid. 1101.

Law reviews. — For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

RESEARCH REFERENCES

ALR. — Applicability of rules of evidence in juvenile delinquency proceeding, 43 ALR2d 1128.

Applicability of rules of evidence to juvenile transfer, waiver, or certification hearings, 37 ALR5th 703.

ARTICLE 2

GENERAL EVIDENTIARY MATTERS

24-1-101. Reserved.

Reserved.

Editor's notes. — Ga. L. 2011, p. 99, § 2/HB 24, effective January 1, 2013, reserved the designation of this Code section.

24-1-102. Reserved.

Reserved.

Editor's notes. — Ga. L. 2011, p. 99, § 2/HB 24, effective January 1, 2013, reserved the designation of this Code section.

24-1-103. Rulings on evidence.

(a) Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and:

(1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal.

(b) The court shall accord the parties adequate opportunity to state grounds for objections and present offers of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of an offer of proof in question and answer form.

(c) Jury proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, including, but not limited to, making statements or offers of proof or asking questions in the hearing of the jury.

(d) Nothing in this Code section shall preclude a court from taking notice of plain errors affecting substantial rights although such errors were not brought to the attention of the court. (Code 1981, § 24-1-103, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Rulings on evidence, Fed. R. Evid. 103.

24-1-104. Preliminary questions.

(a) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (b) of this Code section. In making its determination, the court shall not be bound by the rules of evidence except those with respect to privileges. Preliminary questions shall be resolved by a preponderance of the evidence standard.

(b) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be conducted out of the hearing of the jury when the interests of justice require or when an accused is a witness and requests a hearing outside the presence of the jury.

(d) The accused shall not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the proceeding.

(e) This Code section shall not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. (Code 1981, § 24-1-104, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Preliminary questions, Fed. R. Evid. 104.

Law reviews. — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

24-1-105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but which is not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. (Code 1981, § 24-1-105, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Limiting evidence that is not admissible against other parties or for other purposes, Fed. R. Evid. 105.

24-1-106. Introduction of remaining portions of writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which, in fairness, should be considered contemporaneously with the writing or recorded statement. (Code 1981, § 24-1-106, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-2-4, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Monroe v. Phillips, 64 Ga. 32 (1879); Dowling v. Feeley, 72 Ga. 557 (1884); and Jones v. Grantham, 80 Ga. 472, 5 S.E. 764 (1888).

Cross references. — Remainder of or related writings or recorded statements, Fed. R. Evid. 106.

Administrative rules and regulations. — Fire Safety Information to Be Furnished in Hotels, Motels, Dormitories, Apartments and Personal Care Homes, Official Compilation of the Rules and Regulations of the State of Georgia, Comptroller General, Safety Fire Commissioner, State Minimum Fire Safety Standards, Rule 120-3-3-.06.

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5241, former Civil Code 1910, § 5830,

former Code 1933, § 38-703, and former O.C.G.A. § 24-2-4 are included in the annotations for this Code section.

Brief of evidence. — In the preparation of the brief of evidence after trial, only such portions of documents should be embraced therein as were actually read or considered at the trial. Crawford v. Roney, 126 Ga. 763, 55 S.E. 499 (1906) (decided under former Civil Code 1895, § 5241).

Entry on back of deed. — When the plaintiff relies on a deed coming from the plaintiff's own possession, the opposite party may without proof of the deed's execution, rely upon an endorsement, memorandum, or entry on the back of the deed. McBrayer v. Walker, 122 Ga. 245, 50 S.E. 95 (1905) (decided under former Civil Code 1895, § 5241).

Foreign state code. — When one party offers a section of the code of another state as proof of the law of that state on a given subject, that party is not required to introduce all cognate sections. If there are other sections applicable the opposite party may offer those sections, but cannot complain that one's adversary has not done so. Southern Ry. v. Robertson, 7 Ga. App. 154, 66 S.E. 535 (1909) (decided under former Civil Code 1895, § 5241).

Real estate valuations. — It would be a misconception of the principle invoked by the former statute to allow the several valuations as stated by the real estate board in a document together with their arguments and reasons therefor, to be introduced in evidence by the plaintiff merely because the plaintiff's witness on cross-examination had stated a single valuation from this paper, when the entire document was otherwise absolutely inadmissible as hearsay. City of Atlanta v. Atlanta Title & Trust Co., 45 Ga. App. 265, 164 S.E. 224 (1932) (decided under former Civil Code 1910, § 5830).

Victim's testimony. — After the defense counsel was allowed to pursue the inconsistencies between a witness's trial testimony and the witness's statement to a detective, pursuant to former O.C.G.A. § 24-2-4, the state was entitled to rebut the defense's implication that a robber was not the defendant by reading the entire statement to the jury; consequently, the trial court did not err in allowing the detective to read part of a victim's statement to the jury. Houston v. State, 270 Ga. App. 456, 606 S.E.2d 883 (2004) (decided under former O.C.G.A. § 24-2-4).

Photos of victim. — Trial court properly admitted one of three photographs of the victim's body which showed an exterior mark of strangulation as such was not overly gruesome and inflammatory; moreover, pre-incision photos of a victim which depicted the location and nature of the victim's wounds were admissible as both relevant and material. McWilliams v. State, 280 Ga. 724, 632 S.E.2d 127 (2006) (decided under former O.C.G.A. § 24-2-4).

Letters. — Trial court did not err by refusing the defendant's request to admit only the portions of letters written by the codefendant that cast the codefendant in a bad light relative to the crimes and excluding other portions that described the defendant's role in the crimes as being more significant than the defendant had described in a custodial interview because the defendant was not permitted to admit portions of the letters for the purportedly-limited purpose of showing the codefendant's state of mind without waiving the defendant's objections to the state's introduction of the remainder of the letters. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010) (decided under former O.C.G.A. § 24-2-4).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 365. 29A Am. Jur. 2d, Evidence, § 1042.

C.J.S. — 32A C.J.S., Evidence, §§ 1038, 1102 et seq.

CHAPTER 2

JUDICIAL NOTICE

Article 1

Adjudicative Facts

Sec.
24-2-201. Judicial notice of adjudicative facts.

Article 2

Legislative Facts; Ordinances or Resolutions

24-2-220. Judicial notice of legislative facts.
Sec.
24-2-221. Judicial notice of ordinance or resolution.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011).

ARTICLE 1

ADJUDICATIVE FACTS

24-2-201. Judicial notice of adjudicative facts.

(a) This Code section governs only judicial notice of adjudicative facts.

(b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) A court may take judicial notice, whether or not requested by a party.

(d) A court shall take judicial notice if requested by a party and provided with the necessary information.

(e) A party shall be entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, such request may be made after judicial notice has been taken.

(f) Judicial notice may be taken at any stage of the proceeding.

(g)(1) In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.

(2) In a criminal proceeding, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. (Code 1981, § 24-2-201, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Taking of judicial notice of agency rules, § 50-13-8. Judicial notice of adjudicative facts, Fed. R. Evid. 201.

Law reviews. — For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

For comment on Carter v. Graves, 206 Ga. 234, 56 S.E.2d 917 (1949), see 12 Ga. B.J. 476 (1950).

JUDICIAL DECISIONS

Analysis

General Consideration
Judicial Notice Proper
Judicial Notice Improper

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1819, Cobb's 1851 Digest, p. 272, former Code 1863, §§ 3674, 3738, 3747, former Code 1868, §§ 3698, 3762, 3771, former Code 1873, §§ 3751, 3815, 3824, former Code 1882, §§ 3751, 3815, 3824, former Civil Code 1895, §§ 5148, 5210, 5231, former Civil Code 1910, §§ 5734, 5797, 5818, former Code 1933, § 38-112, and former O.C.G.A. § 24-1-4 are included in the annotations for this Code section.

Notice of intention to take judicial notice. — If a trial court intends to take judicial notice of any fact, the court must first announce the court's intention to do so on the record and afford the parties an opportunity to be heard regarding whether judicial notice should be taken. Graves v. State, 269 Ga. 772, 504 S.E.2d 679 (1998), overruled on other grounds, Jones v. State, 272 Ga. 900, 537 S.E.2d 80 (2000), reversing Graves v. State, 227 Ga. App. 628, 490 S.E.2d 111 (1997) (decided under former O.C.G.A. § 24-1-4).

Customs. — To be judicially recognized, custom must be one about which there is and can be no dispute and which is known to all men. Wood v. Frank Graham Co., 91 Ga. App. 621, 86 S.E.2d 691 (1955) (decided under former Code 1933, § 38-112).

Uncertified copies of pleadings and orders from other Georgia courts were not competent evidence to show that landlord, a Tennessee corporation, was an ousted mortgagor, out of possession and not in control of premises at the time of the incident. Commerce Properties, Inc. v. Linthicum, 209 Ga. App. 853, 434 S.E.2d 769 (1993) (decided under former O.C.G.A. § 24-1-4).

Matters of public knowledge. — Court will take judicial cognizance of matters of common and public knowledge. McGraw v. State, 85 Ga. App. 857, 70 S.E.2d 141 (1952) (decided under former Code 1933, § 38-112).

Test of public knowledge is whether the fact is one of common, everyday knowledge that all persons of average intelligence are presumed to know, and whether it is certain and indisputable. Cole v. Cates, 110 Ga. App. 820, 140 S.E.2d 36 (1964) (decided under former Code 1933, § 38-112).

Judicial notice must be requested. — Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must, in point of form, make a request for it. Reserve Life Ins. Co. v. Peavy, 98 Ga. App. 268, 105 S.E.2d 465 (1958) (decided under former

General Consideration (Cont'd)

Code 1933, § 38-112).

Judicial Notice Proper

Judicial notice of federal summary judgment order. — In a legal malpractice case based on the attorneys' representation in a 42 U.S.C. § 1983 action brought in federal court, the trial court properly took judicial notice of the federal district court's summary judgment order. The federal order was published in a case reporter and thus was "published by authority" under former O.C.G.A. § 24-1-4, and the very nature of the present action meant that all parties and the trial court necessarily had notice that the federal court's opinion would be relied upon. Kramer v. Yokely, 291 Ga. App. 375, 662 S.E.2d 208 (2008), cert. denied, 556 U.S. 1152, 129 S. Ct. 1671, 173 L. Ed. 2d 1037 (2009) (decided under former O.C.G.A. § 24-1-4).

Judicial notice was held proper in the following cases. — See Davis v. Bank of Fulton, 31 Ga. 69 (1860) (bank charter) (decided under former Laws 1819, Cobb's 1851 Digest, p. 272); Abrams v. State, 121 Ga. 170, 48 S.E. 965 (1904) (who is a public officer; abbreviation constituting officer's official designation) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); Towler v. Carithers, 4 Ga. App. 517, 61 S.E. 1132 (1908) (abbreviation for public officer's title) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); O'Connell v. State, 5 Ga. App. 234, 62 S.E. 1007 (1908) (what is an intoxicating beverage) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); Whatley v. Virginia-Carolina Chem. Co., 31 Ga. App. 226, 120 S.E. 436 (1923) (crops not mature in May) (decided under former Civil Code 1910, §§ 5734, 5797, 5818); Skinner v. Stewart Plumbing Co., 42 Ga. App. 42, 155 S.E. 97 (1930) (recording of mortgages) (decided under former Civil Code 1910, §§ 5734, 5797, 5818); Marshall v. Walker, 47 Ga. App. 195, 170 S.E. 267 (1933) (public officers appointed by Governor) (decided under former Civil Code 1910, §§ 5734, 5797, 5818); Watkins v. Augusta Chronicle Publishing Co., 49 Ga. App. 43, 174 S.E. 199 (1934) (election dates) (decided under former Code 1933, § 38-112); Daniel v. Citizens & S. Nat'l Bank, 182 Ga. 384, 185 S.E. 696 (1936) (public officers commissioned by Governor; legality of suspending such officers) (decided under former Code 1933, § 38-112); Thacker v. Morris, 196 Ga. 167, 26 S.E.2d 329 (1943) (computation of time) (decided under former Code 1933, § 38-112); Steed v. State, 80 Ga. App. 360, 56 S.E.2d 171 (1949) (normal periods of gestation) (decided under former Code 1933, § 38-112); McGraw v. State, 85 Ga. App. 857, 70 S.E.2d 141 (1952) (primary physical laws) (decided under former Code 1933, § 38-112); Wright Contracting Co. v. Waller, 89 Ga. App. 827, 81 S.E.2d 541 (1954) (primary physical laws; holding power of automobile brakes) (decided under former Code 1933, § 38-112); Peggy Ann of Ga., Inc. v. Scoggins, 90 Ga. App. 18, 81 S.E.2d 859 (1954) (holding power of automobile brakes) (decided under former Code 1933, § 38-112); Jordon v. State, 212 Ga. 337, 92 S.E.2d 528 (1956) (land lots and location as shown in state survey) (decided under former Code 1933, § 38-112); McGowans v. Speed Oil Co., 94 Ga. App. 35, 93 S.E.2d 597 (1956) (corporate name and existence) (decided under former Code 1933, § 38-112); Williams v. Lawler Hosiery Mills, Inc., 212 Ga. 617, 94 S.E.2d 699 (1956) (public officers commissioned by Governor) (decided under former Code 1933, § 38-112); Daniels v. State, 95 Ga. App. 862, 99 S.E.2d 292 (1957) (definition of moonshine liquor) (decided under former Code 1933, § 38-112); Williams v. State, 96 Ga. App. 833, 101 S.E.2d 747 (1958) (highways approved by State Highway Board are public highways) (decided under former Code 1933, § 38-112); Browne v. Snipes, 97 Ga. App. 149, 102 S.E.2d 634 (1958) (dates and times) (decided under former Code 1933, § 38-112); Jones v. Mills, 216 Ga. 616, 118 S.E.2d 484 (1961) (public officers commissioned by Governor) (decided under former Code 1933, § 38-112); Purcell v. Hill, 107 Ga. App. 85, 129 S.E.2d 341 (1962) (sunrise and sunset) (decided under former Code 1933, § 38-112); Clark v. Rich's, Inc., 114 Ga. App. 242, 150 S.E.2d 716 (1966) (customary department store hours) (decided under former Code 1933,

§ 38-112); Melton v. State, 149 Ga. App. 506, 254 S.E.2d 732 (1979) (currency denomination in circulation on certain date) (decided under former Code 1933, § 38-112); Price v. State, 155 Ga. App. 206, 270 S.E.2d 203 (1980) (state agency list of dangerous substances) (decided under former Code 1933, § 38-112).

Judicial Notice Improper

Judicial notice was taken. — Judicial notice was taken of the deaths of the trial judge and the court reporter handling the case below, which, alone, satisfied O.C.G.A. § 50-2-21(b)(5). Triguero v. ABN AMRO Bank N.V., 273 Ga. App. 92, 614 S.E.2d 209 (2005) (decided under former O.C.G.A. § 24-1-4).

Pleadings in a related action. — Trial court erred in failing to grant a client's request for a hearing on a former attorney's motion to dismiss claims for legal malpractice and intentional infliction of emotional distress because the trial court considered matters outside the pleadings. The trial court could not properly make factual findings based on the pleadings in the divorce action under former O.C.G.A. § 24-1-4 because such issues are a matter of proof that could not be judicially noticed. Fitzpatrick v. Harrison, 300 Ga. App. 672, 686 S.E.2d 322 (2009) (decided under former O.C.G.A. § 24-1-4).

Courts cannot judicially know whether or not a defendant has actually been convicted, unless that fact is verified by the answer of the magistrate. Rutland v. City of Dublin, 50 Ga. App. 242, 177 S.E. 819 (1934) (decided under former Code 1933, § 38-112).

Notice of intent to seek attorney's fees. — Judicial notice could be taken that the exhibit purported to be a notice of intent to seek attorney's fees under O.C.G.A. § 13-1-11; however, judicial notice cannot be taken that the attached notice was, in fact, what it purported to be, because such issues are a matter of proof that cannot be judicially noticed. NationsBank v. Tucker, 231 Ga. App. 622, 500 S.E.2d 378 (1998) (decided under former O.C.G.A. § 24-1-4).

Judicial notice was held improper in the following cases. — See Causey v. Swift & Co., 57 Ga. App. 604, 196 S.E. 228 (1938) (location of city streets and distances between streets) (decided under former Code 1933, § 38-112); Matheson v. Brady, 202 Ga. 500, 43 S.E.2d 703 (1947) (inclusion of a certain high school in the state school system) (decided under former Code 1933, § 38-112); Harmon v. Harmon, 209 Ga. 474, 74 S.E.2d 75 (1953) (location of city street) (decided under former Code 1933, § 38-112); Shirley v. Woods, 98 Ga. App. 111, 105 S.E.2d 399 (1958) (meaning of yellow curb under traffic laws) (decided under former Code 1933, § 38-112); Dayoub v. Yates-Astro Termite Pest Control Co., 239 Ga. App. 578, 521 S.E.2d 600 (1999) (standards of the National Pest Control Association) (decided under former O.C.G.A. § 24-1-4).

Unfiled depositions. — Trial court was authorized by law to take judicial notice only of certain narrowly prescribed categories of information, none of which includes deposition testimony. Therefore, the trial court committed reversible error when the court based the court's conclusions on depositions never filed with the court during the proceedings. Buchanan v. City of Clayton, 180 Ga. App. 740, 350 S.E.2d 320 (1986) (decided under former O.C.G.A. § 24-1-4).

Building Code violation. — In a negligence action, plaintiffs based their contention regarding the construction of a stairwell on a claimed violation of the Georgia State Building Code, in that there was no landing on the stairway as required by the Code for exit stairways. Since the only reference to the Code in the record, however, was its quotation in the brief submitted by the plaintiffs in opposition to a motion for summary judgment, such a quotation was not evidence, nor was such a rule or regulation a matter of which a court could take judicial notice. Joel Properties, Inc. v. Reed, 203 Ga. App. 257, 416 S.E.2d 570 (1992) (decided under former O.C.G.A. § 24-1-4).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 44, 117.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 5.

C.J.S. — 31 C.J.S., Evidence, § 6 et seq.

ALR. — Judicial notice of the coincidence of the days of the week with the days of the month, 8 ALR 63.

Effect of absence of seal from execution, 28 ALR 936.

Judicial notice of banking customs or other matters relating to banks or trust companies, 89 ALR 1336.

Judicial notice of municipal ordinances where action originates in a municipal court, 111 ALR 959.

Distinction between judicial notice and judicial knowledge, 113 ALR 258.

Presumption of regular passage of statute as affected by legislative records showing that bill was defeated, 119 ALR 460.

Admissibility, upon issue of negligence, of evidence of custom or practice of others, 137 ALR 611.

Propriety of instructions on matters of common knowledge, 144 ALR 932.

Uniform Judicial Notice of Foreign Law Act, 23 ALR2d 1437.

Reception of evidence to contradict or rebut matters judicially noticed, 45 ALR2d 1169.

Blood grouping tests, 46 ALR2d 1000.

Judicial notice of matters relating to public thoroughfares and parks, 48 ALR2d 1102; 86 ALR3d 484.

Judicial notice of diseases or similar conditions adversely affecting human beings, 72 ALR2d 554.

Judicial notice of drivers' reaction time and of stopping distance of motor vehicles travelling at various speeds, 84 ALR2d 979.

Choice of law in application of automobile guest statutes, 95 ALR2d 12.

Judicial notice as to assessed valuations, 42 ALR3d 1439.

Proof, by radar or other mechanical or electronic devices, of violation of speed regulations, 47 ALR3d 822.

Admissibility of evidence of neutron activation analysis, 50 ALR3d 117.

Judicial notice as to location of street address within particular political subdivision, 86 ALR3d 484.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 ALR4th 229.

Judicial notice of attorney customs and practices, 61 ALR5th 707.

ARTICLE 2

LEGISLATIVE FACTS; ORDINANCES OR RESOLUTIONS

24-2-220. Judicial notice of legislative facts.

The existence and territorial extent of states and their forms of government; all symbols of nationality; the laws of nations; all laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority; the laws of the United States and of the several states thereof as published by authority; the uniform rules of the courts; the administrative rules and regulations filed with the Secretary of State pursuant to Code Section 50-13-6; the general customs of merchants; the admiralty and maritime courts of the world and their seals; the political makeup and history of this state and the federal government as well as the local divisions of this state; the seals of the several departments of the government of the United States and of the several states of the union; and all similar matters of legislative

fact shall be judicially recognized without the introduction of proof. Judicial notice of adjudicative facts shall be governed by Code Section 24-2-201. (Code 1981, § 24-2-220, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
JUDICIAL NOTICE PROPER
JUDICIAL NOTICE IMPROPER

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1819, Cobb's 1851 Digest, p. 272, former Code 1863, §§ 3674, 3738, 3747, former Code 1868, §§ 3698, 3762, 3771, former Code 1873, §§ 3751, 3815, 3824, former Code 1882, §§ 3751, 3815, 3824, former Civil Code 1895, §§ 5148, 5210, 5231, former Civil Code 1910, §§ 5734, 5797, 5818, former Code 1933, § 38-112, and former O.C.G.A. § 24-1-4 are included in the annotations for this Code section.

Presumption that law in force. — When it appeared in the manner indicated by the former statute that a particular law had been of force in another state, until the contrary was shown it was presumed that such law was still of force. Seaboard Air-Line Ry. v. Phillips, 117 Ga. 98, 43 S.E. 494 (1903) (decided under former Civil Code 1895, §§ 5210, 5231).

Attention of court called to change in law. — While the common law was presumed to be of force in most of the American states, if either party claimed that the former statute or common law obtaining in such state was different from the law laid down in the Code, the party must, by pleading, evidence, or a request to charge, call the attention of the court to such difference. Wells v. Gress, 118 Ga. 566, 45 S.E. 418 (1903) (decided under former Civil Code 1895, §§ 5148, 5210, 5231).

Three methods of proof of foreign laws have been recognized. One was by proof of witnesses, testifying as to their familiarity with the law in reference to a certain subject. A second method was by certified copy of the statute in question. Finally, the third method of proof was clearly authorized by which the former statutory provisions was judicial recognition. Missouri State Life Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S.E. 93 (1907) (decided under former Civil Code 1895, §§ 5148, 5210, 5231). See also Simms v. Southern Express Co., 38 Ga. 129 (1868) (decided under former law).

Notice of foreign law from nature of litigation. — No issue of foreign law pertaining to sufficiency of long arm process service will arise during the course of litigation, unless the defendant timely raised such issue as prescribed by law. Thus, the defendant will always have actual knowledge when an issue of foreign law, pertaining to the adequacy of service of long arm process, will be litigated and will therefore have a reasonable opportunity to prepare for such litigation. Askari v. Dolat, 240 Ga. App. 633, 524 S.E.2d 310 (1999) (decided under former O.C.G.A. § 24-1-4).

Responsibility on party wishing to raise foreign law issue. — Notice of intent was required to raise an issue of foreign law, to establish such law by compliance with statutory means, or cause a duty to be imposed on a court to judicially recognize any relevant, existing foreign law. Samay v. Som, 213 Ga. App. 812, 446 S.E.2d 230 (1994) (decided under former O.C.G.A. § 24-1-4); P.G.L. & C.C. Employ-

General Consideration (Cont'd)

ees Credit Union v. Kimball, 221 Ga. App. 108, 470 S.E.2d 501 (1996) (decided under former O.C.G.A. § 24-1-4); Askari v. Dolat, 240 Ga. App. 633, 524 S.E.2d 310 (1999) (decided under former O.C.G.A. § 24-1-4).

Laws published by authority. — Judicial cognizance of the laws of another state will be taken only when presented in some form that shows the law was "published by authority." Carter v. Graves, 206 Ga. 234, 56 S.E.2d 917 (1949), later appeal, 207 Ga. 308, 61 S.E.2d 282 (1950) (decided under former Code 1933, § 38-112).

Under former O.C.G.A. § 24-1-4, a trial court had a duty to take judicial notice of foreign law if "published by authority," without introduction of any proof of that law. Meeker v. Eufaula Bank & Trust, 208 Ga. App. 702, 431 S.E.2d 475 (1993) (decided under former O.C.G.A. § 24-1-4).

Proof of authority. — Volume of state laws, purporting on the title page to have been printed by order of the Governor, sufficiently shows publication by authority for purpose of judicial recognition of foreign state laws without proof. Hamilton v. Metropolitan Life Ins. Co., 71 Ga. App. 584, 32 S.E.2d 540 (1944) (decided under former Code 1933, § 38-112).

Law must be pled. — Former statute did not dispense with the necessity of pleading a foreign law. On the contrary, this provision merely meant that when the public laws of a foreign state were published by that state's authority, the authenticity of its publications need not be shown by the introduction of proof of their genuineness, but will be judicially recognized by the courts without proof, and given the same effect as though its public laws were proved by the introduction in evidence of a duly certified copy thereof, properly authenticated under the great seal of that state. Savannah, Fla. & W. Ry. v. Evans, 121 Ga. 391, 49 S.E. 308 (1904) (decided under former Civil Code 1895, §§ 5148, 5210, 5231). But see Lane v. Harris, 16 Ga. 217 (1854) (decided under former law).

Municipal ordinances. — In a trial before a municipal court, the recorder may take judicial notice of the ordinances of the city, defining offenses against the city, but neither the Supreme Court, nor any other court than the municipal court, can take judicial cognizance of a municipal ordinance. Slaughter v. City of La Grange, 60 Ga. App. 555, 4 S.E.2d 410 (1939) (decided under former Code 1933, § 38-112).

Superior and appellate courts do not take judicial notice of a municipal ordinance. Police Benevolent Ass'n v. Brown, 268 Ga. 26, 486 S.E.2d 28 (1997) (decided under former O.C.G.A. § 24-1-4).

Plaintiffs' argument that a city's procedures for allocating funds violated the city code could not be considered on appeal because the relevant ordinances were not properly made a part of the record, and courts could not take judicial notice of municipal ordinances. Bailey v. City of Atlanta, 296 Ga. App. 679, 675 S.E.2d 564 (2009) (decided under former O.C.G.A. § 24-1-4).

County ordinances. — Court could not review the merits of a developer's arguments as to a county ordinance when there was no evidence in the record demonstrating that the ordinance was properly proven below. County ordinances constituted foreign law, and a court could not take judicial notice of those ordinances under former O.C.G.A. § 24-1-4. Prime Home Props., LLC v. Rockdale County Bd. of Health, 290 Ga. App. 698, 660 S.E.2d 44 (2008), cert. denied, No. S08C1330, 2008 Ga. LEXIS 685 (Ga. 2008) (decided under former O.C.G.A. § 24-1-4).

Judicial Notice Proper

Statutory provisions need not be set out in full. — Courts are bound to take judicial cognizance of an Act of the General Assembly, and it is not essential that a pleader should set out an entire Act in the pleadings in order to insist upon some paragraph or provision of the Act. Heard v. Pittard, 210 Ga. 549, 81 S.E.2d 799 (1954) (decided under former Code 1933, § 38-112).

Tennessee "slip opinions" were not "published by authority" and were, therefore, not binding on the trial court, with or without introduction of proof. Swafford v. Globe Am. Cas. Co., 187 Ga.

App. 730, 371 S.E.2d 180, cert. denied, 187 Ga. App. 909, 371 S.E.2d 180 (1988) (decided under former O.C.G.A. § 24-1-4).

Judicial notice was held proper in the following cases. — See Ragland v. Barringer, 41 Ga. 114 (1870) (Governor's proclamation) (decided under former Code 1868, §§ 3698, 3762, 3771); Stafford v. Hightower, 68 Ga. 394 (1882) (federal court districts) (decided under former Code 1873, §§ 3751, 3815, 3824); Wells v. Gress, 118 Ga. 566, 45 S.E. 418 (1903) (foreign state statutes) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); Jossey v. Brown, 119 Ga. 758, 47 S.E. 350 (1904) (judge's tenure of office) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); Taylor v. State, 123 Ga. 133, 51 S.E. 326 (1905) (existence of county as corporate body) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); Missouri State Life Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S.E. 93 (1907) (foreign state statutes) (decided under former Civil Code 1895, §§ 5148, 5210, 5231); Central of Ga. Ry. v. Gwynes, 153 Ga. 606, 113 S.E. 183 (1922) (congressional Acts and presidential proclamations) (decided under former Civil Code 1910, §§ 5734, 5797, 5818); Southern Ry. v. Lee, 59 Ga. App. 316, 200 S.E. 569 (1938) (state statutes) (decided under former Code 1933, § 38-112); Decatur County v. Tampa Whsle. Liquor Co., 62 Ga. App. 716, 9 S.E.2d 701 (1940) (state statutes) (decided under former Code 1933, § 38-112); Guess v. Morgan, 196 Ga. 265, 26 S.E.2d 424 (1943) (county location and territory) (decided under former Code 1933, § 38-112); Leonard v. State ex rel. Lanier, 204 Ga. 465, 50 S.E.2d 212 (1948) (county legalization of alcoholic beverages) (decided under former Code 1933, § 38-112); Thigpen v. Town of Davisboro, 81 Ga. App. 610, 59 S.E.2d 522 (1950) (incorporation of town) (decided under former Code 1933, § 38-112); Dawson v. General Disct. Corp., 82 Ga. App. 29, 60 S.E.2d 653 (1950) (state agency seal) (decided under former Code 1933, § 38-112); Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562 (1951) (county and municipal location) (decided under former Code 1933, § 38-112); Brown v. State, 87 Ga. App. 244, 73 S.E.2d 502 (1952) (county legalization of alcoholic beverages) (decided under former Code 1933, § 38-112); Peebles v. State, 96 Ga. App. 836, 101 S.E.2d 726 (1958) (county legalization of alcoholic beverages) (decided under former Code 1933, § 38-112); City of Carrollton v. Walker, 215 Ga. 505, 111 S.E.2d 79 (1959) (federal laws) (decided under former Code 1933, § 38-112); City of Atlanta v. Gower, 216 Ga. 368, 116 S.E.2d 738 (1960) (state statutes) (decided under former Civil Code 1910, §§ 5734, 5797, 5818); South Am. Managers, Inc. v. Reeves, 220 Ga. 493, 140 S.E.2d 201 (1965) (court's records in case at bar) (decided under former Code 1933, § 38-112); Kelly v. Kelly, 115 Ga. App. 700, 155 S.E.2d 732 (1967) (foreign state statutes and court cases) (decided under former Code 1933, § 38-112); Dye v. State, 118 Ga. App. 570, 165 S.E.2d 183 (1968) (county legalization of alcoholic beverages) (decided under former Code 1933, § 38-112); Irwin v. Busbee, 241 Ga. 567, 247 S.E.2d 103 (1978) (incumbent holding office on certain date) (decided under former Code 1933, § 38-112); Thompson v. Cheatham, 244 Ga. 117, 259 S.E.2d 62 (1979) (state statutes; organization and terms of court) (decided under former Code 1933, § 38-112); Brown v. Citizens & S. Nat'l Bank, 245 Ga. 515, 265 S.E.2d 791 (1980) (court records in case at bar) (decided under former Code 1933, § 38-112); In re G.G., 177 Ga. App. 639, 341 S.E.2d 13 (1986) (county of location of incorporated city) (decided under former O.C.G.A. § 24-1-4); Dayoub v. Yates-Astro Termite Pest Control Co., 239 Ga. App. 578, 521 S.E.2d 600 (1999) (rules and regulations of the Georgia Department of Argiculture, Pest Control Commission) (decided under former O.C.G.A. § 24-1-4); Enchanted Valley RV Resort, Ltd. v. Weese, 241 Ga. App. 415, 526 S.E.2d 124 (1999) (rules and regulations of the Department of Human Resources) (decided under former O.C.G.A. § 24-1-4).

Judicial Notice Improper

In pleading the statute of a foreign state, it is not necessary that it should be set forth in haec verba, but the substance of those portions that are relied on should be stated with sufficient distinctness to enable the court to judge the meaning and

Judicial Notice Improper (Cont'd)

effect of the law. Rodale v. Grimes, 211 Ga. 50, 84 S.E.2d 68 (1954) (decided under former Code 1933, § 38-112).

Judicial notice was held improper in the following cases. — See Clifton v. State, 53 Ga. 241 (1874) (previous proceedings before court); Crouch v. Fisher, 43 Ga. App. 484, 159 S.E. 746 (1931) (adoption of agency rules pursuant to statute) (decided under former Civil Code 1910, §§ 5734, 5797, 5818); Livingston v. Schneer's Atlanta, Inc., 61 Ga. App. 637, 7 S.E.2d 190 (1940) (municipal ordinance not pled) (decided under former Code 1933, § 38-112); Carter v. Graves, 206 Ga. 234, 56 S.E.2d 917 (1949), later appeal, 207 Ga. 308, 61 S.E.2d 282 (1950) (foreign state statutes; foreign state cases reported in an unofficial publication) (decided under former Code 1933, § 38-112); Atlanta Gas Light Co. v. Newman, 88 Ga. App. 252, 76 S.E.2d 536 (1953) (rules and regulations of state agency) (decided under former Code 1933, § 38-112); Rodale v. Grimes, 211 Ga. 50, 84 S.E.2d 68 (1954) (foreign state statutes) (decided under former Code 1933, § 38-112); Davis v. General Gas Corp., 106 Ga. App. 317, 126 S.E.2d 820 (1962) (state agency regulations) (decided under former Code 1933, § 38-112); Leger v. Ken Edwards Enters., Inc., 223 Ga. 536, 156 S.E.2d 651 (1967) (city or county ordinances) (decided under former Code 1933, § 38-112); Staggers v. State, 119 Ga. App. 85, 166 S.E.2d 411 (1969) (state agency, municipal, or private agency rules or regulations affecting start of school year) (decided under former Code 1933, § 38-112); Lackey v. DeKalb County, 156 Ga. App. 309, 274 S.E.2d 705 (1980) (local practice rules) (decided under former Code 1933, § 38-112); In re G.G., 177 Ga. App. 639, 341 S.E.2d 13 (1986) (county of location of incorporated city) (decided under former O.C.G.A. § 24-1-4).

City ordinance. — In an appeal from the denial of a subdivision application, the trial court could not take judicial notice of city ordinances; city ordinances have to be alleged and proven. City of St. Marys v. Fulford, 286 Ga. App. 506, 649 S.E.2d 807 (2007) (decided under former O.C.G.A. § 24-1-1).

Venue. — Prerequisites for judicial notice of venue were not satisfied by reference to ambiguous Uniform Traffic Citations. Graves v. State, 269 Ga. 772, 504 S.E.2d 679 (1998), overruled on other grounds, Jones v. State, 272 Ga. 900, 537 S.E.2d 80 (2000), reversing Graves v. State, 227 Ga. App. 628, 490 S.E.2d 111 (1997) (decided under former O.C.G.A. § 24-1-1).

24-2-221. Judicial notice of ordinance or resolution.

When certified by a public officer, clerk, or keeper of county or municipal records in this state in a manner as specified for county records in Code Section 24-9-920 or in a manner as specified for municipal records in paragraph (1) or (2) of Code Section 24-9-902 and in the absence of contrary evidence, judicial notice may be taken of a certified copy of any ordinance or resolution included within a general codification required by paragraph (1) of subsection (b) of Code Section 36-80-19 as representing an ordinance or resolution duly approved by the governing authority and currently in force as presented. Any such certified copy shall be self-authenticating and shall be admissible as prima-facie proof of any such ordinance or resolution before any court or administrative body. (Code 1981, § 24-2-221, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, "Local Government Law," see 53 Mercer L. Rev. 389 (2001). For article on the 2011 enactment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-112, and former O.C.G.A. § 24-1-4 are included in the annotations for this Code section.

Judicial notice was held improper in the following cases. — See Livingston v. Schneer's Atlanta, Inc., 61 Ga. App. 637, 7 S.E.2d 190 (1940) (municipal ordinance not pled) (decided under former Code 1933, § 38-112); Leger v. Ken Edwards Enters., Inc., 223 Ga. 536, 156 S.E.2d 651 (1967) (city or county ordinances) (decided under former Code 1933, § 38-112).

City ordinance. — In an appeal from the denial of a subdivision application, the trial court could not take judicial notice of city ordinances; city ordinances have to be alleged and proven. City of St. Marys v. Fulford, 286 Ga. App. 506, 649 S.E.2d 807 (2007) (decided under former O.C.G.A. § 24-1-1).

CHAPTER 3

PAROL EVIDENCE

Sec.
24-3-1. Parol evidence contradicting writing inadmissible generally.
24-3-2. Proof of unwritten portions of contract admissible where not inconsistent.
24-3-3. Contemporaneous writings explaining each other; parol evidence explaining ambiguities.
24-3-4. Circumstances surrounding execution of contracts.
24-3-5. Known usage.
24-3-6. Rebuttal of equity; discharge of contract; proof of subsequent agreement; change of time or place of performance.
24-3-7. Proof of mistake in deed or written contract.
24-3-8. Original or subsequent voidness of writing.
24-3-9. Explanation or denial of receipts.
24-3-10. Explanation of blank endorsements.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 enactment of this chapter, see 28 Ga. St. U.L. Rev. 1 (2011).

24-3-1. Parol evidence contradicting writing inadmissible generally.

Parol contemporaneous evidence shall be generally inadmissible to contradict or vary the terms of a valid written instrument. (Code 1981, § 24-3-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, "The Parol Evidence Rule in Georgia," see 17 Ga. B.J. 49 (1954). For article discussing the advantages of contract rescission as a remedy for fraud, with respect to the parol evidence rule and the statute of frauds, in light of City Dodge, Inc. v. Gardner, 232 Ga. 766, 208 S.E.2d 794 (1974), see 11 Ga. St. B.J. 172 (1975). For article discussing parol evidence in the law of commercial paper, see 13 Ga. L. Rev. 53 (1978). For article, "Supplementing Written Agreements: Restating the Parol Evidence Rule in Terms of Credibility and Relative Fault," see 34 Emory L.J. 93 (1985).

JUDICIAL DECISIONS

Analysis

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Evidence Admissible
1. In General
2. Notes

3. Real Estate Transactions
4. Other Agreements

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3723, former Code 1868, § 3747, former Code 1873, § 3800, former Code 1882, § 3800, former Civil Code 1895, § 5201, former Civil Code 1910, § 5788, former Code 1933, § 38-501, and former O.C.G.A. § 24-6-1 are included in the annotations for this Code section.

Purpose of the rule that the terms of a valid written agreement which is complete and the terms of which are not ambiguous cannot be contradicted, added to, altered, or varied by parol agreements is to establish the finality of written contracts. Stonecypher v. Georgia Power Co., 183 Ga. 498, 189 S.E. 13 (1936) (decided under former Code 1933, § 38-501).

Parol evidence rule is matter of substantive law and no amount of oral testimony contradicting the legal consequence of a written instrument can avail to destroy or weaken that legal consequence. Albany Fed. Sav. & Loan Ass'n v. Henderson, 198 Ga. 116, 31 S.E.2d 20 (1944) (decided under former Code 1933, § 38-501); Almon v. R.H. Macy & Co., 106 Ga. App. 123, 126 S.E.2d 641 (1962) (decided under former Code 1933, § 38-501).

Parol evidence cannot add to, take from, or vary writing itself. Buice Grading & Pipeline, Inc. v. Bales, 187 Ga. App. 263, 370 S.E.2d 26 (1988) (decided under former O.C.G.A. § 24-6-1); Price v. Age, Ltd., 194 Ga. App. 141, 390 S.E.2d 242 (1990) (decided under former O.C.G.A. § 24-6-1).

Parol evidence rule should not be relaxed. Howard & Soule v. Stephens, 52 Ga. 448 (1874) (decided under former Code 1882, § 3800).

Test for admissibility of oral agreement. — Test to determine whether an oral agreement is one which the law will permit to be plead and proved is whether the oral agreement constitutes a part of the written contract or whether, instead, it is a separate and distinct oral contract which is not inconsistent with the written contract. If the latter, it admits of pleading and proof. S. & S. Bldrs., Inc. v. Equitable Inv. Corp., 219 Ga. 557, 134 S.E.2d 777 (1964) (decided under former Code 1933, § 38-501); Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572 (1977) (decided under former Code 1933, § 38-501).

Court will not ignore clear language of written contract between the parties to enforce an alleged oral contract in contradiction thereto. Johnson v. Ford Motor Credit Co., 142 Ga. App. 547, 236 S.E.2d 527 (1977) (decided under former Code 1933, § 38-501).

Oral agreement that contradicts written agreement inadmissible. — Evidence that attorney verbally agreed to keep fees at the low end of the range specified in the attorney's written agreement with plaintiff and to complete the project within two weeks was inadmissible since that evidence contradicted the parties written agreement. Schluter v. Perrie, Buker, Stagg & Jones, 230 Ga. App. 776, 498 S.E.2d 543 (1998) (decided under former O.C.G.A. § 24-6-1).

All previous negotiations are merged in the subsequent written contract. Freeman v. Bass, 34 Ga. 355, 89 Am. Dec. 255 (1866) (decided under former Code 1863, § 3723); Roberts v. Investors' Sav. Co., 154 Ga. 45, 113 S.E. 398 (1922) (decided under former Civil Code 1910, § 5788); Wynn v. First Nat'l Bank, 176 Ga. 218, 167 S.E. 513 (1933) (decided under former Civil Code 1910, § 5788); Allison v. United Small-Loan Corp., 54 Ga. App. 820, 189 S.E. 263 (1936) (decided under former Code 1933, § 38-501); Thompson v. Riggs, 193 Ga. 632, 19 S.E.2d 299 (1942) (decided under former Code 1933, § 38-501); Heisley v. Allied Am. Mut. Fire Ins. Co., 71 Ga. App. 107, 30 S.E.2d 285 (1944) (decided under former Code 1933, § 38-501); Albany Fed. Sav. & Loan Ass'n v. Henderson, 198 Ga. 116, 31 S.E.2d 20 (1944) (decided under former Code 1933, § 38-501); Thompson v. Arrington, 209 Ga. 343, 72 S.E.2d 293 (1952) (decided under former Code 1933, § 38-501); Simmons v. Wooten, 241 Ga. 518, 246 S.E.2d 639 (1978) (decided under former Code 1933, § 38-501).

General Consideration (Cont'd)

Evidence admitted without objection. — Parol evidence as to the terms of the agreement, and as to statements of the defendant made previously to the execution of the paper was ineffectual to vary the terms of the written instrument, even though admitted without objection. Cleghorn v. Shields, 165 Ga. 362, 141 S.E. 55 (1927) (decided under former Civil Code 1910, § 5788).

Determination of timeliness of objection to parol evidence was unnecessary, since parol evidence, by its nature, was incompetent and without probative value to alter the terms or conditions of a written contract. Lyon v. Patterson, 138 Ga. App. 816, 227 S.E.2d 423 (1976) (decided under former Code 1933, § 38-501).

Uncertainty in contract. — There can be no admission of parol evidence unless and until an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represent the true intention of the parties. McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945) (decided under former Code 1933, § 38-501).

Violation of parol agreement not fraud. — Making and violating a contemporaneous parol agreement if inconsistent with the writing would not be such fraud as would permit a varying of the written instrument, even if plead as fraud, no sufficient reason appearing why the agreement was not incorporated in the writing. Bowen v. Swift & Co., 52 Ga. App. 793, 184 S.E. 625 (1936) (decided under former Code 1933, § 38-501).

Invoices. — Invoice for goods delivered on open account was not "a valid written instrument" as that term was used in former O.C.G.A. § 24-6-1. Wheeler v. IDN-Armstrong's, Inc., 288 Ga. App. 253, 653 S.E.2d 835 (2007) (decided under former O.C.G.A. § 24-6-1).

Jury question. — It is for the jury to decide whether an independent collateral oral agreement was made and, if so, whether the oral agreement was part of the inducement to the written agreement. Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572 (1977) (decided under former Code 1933, § 38-501).

Attempt to invoke rule on appeal. — When a party who was entitled to the benefit of the rule prohibiting the admission of parol evidence to vary or contradict a writing waived the benefit thereof by allowing such evidence to be received without objection and without any effort to have the evidence stricken and disregarded by the trial judge or the jury, the party cannot, after the trial terminated and the case had been decided against the party, invoke the parol evidence rule in order to obtain a reversal of such verdict and judgment in the appellate court. Southern Envelope Co. v. Adamson Printing Co., 51 Ga. App. 475, 180 S.E. 770 (1935) (decided under former Code 1933, § 38-501); Commercial Credit Co. v. Lewis, 59 Ga. App. 144, 200 S.E. 566 (1938) (decided under former Code 1933, § 38-501).

Evidence Inadmissible

1. In General

Prior and contemporaneous statements or agreements cannot be shown to vary, contradict, or change the terms of a valid written contract purporting on the contract's face to contain all the terms of an agreement between the parties. Campbell v. Alkahest Lyceum Sys., 10 Ga. App. 839, 74 S.E. 443 (1912) (decided under former Civil Code 1910, § 5788); Roberts v. Investors' Sav. Co., 154 Ga. 45, 113 S.E. 398 (1922) (decided under former Civil Code 1910, § 5788); Eaves v. Georgian Co., 47 Ga. App. 37, 169 S.E. 519 (1933) (decided under former Civil Code 1910, § 5788); Hardin v. Atlanta Gas Light Co., 71 Ga. App. 63, 30 S.E.2d 121 (1944) (decided under former Code 1933, § 38-501); Owensby v. Byrd, 75 Ga. App. 729, 44 S.E.2d 452 (1947) (decided under former Code 1933, § 38-501); Cone Mills Corp. v. A.G. Estes, Inc., 399 F. Supp. 938 (N.D. Ga. 1975) (decided under former Code 1933, § 38-501); Lewis v. Citizens & S. Nat'l Bank, 139 Ga. App. 855, 229 S.E.2d 765 (1976) (decided under former Code 1933, § 38-501); Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240

S.E.2d 572 (1977) (decided under former Code 1933, § 38-501).

When the contract was complete on the contract's face and the evidence offered to explain the ambiguity contradicts the terms of the written instrument, parol evidence should not be admitted. American Cyanamid Co. v. Ring, 248 Ga. 673, 286 S.E.2d 1 (1982) (decided under former O.C.G.A. § 24-6-1).

In absence of fraud, accident, or mistake, parol evidence is not admissible to vary an unambiguous written agreement. Freeman v. Bass, 34 Ga. 355, 89 Am. Dec. 255 (1866) (decided under former Code 1863, § 3723); Roberts v. Investors' Sav. Co., 154 Ga. 45, 113 S.E. 398 (1922) (decided under former Civil Code 1910, § 5788); Holloway v. Brown, 171 Ga. 481, 155 S.E. 917 (1930) (decided under former Civil Code 1910, § 5788); Long v. Sullivan, 52 Ga. App. 318, 183 S.E. 71 (1935) (decided under former Code 1933, § 38-501); Albany Fed. Sav. & Loan Ass'n v. Henderson, 198 Ga. 116, 31 S.E.2d 20 (1944) (decided under former Code 1933, § 38-501); Gilleland v. Welch, 199 Ga. 341, 34 S.E.2d 517 (1945) (decided under former Code 1933, § 38-501); McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945) (decided under former Code 1933, § 38-501); Smith v. Standard Oil Co., 227 Ga. 268, 180 S.E.2d 691 (1971) (decided under former Code 1933, § 38-501); Vulcan Materials Co. v. Douglas, 131 Ga. App. 21, 205 S.E.2d 84 (1974) (decided under former Code 1933, § 38-501); Wilson v. Sheppard, 136 Ga. App. 475, 221 S.E.2d 671 (1975) (decided under former Code 1933, § 38-501); C.P.D. Chem. Co. v. National Car Rental Sys., 148 Ga. App. 756, 252 S.E.2d 665 (1979) (decided under former Code 1933, § 38-501).

Parol evidence inadmissible even to establish fraud. — Parol evidence was not admissible to vary the terms of a binding written agreement, even to establish fraud. Cosby v. A.M. Smyre Mfg. Co., 158 Ga. App. 587, 281 S.E.2d 332 (1981) (decided under former Code 1933, § 38-501).

Oral representations made as inducements to the contract are inadmissible to add to, take from, or vary a written contract. Pepsico Truck Rental, Inc. v. Eastern Foods, Inc., 145 Ga. App. 410, 243 S.E.2d 662 (1978) (decided under former Code 1933, § 38-501).

Different consideration. — As a general rule, the consideration of a contract is open to inquiry as between the original parties, but if the consideration be so stated in the contract as to make it one of the contract's terms or conditions, as when the consideration consists of mutual promises expressed in the contract, a different consideration, whether variant or additional, cannot be shown by parol. Lynchburg Shoe Co. v. Daniel, 23 Ga. App. 186, 98 S.E. 107 (1919) (decided under former Civil Code 1910, § 5788); Georgia Cas. Co. v. Dixie Trust & Sec. Co., 23 Ga. App. 447, 98 S.E. 414 (1919) (decided under former Civil Code 1910, § 5788); Ramsey-Fender Motor Co. v. Chapman, 46 Ga. App. 385, 168 S.E. 92 (1932) (decided under former Civil Code 1910, § 5788); Phillips v. Phillips, 46 Ga. App. 838, 169 S.E. 537 (1933) (decided under former Civil Code 1910, § 5788).

Party cannot engraft new condition under guise of inquiring into consideration. — Although it was permissible to inquire into consideration when the principles of justice require it, one of the parties to a contract cannot, under the guise of inquiring into consideration, engraft upon the contract a new condition which imposed an additional affirmative obligation upon the other party. Hanover Ins. Co. v. Nelson Conveyor & Mach. Co., 159 Ga. App. 13, 282 S.E.2d 670 (1981) (decided under former Code 1933, § 38-501).

Inquiry into consideration to vary terms of contract. — When in some instances parol evidence that the real consideration of a contract was different from the one actually recited in the instrument was admissible for the purpose of proving that the true consideration has failed, it was never allowable, under the guise of inquiring into the consideration, to vary or contradict by parol the substance and meaning of the written terms of the contract itself. Lynchburg Shoe Co. v. Daniel, 23 Ga. App. 186, 98 S.E. 107 (1919) (decided under former Civil Code 1910, § 5788); Middlebrooks v.

Evidence Inadmissible (Cont'd)
1. In General (Cont'd)

Dunlap-Huckabee Auto Co., 44 Ga. App. 543, 162 S.E. 153 (1932) (decided under former Civil Code 1910, § 5788); Phillips v. Phillips, 46 Ga. App. 838, 169 S.E. 537 (1933) (decided under former Civil Code 1910, § 5788); Tyre v. Price, 52 Ga. App. 526, 183 S.E. 843 (1936) (decided under former Code 1933, § 38-501); Redfearn v. Citizens & S. Nat'l Bank, 122 Ga. App. 282, 176 S.E.2d 627 (1970) (decided under former Code 1933, § 38-501); Zorn v. Robertson, 237 Ga. 395, 228 S.E.2d 804 (1976) (decided under former Code 1933, § 38-501).

Proof of different contract. — Entirely different contract from that evidenced by a writing cannot be pled or proved by parol as a substitute for that embodied in such writing. Branan v. Warfield & Lee, 3 Ga. App. 586, 60 S.E. 325 (1908) (decided under former Civil Code 1895, § 5201).

2. Notes

Admission to vary promissory note. — In absence of fraud, accident, or mistake, parol evidence is not admissible to vary or contradict express terms of a promissory note. Tyson v. Henson, 159 Ga. App. 684, 285 S.E.2d 27 (1981) (decided under former O.C.G.A. § 24-6-1).

With respect to an unambiguous promissory note, in the absence of fraud, accident, or mistake, parol evidence cannot be considered to alter or vary the terms of a promissory note. Citizens & S. Trust Co. v. Johnson, 201 Ga. App. 464, 411 S.E.2d 543 (1991) (decided under former O.C.G.A. § 24-6-1).

Showing note to be conditional. — In an action upon an unconditional promissory note, evidence of a contemporaneous parol agreement that the note was not to be paid except upon the happening of a certain event was inadmissible in the absence of evidence tending to show that the agreement was omitted from the note by accident, fraud, or mistake. Probasco v. Shaw, 144 Ga. 416, 87 S.E. 466 (1915) (decided under former Civil Code 1910, § 5788); Cairo Banking Co. v. Hall, 42 Ga. App. 785, 157 S.E. 346 (1931) (decided under former Civil Code 1910, § 5788); Jewell v. Norrell, 66 Ga. App. 11, 16 S.E.2d 797 (1941) (decided under former Code 1933, § 38-501); Mooney v. Boyd, 86 Ga. App. 369, 71 S.E.2d 685 (1952) (decided under former Code 1933, § 38-501); Knight v. William Summerlin Co., 119 Ga. App. 575, 168 S.E.2d 179 (1969) (decided under former Code 1933, § 38-501); Smith v. Standard Oil Co., 227 Ga. 268, 180 S.E.2d 691 (1971) (decided under former Code 1933, § 38-501); First Nat'l Bank v. Harrison, 408 F. Supp. 137 (N.D. Ga. 1975), aff'd, 529 F.2d 1350 (5th Cir. 1976) (decided under former Code 1933, § 38-501); Hyman v. Horwitz, 148 Ga. App. 647, 252 S.E.2d 74 (1978) (decided under former Code 1933, § 38-501).

Showing a want or failure of consideration. — When the consideration underlying a note was at issue, the maker of the note had the right to show by parol a want or failure of consideration. Beasley v. Paul, 223 Ga. App. 706, 478 S.E.2d 899 (1996) (decided under former O.C.G.A. § 24-6-1).

Variance in time of payment. — Parol evidence was inadmissible to vary the terms of payment or the date of the maturity of a promissory note, or to engraft upon the note a provision for an extension of time. Crooker v. Hamilton, 3 Ga. App. 190, 59 S.E. 722 (1907) (decided under former Civil Code 1895, § 5201); Wilder v. Federal Land Bank, 176 Ga. 813, 169 S.E. 13 (1933) (decided under former Civil Code 1910, § 5788).

Showing that note would not be enforced. — An unconditional promise to pay could not be defeated by proof of a contemporaneous oral agreement that it would never be enforced. Pulliam v. Merchants & Miners State Bank, 33 Ga. App. 68, 125 S.E. 509 (1924) (decided under former Civil Code 1910, § 5788); Cohan v. Flanders, 315 F. Supp. 1046 (S.D. Ga. 1970) (decided under former Code 1933, § 38-501).

Note not to be paid in money. — Note in which it was stipulated that a certain sum would be paid meant that this sum will be paid in money, and the maker would not be heard to plead or prove that there was a parol agreement by which the note was to be satisfied with something

else than money. Kerr v. Holder, 13 Ga. App. 9, 78 S.E. 682 (1913) (decided under former Civil Code 1910, § 5788); Cole v. Bank of Bowersville, 31 Ga. App. 435, 120 S.E. 790 (1923) (decided under former Civil Code 1910, § 5788).

Express warranty. — When a promissory note was given for purchase money, which was unambiguous and unconditional, and contained no warranty of soundness, no express warranty could be added to the note by parol. Fleming v. Satterfield, 4 Ga. App. 351, 61 S.E. 518 (1908) (decided under former Civil Code 1895, § 5201).

Additional warranty. — Purchaser of an article, who accepted a note for the price of the article, and therein gave a limited warranty, and stipulated not to exact anything beyond, would not be allowed to prove by parol another representation or warranty of the seller, unless upon the ground of fraud. Commercial Credit Co. v. Lewis, 59 Ga. App. 144, 200 S.E. 566 (1938) (decided under former Code 1933, § 38-501).

Obligation conditioned on additional security. — "Parol contemporaneous evidence was inadmissible generally to contradict or vary the terms of a valid written instrument," thus, when an unconditional promissory note was signed by two persons, while it was permissible for one of them to show that one was a mere surety, it was not permissible to alter the unconditional character of the obligation by setting up a prior or contemporaneous parol agreement to the effect that the obligation was conditional upon the payees taking a mortgage upon personalty from the principal debtor as additional security. Bowen v. Mobley, 40 Ga. App. 833, 151 S.E. 667 (1930) (decided under former Civil Code 1910, § 5788).

Claim only in rem. — In a suit on a promissory note secured by a deed to land, it was not permissible for the maker to set up by way of plea and answer that by executing the two instruments together the payee agreed to look solely to the land for repayment of the debt due, and the maker of the note was not to be under any personal obligation, and no personal judgment could be procured against the maker, but only a judgment in rem against the property could be had for such an interpretation would be to vary by parol the plain terms of a written instrument by which the maker agreed to pay a stated sum on a certain day. Skeffington v. Rowland, 52 Ga. App. 619, 184 S.E. 330 (1936) (decided under former Code 1933, § 38-501).

Existence of prior cause of action. — In a suit by a payee against the maker of a promissory note reciting that the note was given "for value received," a contemporaneous parol agreement cannot be engrafted thereon by the defendant by testimony to the effect that while the defendant, at the time of executing the note, actually received from the plaintiff the principal sum thereof, yet the defendant had a prior cause of action against the plaintiff and the note was to be set up against the demand of the defendant against the plaintiff in this case, and so understood at the time of the execution and delivery of the note. Dunson & Bros. Co. v. Smith Seed Co., 26 Ga. App. 585, 106 S.E. 914 (1921) (decided under former Civil Code 1910, § 5788).

Memorandum written at bottom of note. — Parol evidence was inadmissible to vary or contradict an unambiguous contract in writing so as to include a memorandum written upon the bottom of one note showing the note to be collateral, and this memorandum cannot by parol be included in (nor can this stipulation in itself include) another note of a prior date when in such prior note no such words appear. Buffington v. Bank of College Park, 157 Ga. 570, 122 S.E. 50 (1924) (decided under former Civil Code 1910, § 5788).

3. Real Estate Transactions

Additional conditions. — When expressed only by way of recital, parol evidence was admissible to show that the true consideration of the deed was in fact different from the one stated merely by way of recital. However, one of the parties to a deed cannot, under the guise of inquiring into the deed's consideration, engraft upon the instrument a new condition or covenant which imposed an additional affirmative obligation upon the other party. Awtrey v. Awtrey, 225 Ga. 666, 171 S.E.2d 126 (1969) (decided under for-

Evidence Inadmissible (Cont'd)
3. Real Estate Transactions (Cont'd)

mer Code 1933, § 38-501).

Answer at variance with deed. — Allegations of the defendant's answer, setting up an understanding at variance with the terms of the deed executed by the plaintiff to the defendant, should have been stricken. Groover v. Simmons, 152 Ga. 423, 110 S.E. 179 (1921) (decided under former Civil Code 1910, § 5788).

House not included in deed. — When there was a conveyance of land by deed, containing no reservations as to the buildings, a parol understanding that the vendor retains the ownership of the houses, with the right to enter and remove the houses, was certainly inconsistent with the deed and ought to be excluded from evidence. Simpson v. Tate, 226 Ga. 558, 176 S.E.2d 62 (1970) (decided under former Code 1933, § 38-501).

Obligation to sell adjoining tract. — When one of the parties to a contract involving a purchase and sale of land executed and delivered to the other a deed conveying a described tract of land for a named sum of money, a contemporaneous oral agreement obligating the grantee in the deed to purchase, at the option of the grantor and during the grantor's lifetime, an adjoining tract of land for an additional sum of money will not be enforced if it appears that the deed and the oral agreement constitute parts of the same contract, and the terms of the oral agreement add to and vary those of the written instrument. Stonecypher v. Georgia Power Co., 183 Ga. 498, 189 S.E. 13 (1936) (decided under former Code 1933, § 38-501).

Showing deed to be mortgage. — Father, by a deed absolute, conveyed land to his son, who mortgaged the land for a large sum. Thereafter, with the consent of his father, he sold and assigned in writing the equity of redemption. Under the law, the father could not show by parol a subsequent rescission of the transfer, and that the original deed from himself to his son was intended only as a mortgage, and thereby establish a right in himself to redeem the land. New England Mtg. Sec. Co. v. Tarver, 60 F. 660 (5th Cir. 1894) (decided under former Code 1882, § 3800).

Failure to make improvements. — In a suit based on a written contract given for the purchase money of described cemetery lots, the court did not err in sustaining demurrer to defense asserting failure of plaintiff to make certain improvements in the cemetery which prior to or contemporaneously with the execution of the contract it had verbally agreed to make. Slaten v. College Park Cem. Co., 185 Ga. 27, 193 S.E. 872 (1937) (decided under former Code 1933, § 38-501).

Administrator denying sale at auction. — An administrator cannot dispute the truth of a solemn recital contained in a deed that the property was exposed for sale, that the highest bid was a stated sum, and that the administrator held the property therefor. The administrator may deny receipt of the proceeds, but the administrator cannot deny the sale at public auction for a stated sum. Gammage v. Perry, 29 Ga. App. 427, 116 S.E. 126 (1923) (decided under former Civil Code 1910, § 5788).

Real estate bond. — Rule that negotiations in parol, occurring prior to or contemporaneously with the execution of a written contract, are considered as merged therein, and evidence as to parol terms which vary or contradict the terms of the written instrument should be excluded is ordinarily applied in a suit on the contract itself, but it also applies in suit against surety on real estate bond, as the alleged default under the bond sued on was in respect to the relation between the parties as fixed and governed by the real estate sales contract, especially in respect to the broker's right to commissions under the contract of sale. Pfeffer v. General Cas. Co. of Am., 87 Ga. App. 173, 73 S.E.2d 234 (1952) (decided under former Code 1933, § 38-501).

Real estate entire agreement clause. — Provision in parties' contracts that there would be no verbal agreements of any kind between the parties was absolute, and as such, the provision barred the enforcement of a prior verbal agreement that, in fulfillment of its written contractual obligation to convey "lakefront" lots to the plaintiffs, contractor would provide plaintiffs with a permanent easement ensuring their littoral rights. Great Am.

Bldrs., Inc. v. Howard, 207 Ga. App. 236, 427 S.E.2d 588 (1993) (decided under former O.C.G.A. § 24-6-1).

Conveyance of right of way. — Written contract of conveyance of a right of way to a railroad company, duly executed and delivered by an owner of land, cannot be varied by oral testimony to the effect that the owner executed and delivered the contract upon agreement by the agent of the railroad company that the company would so construct the railroad as not to interfere with use of this land, on either side of the right of way, for pasturage purposes. Poole v. Elberton & E. Ry., 19 Ga. App. 631, 91 S.E. 1052 (1917) (decided under former Civil Code 1910, § 5788).

4. Other Agreements

Specific performance. — Parol evidence rule is applicable in a suit for specific performance to deny another parol proof of an antecedent, inconsistent parol agreement. Thompson v. Arrington, 209 Ga. 343, 72 S.E.2d 293 (1952) (decided under former Code 1933, § 38-501).

Exclusion of specific performance in land purchase contract. — When there is no language excluding specific performance as a remedy in a land purchase contract, the contract being unambiguous on this point, proffered evidence to the contrary, which purports to show that the parties intended liquidated damages to be the sole remedy, violates the parol evidence rule and is properly disregarded by the trial judge. Laseter v. Brown, 251 Ga. 179, 304 S.E.2d 72 (1983) (decided under former O.C.G.A. § 24-6-1).

Merger of prior negotiations. — Contract of sale merges prior negotiations and all oral understandings and the court cannot rewrite the agreement to suit one of the parties. Worthington Pump & Mach. Corp. v. Briarcliff, 67 Ga. App. 71, 19 S.E.2d 574 (1942) (decided under former Code 1933, § 38-501); R.C. Craig, Ltd. v. Ships of Sea, Inc., 401 F. Supp. 1051 (S.D. Ga. 1975) (decided under former Code 1933, § 38-501).

Showing sale to be conditional. — When a special agent makes a contract of sale in writing, evidence of prior conversations is inadmissible for the purpose of showing that the sale, on the sale's face absolute was in fact conditional. Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 S.E. 980 (1903) (decided under former Civil Code 1895, § 5201).

Oral understanding concerning contractual phrase. — When a timber release contains a general descriptive phrase, the meaning of which was presumably well known to both the contracting parties, any attempt to prove that at the time of the execution of the contract the parties had an oral understanding as to the meaning of such phrase would clearly violate the statute of frauds, as well as the parol evidence rule. Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783 (1947) (decided under former Code 1933, § 38-501).

Material contractual term. — Statement in a complete conditional sales contract that one of the parties "has this day purchased" from the other party certain described personal property, for which one agrees to pay a stated amount of money, is a material contractual term and not a mere recital of the consideration of the contract, and may not be contradicted by parol evidence. Wade v. Ballard, 69 Ga. App. 669, 26 S.E.2d 542 (1943) (decided under former Code 1933, § 38-501).

Employment contract. — Parol "lifetime" employment contract between the parties upon which the plaintiff relied, even if certain and definite enough to be enforceable, is superseded by the inconsistent, valid, complete, unambiguous, written employment contracts covering the same subject matter and providing for termination of employment by written notice. Vulcan Materials Co. v. Douglas, 131 Ga. App. 21, 205 S.E.2d 84 (1974) (decided under former Code 1933, § 38-501).

Sales contract. — Parol evidence was inadmissible to establish that a seller breached a written contract for the sale of certain carpet-making technology because such evidence would contradict the express disclaimers of the parties' written contract. Textile Rubber & Chem. Co. v. Thermo-Flex Techs., Inc., 301 Ga. App. 491, 687 S.E.2d 919 (2009) (decided under former O.C.G.A. § 24-6-1).

Endorser. — When the contract was not one by which the plaintiff was merely secured against loss which might result

Evidence Inadmissible (Cont'd)
4. Other Agreements (Cont'd)

from the plaintiff becoming an endorser for the defendant, any testimony which sought to show that such was the understanding of the parties at the time the contract was entered into was inadmissible since the testimony sought to vary the express terms of the written contract by proof of a contemporaneous parol agreement. Macon Baseball Ass'n v. Pennington, 45 Ga. App. 611, 166 S.E. 35 (1932) (decided under former Civil Code 1910, § 5788).

Guarantor. — After parties sign a bond as guarantors, the parties cannot set up, by way of defense to a suit thereon, that the instrument was executed by reason of a contemporaneous parol understanding with the principal debtor that they were not to be bound, and for a purpose wholly at variance with the instrument's plain tenor and import, as this would in effect be merely adding to and varying the terms of a written contract by parol evidence. Christopher v. Georgian Co., 22 Ga. App. 707, 97 S.E. 97 (1918) (decided under former Civil Code 1910, § 5788).

Replevy bond. — When a defendant, on whose property a distress warrant was levied, gave a replevy bond for condemnation money, the security could not defend on the ground that the defendant signed on condition that the bond was only a forthcoming bond. Daniels v. Smith, 144 Ga. 561, 87 S.E. 774 (1916) (decided under former Civil Code 1910, § 5788).

Partnership agreement to dissolve. — When one partner buys out another's interest, and assumes all the liabilities of the firm, and the terms of sale are in writing, parol evidence is not admissible to show that the purchaser agreed to pay an account of the vendor for board, though a memorandum of that account was on the partnership books and the board was due to a third member of the partnership. Delaney v. Anderson, 54 Ga. 586 (1875) (decided under former Code 1873, § 3800).

Prior indebtedness. — In the absence of fraud, accident, or mistake, a writing signed by the parties and treated by the parties as an account stated would be presumed to contain or represent the entire agreement between the parties with reference to the indebtedness then existing between the parties by reason of contract of employment in question, and it was error for the court to admit testimony tending to contradict or vary the terms of the account stated. Bullard v. Western Waterproofing Co., 63 Ga. App. 547, 11 S.E.2d 713 (1940) (decided under former Code 1933, § 38-501).

Present transfer or discharge. — Parol evidence rule forbids any attempt to prove that the promises stated in a writing do not accurately represent the agreement of the parties; and words, not merely reciting that a transfer or discharge had been made as consideration as an existing fact, but purporting to make a present transfer or present discharge, have also been held contractual in their nature and within the rule. Wade v. Ballard, 69 Ga. App. 669, 26 S.E.2d 542 (1943) (decided under former Code 1933, § 38-501).

Understandings between spouses not incorporated in divorce decree. — Negotiations and oral agreements between husband and wife, preceding divorce, as to alimony or child support, are, by presumption of law, merged in the final judgment in the divorce suit. Understandings between the husband and wife which are not incorporated into the divorce decree are not binding. Cabaniss v. Cabaniss, 251 Ga. 177, 304 S.E.2d 65 (1983) (decided under former O.C.G.A. § 24-6-1).

E-mail was inadmissible hearsay of disqualification in unemployment benefits. — Decision denying unemployment benefits to a discharged claimant under O.C.G.A. § 34-8-194 was reversed on appeal because the only evidence of the alleged violation of the employer's policy came by way of a patient's e-mail, which was inadmissible hearsay since the patient did not testify at the hearing. Robinson v. Butler, 319 Ga. App. 633, 737 S.E.2d 731 (2013) (decided under former O.C.G.A. § 24-6-1).

Evidence Admissible

1. In General

When writing incomplete. — Before parol evidence can be received to show a

collateral agreement, it must appear, either from the contract itself or from the attendant circumstances, that the contract is incomplete, and that what is sought to be shown as a collateral agreement does not in any way conflict with or contradict what is contained in the writing. Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S.E. 485, 81 Am. St. R. 28 (1900) (decided under former Civil Code 1895, § 5201); McCommons v. Williams, 131 Ga. 313, 62 S.E. 230 (1908) (decided under former Civil Code 1895, § 5201); Napier v. Strong, 19 Ga. App. 401, 91 S.E. 579, cert. denied, 19 Ga. App. 828, 92 S.E. 558 (1917) (decided under former Civil Code 1910, § 5788); Roberts v. Investors' Sav. Co., 154 Ga. 45, 113 S.E. 398 (1922) (decided under former Civil Code 1910, § 5788); Bowen v. Swift & Co., 52 Ga. App. 793, 184 S.E. 625 (1936) (decided under former Code 1933, § 38-501); Shubert v. Speir, 201 Ga. 20, 38 S.E.2d 835 (1946) (decided under former Code 1933, § 38-501); Preferred Risk Mut. Ins. Co. v. Jones, 233 Ga. 423, 211 S.E.2d 720 (1975) (decided under former Code 1933, § 38-501).

If the writing appears on the writing's face to be an incomplete contract and if the parol evidence offered is consistent with and not contradictory of the terms of the written instrument, then the parol evidence is admissible to complete the agreement between the parties. Thomas v. Clark, 178 Ga. App. 823, 344 S.E.2d 754 (1986) (decided under former O.C.G.A. § 24-6-1).

Invoices as valid written instrument. — On an action on an open account, the trial court did not violate the parol evidence rule by admitting evidence that explained a "paid" notation on invoices. An invoice for goods delivered on open account was not "a valid written instrument" as that term was used in former O.C.G.A. § 24-6-1 (see now O.C.G.A. § 24-3-1); furthermore, former O.C.G.A. § 24-6-9 (see now O.C.G.A. § 24-3-9) specifically provided that receipts for money were always only prima facie evidence of payment and could be denied or explained by parol. Wheeler v. IDN-Armstrong's, Inc., 288 Ga. App. 253, 653 S.E.2d 835 (2007) (decided under former O.C.G.A. § 24-6-1).

Construction of contract or explanation of ambiguities. — Parol evidence may be used to explain ambiguities, or aid on the construction of a contract, although it is clearly inadmissible to vary the terms of the written instrument. State Farm Fire & Cas. Co. v. Fordham, 148 Ga. App. 48, 250 S.E.2d 843 (1978) (decided under former Code 1933, § 38-501); Kellos v. Parker-Sharpe, Inc., 245 Ga. 130, 263 S.E.2d 138 (1980) (decided under former Code 1933, § 38-501).

Conflicting documents should be read consistently if possible. — Courts may not use extrinsic evidence to vary the terms of or otherwise render ambiguous a written contract. However, when two releases both concern the allocation of liability between the parties and were executed on the same day, the court should read the releases together and consider the releases as a single contract in determining whether an ambiguity exists. But if one release violates public policy, the court may not consider extrinsic evidence altering or contradicting the unambiguous language of the valid release. Watson v. Union Camp Corp., 861 F. Supp. 1086 (S.D. Ga. 1994) (decided under former O.C.G.A. § 24-6-1).

Existence of fraud. — Parol evidence is admissible to show that what appears to be a valid written contract is void because the complaining party was induced to execute the contract by the fraud of the other. Johnson v. Sherrer, 197 Ga. 392, 29 S.E.2d 581 (1944) (decided under former Code 1933, § 38-501); Hinson v. Hinson, 221 Ga. 291, 144 S.E.2d 381 (1965) (decided under former Code 1933, § 38-501); Brown v. Techdata Corp., 238 Ga. 622, 234 S.E.2d 787 (1977) (decided under former Code 1933, § 38-501).

Contracts procured by fraud. — Rule that parol agreements shall not be received to change or add to terms of written contract does not apply when alleged contract was procured by fraud, and stipulation in contract that provisions thereof constitute sole and entire agreement between parties and that no modification thereof shall be binding on either party unless in writing and signed by seller can have no bearing in a case where

Evidence Admissible (Cont'd)
1. In General (Cont'd)

fraud to induce the contract is at issue. Spires v. Relco, Inc., 165 Ga. App. 4, 299 S.E.2d 58 (1983) (decided under former O.C.G.A. § 24-6-1).

In a dispute over installment contract to purchase land, evidence of alleged oral agreement between the parties, which the buyer partially performed and the seller accepted the benefits of, was not violative of the parol evidence rule and helped to prove the existence of the oral agreement as the buyer alleged. Hernandez v. Carnes, 290 Ga. App. 730, 659 S.E.2d 925 (2008) (decided under former O.C.G.A. § 24-6-1).

Rebuttal of fraud. — Parol evidence rule has no application when the defendant introduces testimony for the purpose of rebutting one of the elements of fraud, not for altering the instrument. Friendly Fin. Co. v. Stover, 109 Ga. App. 21, 134 S.E.2d 837 (1964) (decided under former Code 1933, § 38-501).

Lack of valid agreement. — Parol evidence may be used to show no valid agreement ever existed. Citizens & S. Nat'l Bank v. Williams, 147 Ga. App. 205, 249 S.E.2d 289 (1978) (decided under former Code 1933, § 38-501).

Lack of consideration. — While it is never allowable, under the guise of inquiring into the consideration of a valid written contract, to vary or contradict the terms or conditions of the instrument, it is permissible to show by parol evidence which does not vary or contradict the terms and conditions of the writing that it was never a contract for want of consideration. Miller v. Whitesburg Banking Co., 58 Ga. App. 84, 197 S.E. 906 (1938) (decided under former Code 1933, § 38-501).

Oral contract as inducement for written contract. — Collateral oral agreement, not inconsistent with a written contract, is not necessarily merged into the written contract, and one contract may be the consideration for another contract and may induce the execution of the other contract; such independent oral contract may be proved and enforced. Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572 (1977) (decided under former Code 1933, § 38-501).

Verbal agreement independent of written contract. — When a verbal agreement is an independent and complete contract within itself and forms no part of the written contract, it does not come within the operation of the parol evidence rule. Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572 (1977) (decided under former Code 1933, § 38-501).

Subsequent agreement. — Rule is not violated by proof of a new and distinct subsequent agreement in the nature of a novation. Wimberly v. Tanner, 34 Ga. App. 313, 129 S.E. 306 (1925) (decided under former Civil Code 1910, § 5788); Mutual Furn. Co. v. Moore, 60 Ga. App. 655, 4 S.E.2d 711 (1939) (decided under former Code 1933, § 38-501); Long Tobacco Harvesting Co. v. Brannen, 98 Ga. App. 142, 105 S.E.2d 390 (1958), later appeal, 99 Ga. App. 541, 109 S.E.2d 90 (1959) (decided under former Code 1933, § 38-501).

Evidence of nondelivery. — It is no contradiction of a written agreement, which does not of itself purport to have been delivered, to assert its nondelivery, and therefore parol evidence is admissible to disprove the fact of delivery. Nalley Land & Inv. Co. v. Merchants' & Planters' Bank, 178 Ga. 818, 174 S.E. 618 (1934), later appeal, 187 Ga. 142, 199 S.E. 815 (1938) (decided under former Code 1933, § 38-501).

Implication or rebuttal of trust. — Parol evidence rule does not prevent the introduction of evidence to show the nature of the transaction or the circumstances or conduct of the parties, either to imply or rebut a trust, although the effect is to alter or vary a written instrument. Hodges v. Hodges, 221 Ga. 587, 146 S.E.2d 313 (1965) (decided under former Code 1933, § 38-501).

Identification of real party in interest. — Parol evidence is admissible when not a variance with a written contract to identify the real party in interest. Contractors Mgt. Corp. v. McDowell-Kelley, Inc., 136 Ga. App. 116, 220 S.E.2d 473 (1975) (decided under former Code 1933, § 38-501).

Proof of signature. — Although under O.C.G.A. § 13-2-2(1) and former O.C.G.A.

§ 24-6-1, parol evidence was inadmissible to add to, take from, or vary a written contract, it was properly admitted to show that a promisor who died signing a guaranty had actually signed the guaranty. A store employee testified that the employee witnessed the store owner sign the guaranty. John Deere Co. v. Haralson, 278 Ga. 192, 599 S.E.2d 164 (2004) (decided under former O.C.G.A. § 24-6-1).

Lack of malice. — When evidence is not offered for the purpose of altering the substantive rights of the parties under a written sales contract, but for the purpose of establishing that one party did not act maliciously and oppressively, and if the evidence is probative on that issue, the evidence should be admitted. Oden & Sims Used Cars, Inc. v. McMullen, 153 Ga. App. 127, 264 S.E.2d 580 (1980) (decided under former Code 1933, § 38-501).

Division of consideration. — While proof of parol contemporaneous agreements is generally inadmissible to add to, take from, or vary a written contract, the allegations of the petition setting forth the division to be made of the consideration to be paid to the co-obligees under the contract do not come within the inhibition of the parol evidence rule since such alleged facts do not add to, take from, or vary the terms of the written instrument, but merely set forth the respective interests of the obligees. Bernstein v. Fagelson, 38 Ga. App. 294, 143 S.E. 237 (1928) (decided under former Civil Code 1910, § 5788).

Waiver of stipulation of contract. — While parol evidence is inadmissible to add to, take from, or vary a written contract, the parol evidence rule has no application to a case if waiver of a stipulation of the contract is being asserted. Henry v. Hemingway, 159 Ga. App. 375, 283 S.E.2d 341 (1981) (decided under former Code 1933, § 38-501).

2. Notes

Contract partly in parol. — Parol evidence is admissible not only when a promissory note is obtained by fraud, but when the note is not the entire contract between the parties, and when the contract is partly in parol and partly in writing. Crooker v. Hamilton, 3 Ga. App. 190, 59 S.E. 722 (1907) (decided under former Civil Code 1895, § 5201).

Inquiry into consideration. — When a promissory note recited no consideration except in the words "for value received," the real consideration of the note may be inquired into as far as may be necessary to the defense pleaded. Dunson & Bros. Co. v. Smith Seed Co., 26 Ga. App. 585, 106 S.E. 914 (1921) (decided under former Civil Code 1910, § 5788).

Failure of consideration. — In a suit on an unconditional promise to pay, although the consideration may not be expressed in the instrument, it is ordinarily permissible for the defendant to plead, and to prove by parol, that the consideration supporting the promise has failed either in whole or in part. Tyre v. Price, 52 Ga. App. 526, 183 S.E. 843 (1936) (decided under former Code 1933, § 38-501).

Note placed as collateral. — When there was evidence of a parol agreement on the part of the payee of the collateral note that a note should be held as collateral, which was itself a fact not affecting the contents of the writing, and which, if credible, tended to show that the note had been placed as collateral, the fact as to the pledge, being entirely independent from the contents of the note, could properly be shown by parol. Buffington v. Bank of College Park, 157 Ga. 570, 122 S.E. 50 (1924) (decided under former Civil Code 1910, § 5788).

When the alleged oral agreement was entered into subsequent to the execution of the promissory note, former O.C.G.A. § 24-6-1 (see now O.C.G.A. § 24-3-1) did not stand as a barrier to the agreement's enforcement. South Atl. Prod. Credit Ass'n v. Gibbs, 257 Ga. 521, 361 S.E.2d 167 (1987) (decided under former O.C.G.A. § 24-6-1).

3. Real Estate Transactions

Creation of trust. — Deed absolute in form may be shown by parol evidence to have been made in trust for the benefit of the grantor if the maker remains in possession of the land. Hall v. Turner, 198 Ga. 763, 32 S.E.2d 829 (1945) (decided under former Code 1933, § 38-501).

Clerical error. — In view of the particular statement in a deed that the tract conveyed was bounded on the east and

Evidence Admissible (Cont'd)
3. Real Estate Transactions (Cont'd)

south by lands of named owners, parol evidence was admissible for the purpose of applying the description to the intended subject matter and to show that the statement as to the district number was a clerical error. Smith v. Federal Land Bank, 181 Ga. 1, 181 S.E. 149 (1935) (decided under former Code 1933, § 38-501).

4. Other Agreements

Receipt in full. — Receipt for money in full of all demands is always open to contradiction or explanation. Walters v. Odom, 53 Ga. 286 (1874) (decided under former Code 1873, § 3800).

Implied trust. — While an express trust must be created by writing and cannot be proved by parol, implied trusts may be established by parol evidence, although the effect of such evidence is to alter or vary a written instrument, and although the defendant sets up and insists upon the statute of frauds. Hall v. Turner, 198 Ga. 763, 32 S.E.2d 829 (1945) (decided under former Code 1933, § 38-501).

Implied warranty. — In an action to recover the purchase price of defective goods, testimony that the defendant told the plaintiff the goods would give satisfactory service and that the defendant would give a one-year warranty with reference to the service was admissible to show the alleged breach of an implied contract and the trial court did not err in failing to charge the general rule concerning parol evidence. Cloud v. Stewart, 92 Ga. App. 247, 88 S.E.2d 323 (1955) (decided under former Code 1933, § 38-501).

Surety induced by false representation. — Plea to the effect that a surety was induced to sign by a false representation that a surety whose name appeared as such had already signed the contract of suretyship is not an effort to vary the terms of a written contract. W.T. Rawleigh Co. v. Kelly, 78 Ga. App. 10, 50 S.E.2d 113 (1948) (decided under former Code 1933, § 38-501).

Assignment of salary as cover for usurious loan. — Parol evidence is admissible to show that a purported assignment of salary is but a cover for a usurious loan, notwithstanding its recitals to the contrary. Hinton v. Mack Purchasing Co., 41 Ga. App. 823, 155 S.E. 78 (1930) (decided under former Civil Code 1910, § 5788).

Variance in deposit slip. — When husband had withdrawn money from the wife's account, in subsequent suit by the wife against the bank to recover money, evidence offered by the defendant bank, to the effect that while the deposit slip showed the money deposited to the separate account of the wife, such money was in fact placed to the credit of a joint business enterprise of the husband and wife, and thereafter drawn out on checks against this account by the plaintiff and her husband, was admissible in support of the defense urged by the defendant bank. Greeson v. Farmers' & Merchants' Bank, 50 Ga. App. 566, 179 S.E. 191 (1935) (decided under former Code 1933, § 38-501).

Bill of sale. — Court erred in admitting parol evidence that a "bill of sale" was not intended to transfer ownership of a boat, the bill being executed on the regular required Coast Guard form, and all language therein relating to a sale and conveyance, the other provisions merely relating to the method of payment. Peterson v. Lexington Ins. Co., 753 F.2d 1016 (11th Cir. 1985) (decided under former O.C.G.A. § 24-6-1).

Conversations supplementing recertification documents for lease. — When a public housing lease required information about family size and income annually, but the lease did not indicate that completion of the recertification documents was a condition precedent to renewal of the lease, the recertification document was not an agreement and was not merged with the lease so as to make admission of conversations supplementing the information contained in the recertification documents a violation of the parol evidence rule. Decatur Hous. Auth. v. Christian, 182 Ga. App. 270, 355 S.E.2d 764 (1987) (decided under former O.C.G.A. § 24-6-1).

Collective bargaining agreement. — In action by retired employees to prevent the corporation from modifying their

health insurance benefits, the fact that both parties offered reasonable interpretations of a collective bargaining agreement that gave full effect to one clause and qualified the other was sufficient to establish that the contract was ambiguous and that the trial court should have considered extrinsic evidence. Stewart v. KHD Deutz of Am., Corp., 980 F.2d 698 (11th Cir. 1993), cert. denied, 519 U.S. 930, 117 S. Ct. 300, 136 L. Ed. 2d 218 (1996) (decided under former O.C.G.A. § 24-6-1).

Not admissible if contract unambiguous. — Trial court properly struck a paragraph in an estate executrix's affidavit in opposition to the decedent's nephew's motion for summary judgment, arising from an action regarding estate assets and joint venture agreements, as the executrix's assertions regarding a handwritten note by the husband constituted parol evidence which could not be used to alter the meaning of the unambiguous language of the agreements, and necessity was not shown for admission of the hearsay evidence; accordingly, the handwritten notation that the properties at issue were to be sold for "market value" could not change the contractual language that indicated that the properties would be sold for a predetermined price. Zaglin v. Atlanta Army Navy Store, Inc., 275 Ga. App. 855, 622 S.E.2d 73 (2005) (decided under former O.C.G.A. § 24-6-1).

Life insurance beneficiary designation form. — Trial court erred by granting summary judgment to a child in a suit brought by a sibling seeking a determination that the sibling was the sole beneficiary of their parent's life insurance policy as the sibling sufficiently alleged fraud and/or forgery with regard to a second beneficiary designation form allegedly signed by the parent. As such, the trial court should have permitted the sibling to introduce two affidavits that supported the sibling's allegations that the second beneficiary designation form was void. Weatherly v. Weatherly, 292 Ga. App. 879, 665 S.E.2d 922 (2008) (decided under former O.C.G.A. § 24-6-1).

RESEARCH REFERENCES

Am. Jur. 2d. — 17A Am. Jur. 2d, Contracts, § 329 et seq. 29A Am. Jur. 2d, Evidence, § 1104.

C.J.S. — 32A C.J.S., Evidence, §§ 1125 et seq., 1130 et seq., 1148 et seq., 1207, 1211, 1212, 1216, 1241 et seq., 1247, 1249 et seq., 1270, 1271.

ALR. — Parol evidence to prove title to real property when the title is only collaterally involved, 1 ALR 1143.

Admissibility of parol evidence to vary or explain the contract implied from the regular endorsement of a bill or note, 11 ALR 637; 22 ALR 527; 35 ALR 1120; 54 ALR 999; 92 ALR 721.

Parol evidence rule as applied to lease, 25 ALR 787; 88 ALR 1380; 151 ALR 279.

Parol evidence rule as applied to escrow agreement, 49 ALR 1529.

Parol evidence in relation to assumption of mortgage debt by grantee of mortgaged property, 50 ALR 1220; 143 ALR 548.

Parol evidence rule as applicable to agreement for improvement or alterations by vendor of real property, 68 ALR 245.

Parol evidence rule as applied to letters or other informal writings not purporting to be the agreement itself, 68 ALR 1251.

Admissibility of parol evidence of contents of lost certificate of protest, 75 ALR 134.

Parol evidence rule as affecting extrinsic evidence to show or to negative usury, 82 ALR 1199; 104 ALR 1261.

Admissibility of parol or extrinsic evidence to show promise of employment or other consideration not embodied in written release of claim for bodily injury or death, 92 ALR 248.

Admissibility of parol or extrinsic evidence to alter or supplement written records of local legislative bodies, 98 ALR 1229.

"Contractual" consideration as regards parol evidence rule, 100 ALR 17.

Admissibility of parol evidence to show whether particular word or phrase was intended to connote a chattel mortgage or conditional sale, 101 ALR 625.

Exception to rule of admissibility of parol evidence to show that deed absolute

on its face was intended as a mortgage, 111 ALR 448.

Duty of federal courts to follow decisions of state courts as to the so-called "parol evidence rule"; and conflict of laws as to that rule, 141 ALR 1043.

Application and effect of parol evidence rule as determinable upon the pleading, 10 ALR2d 720.

Parol evidence rule as applicable to agreement not to engage in competition with a business sold, 11 ALR2d 1227.

Parol evidence to show duration of written contract for support or maintenance, 14 ALR2d 897.

Failure to object to parol evidence, or voluntary introduction thereof, as waiver of defense of statute of frauds, 15 ALR2d 1330.

Parol evidence rule as applied to deposit of funds in name of depositor and another, 33 ALR2d 569.

Parol evidence rule as applied to written guaranty, 33 ALR2d 960.

Applicability of parol evidence to written listing agreement of real estate broker, 38 ALR2d 542.

Admissibility of extrinsic evidence to explain or contradict bank deposit slips, deposit entries in passbooks, certificate of deposit, or similar instruments, 42 ALR2d 600.

Admissibility of parol evidence of election officials to impeach election returns, 46 ALR2d 1385.

Admissibility of parol evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 48 ALR2d 1259.

Parol evidence to show that lease of personalty, absolute on its face, is conditional sale, 57 ALR2d 1076.

Applicability of parol evidence rule to agreement between stockbroker and customer, 60 ALR2d 1135.

Admissibility of parol evidence with respect to reservations or exceptions upon conveyance of real property, 61 ALR2d 1390.

Admissibility of parol evidence as to limitation on cost structure in builder's action on written cost-plus-fee construction contract, 84 ALR2d 1324.

"Merger" clause in written contract as precluding conviction for false pretenses based on earlier oral false representations, 94 ALR2d 570.

Applicability of parol evidence rule in favor of or against one not a party to contract of release, 13 ALR3d 313.

Parol exception of fixtures from conveyance or lease, 29 ALR3d 1441.

Application of parol evidence rule in action on contract for architect's services, 69 ALR3d 1353.

Modern status of rules governing legal effect of failure to object to admission of extrinsic evidence violative of parol evidence rule, 81 ALR3d 249.

Admissibility of evidence to establish oral antenuptial agreement, 81 ALR3d 453.

Liability in tort for interference with physician's contract or relationship with hospital, 7 ALR4th 572.

24-3-2. Proof of unwritten portions of contract admissible where not inconsistent.

If the writing does not purport to contain all the stipulations of the contract, parol evidence shall be admissible to prove other portions thereof not inconsistent with the writing; collateral undertakings between parties of the same part among themselves would not properly be looked for in the writing. (Code 1981, § 24-3-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3726, former Code 1868, § 3750, former Code

1873, § 3803, former Code 1882, § 3803, former Civil Code 1895, § 5204, former Civil Code 1910, § 5791, former Code 1933, § 38-504, and former O.C.G.A. § 24-6-2 are included in the annotations for this Code section.

Requirements for application. — To bring a case within the rule admitting parol evidence to complete an entire agreement of which a writing is only a part, two things are essential. First, the writing must appear on inspection to be an incomplete contract; and, second, the parol evidence must be consistent with and not contradictory of the written instrument. Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S.E. 485, 81 Am. St. R. 28 (1900) (decided under former Civil Code 1895, § 5204); McCreary v. Acton, 29 Ga. App. 162, 114 S.E. 230 (1922) (decided under former Civil Code 1910, § 5791). See also Rauschenberg v. Peeples, 30 Ga. App. 384, 118 S.E. 409 (1923) (decided under former Civil Code 1910, § 5791); Bowen v. Swift & Co., 52 Ga. App. 793, 184 S.E. 625 (1936) (decided under former Code 1933, § 38-504); Harden v. Orr, 219 Ga. 54, 131 S.E.2d 545 (1963) (decided under former Code 1933, § 38-504).

Writing must have essential elements of contract. — While it is true that parol evidence as to all attendant and surrounding facts and circumstances may be admitted to explain ambiguities in a written contract and that if it appears from the contract itself that it was not intended that the instrument should embrace the entire agreement, parol evidence is admissible to set up collateral agreements not inconsistent with the terms of the writing, in order for these principles of law to have application, the instrument relied on must embrace within itself the essential elements of a contract. Jones v. Knight Mercantile Co., 51 Ga. App. 57, 179 S.E. 569 (1935) (decided under former Code 1933, § 38-504).

Mere unsigned slip of paper, although in the handwriting of the president of the plaintiff corporation, containing only the words "Contract price, $2,950 — J.A. Glass, carpenter, San Verner, plumber and elect," wholly failed to disclose the subject matter of the alleged contract, did not purport to bind anyone with reference thereto, and cannot be construed as such an instrument as, when aided by parol, would constitute a binding agreement. Jones v. Knight Mercantile Co., 51 Ga. App. 57, 179 S.E. 569 (1935) (decided under former Code 1933, § 38-504).

Contracts within the statute of frauds. — Parol evidence rule does not apply to contracts covered by the statute of frauds. Douglass v. Bunn, 110 Ga. 159, 35 S.E. 339 (1900) (decided under former Civil Code 1895, § 5204); Shinall Bros. v. Skelton, 28 Ga. App. 527, 112 S.E. 163 (1922) (decided under former Civil Code 1910, § 5791).

Provision of former O.C.G.A. § 24-6-2 that if a writing did not purport to be entire agreement between parties, parol evidence was admissible to prove other portions thereof not inconsistent with the writing, was inapplicable to a contract of guaranty because such contracts are required to be entirely in writing under O.C.G.A. § 13-5-30(2), statute of frauds. Builder's Supply Corp. v. Taylor, 164 Ga. App. 127, 296 S.E.2d 417 (1982) (decided under former O.C.G.A. § 24-6-2).

In action to recover on contract of guaranty, parol evidence was not admissible to prove identity of principal debtor, the identity not having been provided by the subject written agreement. Builder's Supply Corp. v. Taylor, 164 Ga. App. 127, 296 S.E.2d 417 (1982) (decided under former O.C.G.A. § 24-6-2).

Contract, partly oral and partly written, for a period of one year is valid and enforceable. Empire Box, Inc. v. Moore, 87 Ga. App. 57, 73 S.E.2d 63 (1952) (decided under former Code 1933, § 38-504).

Collateral agreement which is inducement for written agreement. — Distinct, collateral oral agreement that is consistent with and usually forms part of the consideration or inducement for the second written agreement, may be established by parol evidence. Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572 (1977) (decided under former Code 1933, § 38-504).

When the evidence showed the existence of a separate and independent collateral agreement, the renewal of which, for three consecutive years, induced ap-

pellee to renew a written agreement with appellant and that the appellant honored this agreement, the appellant could not now keep the agreement from evidence under the sanction of the parol evidence rule. Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572 (1977) (decided under former Code 1933, § 38-504).

Filling blanks. — Parol evidence is admissible to fill blanks in the writing not inconsistent with the writing itself. Westbrook v. Griffin, 24 Ga. App. 808, 102 S.E. 453 (1920) (decided under former Civil Code 1910, § 5791).

When, in a special contract in writing between a common carrier and a shipper of livestock, the amount of freight is left blank, the blank may be filled by parol evidence showing the actual amount contracted for and paid by the shipper. Georgia R.R. & Banking Co. v. Reid, 91 Ga. 377, 17 S.E. 934 (1893) (decided under former Code 1882, § 3803).

Subscription for stock. — Parol evidence rule applies to a written subscription for stock. Hendrix v. Academy of Music, 73 Ga. 437 (1884) (decided under former Code 1882, § 3803).

Receipt given by attorney. — Parol evidence rule applies to a receipt given by an attorney for a note placed in the attorney's hands for collection. Barclay v. Hopkins, 59 Ga. 562 (1877) (decided under former Code 1882, § 3803).

Contract excluding other representations. — If a written contract of sale stated that the writing was "made under inducements and representations herein expressed and no others," it could not be proved by parol that plaintiff's agent made any other representation or warranty. Shinall Bros. v. Skelton, 28 Ga. App. 527, 112 S.E. 163 (1922) (decided under former Civil Code 1910, § 5791).

Unambiguous maturity date not waived. — Former O.C.G.A. § 24-6-2 permitted parol evidence of collateral undertakings between the parties only when the writing did not purport to contain all the stipulations of the contract and only when such evidence was not inconsistent with the writing. In this case, defendant's testimony that the maturity date was waived by parol agreement was directly inconsistent with the certain and unambiguous maturity date stipulated in the written note. Moreover, the general rule prohibiting parol evidence may not be avoided on the theory of a confidential or fiduciary relationship between the parties. Barton v. Marubeni Am. Corp., 204 Ga. App. 346, 419 S.E.2d 342 (1992) (decided under former O.C.G.A. § 24-6-2).

Letter reciting writer's understanding of oral contract. — Letter written by vice-president of corporation reciting the vice-president's understanding of the oral contract of employment between the president of corporation and the recipient of the letter, since it did not purport to be the contract itself, did not prevent the use of parol evidence to show what the full contract was. Marston v. Downing Co., 73 F.2d 94 (5th Cir. 1934) (decided under former Code 1933, § 38-504).

When written part may be varied. — When a contract is entire, part of which is in writing and part in parol, the written part cannot be varied by parol evidence in the absence of fraud, accident, or mistake. Rauschenberg v. Peeples, 30 Ga. App. 384, 118 S.E. 409 (1923) (decided under former Civil Code 1910, § 5791).

Contract held complete on contract's face. — See McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945) (timber lease); (decided under former Code 1933, § 38-504).

Effect of part performance. — Acceptance of the benefits and part performance of the contract by the plaintiff would preclude the defendant from attacking the alleged oral portion of a contract which appeared to be an explanation of the entire contract rather than conflicting with any written provisions. Consumers Fin. Corp. v. Lamb, 217 Ga. 359, 122 S.E.2d 101 (1961) (decided under former Code 1933, § 38-504).

Admitting contract in answer. — When the defendants admitted in their answer that the written order and notes constituted the entire contract, the defendants were precluded from offering evidence of any other contract. Shinall Bros. v. Skelton, 28 Ga. App. 527, 112 S.E. 163 (1922) (decided under former Civil Code 1910, § 5791).

Assignment of note to secure assignor's debts to bank. — For applica-

tion of former O.C.G.A. § 24-6-2 to a situation where debts secured by an assignment of a note included only the assignor's debts on notes signed by the assignor as maker or also to notes on which the assignor might be liable as an endorser or accommodation party, see National City Bank v. Busbin, 175 Ga. App. 103, 332 S.E.2d 678 (1985) (decided under former O.C.G.A. § 24-6-2).

Promissory note held complete. — If the promissory note constituted an unconditional promise to pay, defendants were prohibited from proving the lender's alleged oral promise which, if proven, would clearly have contradicted the terms of the note requiring payment. Devin Lamplighter, Ltd. v. American Gen. Fin., Inc., 206 Ga. App. 747, 426 S.E.2d 645 (1992) (decided under former O.C.G.A. § 24-6-2).

Written part may not be varied. — Trial court properly struck a paragraph in an estate executrix's affidavit in opposition to the decedent's nephew's motion for summary judgment, arising from an action regarding estate assets and joint venture agreements, as the executrix's assertions regarding a handwritten note by the husband constituted parol evidence which could not be used to alter the meaning of the unambiguous language of the agreements, and necessity was not shown for admission of the hearsay evidence; accordingly, the handwritten notation that the properties at issue were to be sold for "market value" could not change the contractual language that indicated that the properties would be sold for a predetermined price. Zaglin v. Atlanta Army Navy Store, Inc., 275 Ga. App. 855, 622 S.E.2d 73 (2005) (decided under former O.C.G.A. § 24-6-2).

Cited in Stallings v. State, 319 Ga. App. 587, 737 S.E.2d 592 (2013).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1128 et seq.

C.J.S. — 32A C.J.S., Evidence, §§ 1176, 1195, 1196, 1219, 1243, 1244, 1245, 1255 et seq., 1269.

ALR. — Competency of parol evidence to show a money consideration additional to that stipulated in a written contract, 12 ALR 354.

Competency of parol evidence to vary, contradict, or add to terms of ticket or token issued by carrier for transportation or accommodation of passenger, 62 ALR 655.

Parol evidence rule: tests for determining whether entire agreement is embodied in the writing (rule of integration), 70 ALR 752.

Admissibility of parol or extrinsic evidence to show promise of employment or other consideration not embodied in written release of claim for bodily injury or death, 92 ALR 248.

Admissibility of parol or extrinsic evidence to alter or supplement written records of local legislative bodies, 98 ALR 1229.

"Contractual" consideration as regards parol evidence rule, 100 ALR 17.

Parol evidence rule as applied to rights or liabilities of coparties to contract as between themselves or their privies, 129 ALR 673.

Election by beneficiary to take under or against will as predictable upon initiation of, or participation in, court proceedings, 166 ALR 316.

Performance of work previously contracted for as consideration for promise to pay greater or additional amount, 12 ALR2d 78.

Parol evidence to show duration of written contract for support or maintenance, 14 ALR2d 897.

Failure to object to parol evidence, or voluntary introduction thereof, as waiver of defense of statute of frauds, 15 ALR2d 1330.

Admissibility of oral agreement as to specific time for performance where written contract is silent, 85 ALR2d 1269.

Admissibility of oral agreement respecting duration of employment or agency where written contract is silent, 85 ALR2d 1331.

Effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements, 7 ALR3d 1394.

Enforceability of voluntary promise of additional compensation because of unforeseen difficulties in performance of existing contract, 85 ALR3d 259.

24-3-3. Contemporaneous writings explaining each other; parol evidence explaining ambiguities.

(a) All contemporaneous writings shall be admissible to explain each other.

(b) Parol evidence shall be admissible to explain all ambiguities, both latent and patent. (Code 1981, § 24-3-3, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, "Supplementing Written Agreements: Restating the Parol Evidence Rule in Terms of Credibility and Relative Fault," see 34 Emory L.J. 93 (1985).

JUDICIAL DECISIONS

Analysis

General Consideration
Writings Explaining Each Other
Writings in Real Estate Transactions

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3724, former Code 1868, § 3748, former Code 1873, § 3801, former Code 1882, § 3801, former Civil Code 1895, § 5202, former Civil Code 1910, § 5789, former Code 1933, § 38-502, and former O.C.G.A. § 24-6-3 are included in the annotations for this Code section.

Parol evidence is admissible to explain an ambiguity in a writing. Chero-Cola Bottling Co. v. Southern Express Co., 29 Ga. App. 656, 116 S.E. 325 (1923) (decided under former Civil Code 1910, § 5789); Commercial Credit Co. v. Lewis, 59 Ga. App. 144, 200 S.E. 566 (1938) (decided under former Code 1933, § 38-502); Hanson v. Stern, 102 Ga. App. 341, 116 S.E.2d 237 (1960) (decided under former Code 1933, § 38-502); R.C. Craig, Ltd. v. Ships of Sea, Inc., 401 F. Supp. 1051 (S.D. Ga. 1975) (decided under former Code 1933, § 38-502); Fruin-Colnon Corp. v. Air Door, Inc., 157 Ga. App. 804, 278 S.E.2d 708 (1981) (decided under former Code 1933, § 38-502).

Parol evidence is admissible to explain an ambiguity in a written contract, although such evidence is inadmissible to add to, take from, or vary the writing itself. Andrews v. Skinner, 158 Ga. App. 229, 279 S.E.2d 523 (1981) (decided under former Code 1933, § 38-502).

If parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the entire contract, and parol evidence of prior or contemporaneous representations or statements is inadmissible to add to, take from, or vary the written instrument. Andrews v. Skinner, 158 Ga. App. 229, 279 S.E.2d 523 (1981) (decided under former Code 1933, § 38-502).

One writing purports to contain the entire understanding. — Contemporaneous writings should be considered even if one of the writings purports to contain the entire understanding of the parties in the transaction contemplated and even if the writings are not cross-referenced. Duke v. KHD Deutz of Am. Corp., 221 Ga. App. 452, 471 S.E.2d 537 (1996) (decided under former O.C.G.A. § 24-6-3).

Abbreviations. — When a writing is obscure or ambiguous, by reason of an

unfamiliar abbreviation, what it means is for the jury and to arrive at the meaning, clear and intelligible expressions in the instrument may be compared with facts otherwise proved. Holland v. Long & Bro., 57 Ga. 36 (1876) (decided under former Code 1873, § 3801).

Letters "O.K." being ambiguous, their meaning may be explained by parol evidence. Penn Tobacco Co. v. Leman & Co., 109 Ga. 428, 34 S.E. 679 (1899) (decided under former Civil Code 1895, § 5202).

Capacity of signer. — When there is a written contract, not under seal and not containing a so-called integration or "entire agreement" clause, parol is admissible to show the capacity in which one signed such agreement. Evans v. Smithdeal, 143 Ga. App. 287, 238 S.E.2d 278 (1977) (decided under former Code 1933, § 38-502).

Jury question. — As a general rule, the construction of a contract is a question for the court; but if the terms of a written instrument are ambiguous, the contract's meaning should be left to the jury. Illges v. Dexter, 77 Ga. 36 (1886) (decided under former Code 1882, § 3801).

Contracts, even when ambiguous, are to be construed by the court and no jury question is presented unless after application of applicable rules of construction an ambiguity remains. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566 (1981) (decided under former O.C.G.A. § 24-6-3).

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Affidavits admissible. — Summary judgment was proper and parol evidence was admissible to show the meaning of a separation agreement when a former wife's affidavits established that four certificates of deposit were purchased with the proceeds from the sale of her premarital property and were her separate property and decedent husband's redemption of one of the CD's was in contravention of their separation agreement. Bradley v. Frank, 264 Ga. App. 772, 592 S.E.2d 138 (2003) (decided under former O.C.G.A. § 24-6-3).

Contract is not necessarily contained in a single paper, and law provides that all contemporaneous writings shall be admissible to explain each other. Manry v. Hendricks, 66 Ga. App. 442, 18 S.E.2d 97 (1941) (decided under former Code 1933, § 38-502).

Legal effect of two writings. — If it takes both writings to make the real contract of the parties, the legal effect is the same as if one paper held the contents of the note and the contemporaneous writing. Jewell v. Norrell, 66 Ga. App. 11, 16 S.E.2d 797 (1941) (decided under former Code 1933, § 38-502).

Terms of contract cannot be varied by parol. — When a written contract is expressly entered into on terms and conditions expressed and stated in two papers which constituted but one entire written contract, a party cannot change such terms and conditions in the written contract and set up terms and conditions by parol which are contrary to the written terms. Jewell v. Norrell, 66 Ga. App. 11, 16 S.E.2d 797 (1941) (decided under former Code 1933, § 38-502).

"Contemporaneous" means, literally, according to Webster, "living, existing, or occurring at the same time," but numerous authorities could be cited to the effect that the word does not connote perfect or absolute coincidence in point of time. One thing is contemporaneous with a given transaction when it is so related in point of time as reasonably to be said to be a part of such transaction. Manry v. Hendricks, 66 Ga. App. 442, 18 S.E.2d 97 (1941) (decided under former Code 1933, § 38-502).

Letters to explain note. — When a promissory note did not express within itself the entire contract between the parties, but the remainder thereof was contained in letters written by the parties in connection with the making of the note, such letters were admissible in evidence in a suit between the maker and one who took the note after maturity. Marietta Sav. Bank v. Janes, 66 Ga. 286 (1881) (decided under former Code 1873, § 3801).

Documents properly construed together. — Trial court correctly evaluated an asset purchase agreement between a buyer and the owners of a dialysis center, including a doctor's spouse, a covenant not to compete, and a medical director agreement between a doctor and a buyer, all signed the same day, together under for-

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mer O.C.G.A. § 24-6-3 as related to the sale of a business as the doctor was integral to the continued success of the center, and the doctor's execution of the medical director agreement was integral to the execution of the asset purchase agreement. Martinez v. DaVita, Inc., 266 Ga. App. 723, 598 S.E.2d 334 (2004) (decided under former O.C.G.A. § 24-6-3).

In a breach of contract action arising from a guaranty agreement between a guarantor and a retail space owner, the trial court properly granted summary judgment in the owner's favor as the court properly construed contemporaneous written agreements, which were executed on the same date, at the same time, and at the same location, despite a misnomer contained therein, as such did not render the agreement unenforceable. Thus, it was not erroneous for the court to correct an obvious error in the agreement, specifically, the failure to substitute one entity's name for another as the parties intended, and interpret the guaranty accordingly. C.L.D.F., Inc. v. Aramore, LLC, 290 Ga. App. 271, 659 S.E.2d 695 (2008), cert. denied, No. S08C1224, 2008 Ga. LEXIS 668 (Ga. 2008) (decided under former O.C.G.A. § 24-6-3).

As the evidence supported a finding that the defendant freely and voluntarily consented to a special condition in a bond, allowing a warrantless search of the defendant's residence, denial of suppression with respect to drugs and a handgun seized during the search was proper as was the finding that the defendant had waived rights under U.S. Const., amend. IV; the special condition form was considered along with the bond order as the documents had been executed contemporaneously pursuant to former O.C.G.A. § 24-6-3(a). Curry v. State, 309 Ga. App. 338, 711 S.E.2d 314 (2011) (decided under former O.C.G.A. § 24-6-3).

Trial court erred in granting a flea market operator and a property owner summary judgment in their slander of title action against a real estate investment firm and the estate of the firm's sole member because there was a genuine issue of material fact as to whether the firm was a party to the sales contract entered into between the operator and the member since at the time the sales contract was executed contemporaneously with the promissory note and deed to secure debt, the member executed an affidavit of filing claiming specifically that the firm had a vested interest in the property pursuant to the sales contract; that affidavit was recorded along with the contract as an attachment, and the contemporaneous filings, considered together under former O.C.G.A. § 24-6-3, created an ambiguity as to whether the member signed the sales contract in a personal or corporate capacity. Shiva Mgmt., LLC v. Walker, 308 Ga. App. 878, 708 S.E.2d 710 (2011) (decided under former O.C.G.A. § 24-6-3).

Statute of frauds did not bar a landlord's claim on a guaranty because the guaranty identified the debt, and the assignment contemplated in the guaranty was documented by a written agreement; the guaranty and the assignment, along with an amendment, could be read together to determine whether the guaranty complied with the statute of frauds, and when read together the documents identified the principal debt as required by the statute of frauds. Patterson v. Bennett St. Props., 314 Ga. App. 896, 726 S.E.2d 147 (2012) (decided under former O.C.G.A. § 24-6-3).

Contract for sale of coal. — When at the time of making a written contract for the sale of coal, the parties also executed a contemporaneous writing as to the kind of coal to be furnished, both writings should be considered together to determine the true intent of the parties. National Rosin Oil & Size Co. v. South Atl. Coal Co., 23 Ga. App. 87, 97 S.E. 559 (1918) (decided under former Civil Code 1910, § 5789).

Pleading contemporaneous writings. — It is not intimated in law that in order for contemporaneous writings to be admitted in evidence, even though the writings may govern and control the contract, the writings must be pled in the plaintiff's petition. International Harvester Co. of Am. v. Morgan, 19 Ga. App. 716, 92 S.E. 35 (1917) (decided under former Civil Code 1910, § 5789).

Contemporaneous writings need not be cross-referenced. — If all the

necessary terms of an agreement are contained in signed contemporaneous writings, the statutory requirements and purpose of the statute of frauds have been met whether or not the writings are cross-referenced. Baker v. Jellibeans, Inc., 252 Ga. 458, 314 S.E.2d 874 (1984) (decided under former O.C.G.A. § 24-6-3); Harris v. Distinctive Bldrs., Inc., 249 Ga. App. 686, 549 S.E.2d 496 (2001) (decided under former O.C.G.A. § 24-6-3).

Language clear and unambiguous may not be contradicted by parol evidence of custom, surrounding circumstances, or intent. Daniel & Daniel, Inc. v. Cosmopolitan Co., 146 Ga. App. 200, 245 S.E.2d 885 (1978) (decided under former Code 1933, § 38-502).

When the words and phrases are not technical nor in any sense ambiguous, a witness cannot, as an expert or otherwise, give the witness's opinion of the meaning of the instrument. Chero-Cola Bottling Co. v. Southern Express Co., 29 Ga. App. 656, 116 S.E. 325 (1923) (decided under former Civil Code 1910, § 5789).

Parol evidence inadmissible in unambiguous contract. — Rule that the construction put upon the contract by the parties before or after the contract's execution may be considered in arriving at the contract's true meaning does not apply to an unambiguous contract. Alexander Film Co. v. Brittain, 63 Ga. App. 384, 11 S.E.2d 66 (1940) (decided under former Code 1933, § 38-502).

If the provisions of a deed to land are plain and unambiguous, parol evidence is not admissible for the purpose of showing an intent at variance with the plain terms of the deed. Rowland v. Sumner, 201 Ga. 317, 39 S.E.2d 655 (1946) (decided under former Code 1933, § 38-502).

In the absence of fraud, parol evidence is not admissible to overcome the express unambiguous language of a contract. Wilson v. Sheppard, 136 Ga. App. 475, 221 S.E.2d 671 (1975) (decided under former Code 1933, § 38-502).

Parol evidence cannot be employed to add to, take from, or vary the terms of the written instrument. R.C. Craig, Ltd. v. Ships of Sea, Inc., 401 F. Supp. 1051 (S.D. Ga. 1975) (decided under former Code 1933, § 38-502). Kellos v. Parker-Sharpe, Inc., 245 Ga. 130, 263 S.E.2d 138 (1980) (decided under former Code 1933, § 38-502).

When the contract is complete on the contract's face and the evidence offered to explain the ambiguity contradicts the terms of the written instrument, parol evidence should not be admitted. American Cyanamid Co. v. Ring, 248 Ga. 673, 286 S.E.2d 1 (1982) (decided under former O.C.G.A. § 24-6-3).

"Ambiguity" defined. — "Ambiguity" is defined as duplicity, indistinctness, an uncertainty of meaning or expression. Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 55 S.E. 923 (1906) (decided under former Civil Code 1895, § 5202); Wood v. Phoenix Ins. Co., 199 Ga. 461, 34 S.E.2d 688 (1945) (decided under former Code 1933, § 38-502).

"Ambiguity" also signifies doubtful or uncertain nature; wanting clearness or definiteness; difficult to comprehend or distinguish; of doubtful purport; open to various interpretations. Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 55 S.E. 923 (1906) (decided under former Civil Code 1895, § 5202).

Ambiguity refers to words or phrases of duplicitous, indistinct, or uncertain meanings which may fairly be understood in more ways than one. Contractors Mgt. Corp. v. McDowell-Kelley, Inc., 136 Ga. App. 116, 220 S.E.2d 473 (1975) (decided under former Code 1933, § 38-502).

Intent of parties. — If a written contract is ambiguous as to the intention of the parties, evidence, otherwise competent, of acts and transactions between the parties, tending to show the construction the parties themselves put upon the agreement when the agreement was executed, whether occurring prior to or subsequently to the execution of the contract, is admissible. Armistead v. McGuire, 46 Ga. 232 (1872) (decided under former Code 1868, § 3748); Georgia Iron & Coal Co. v. Ocean Accident & Guarantee Corp., 133 Ga. 326, 65 S.E. 775 (1909) (decided under former Civil Code 1895, § 5202).

Even if the instrument is ambiguous, the testimony of one party as to that party's intent, undisclosed to the other, is not competent. National Manufacture &

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Stores Corp. v. Dekle, 48 Ga. App. 515, 173 S.E. 408 (1934) (decided under former Code 1933, § 38-502).

If the language of the contract defining what interest the petitioners were buying is ambiguous, the court does not err in admitting testimony of the petitioners of what the petitioners thought the petitioners were buying. Manning v. Carroll, 204 Ga. 100, 48 S.E.2d 737 (1948), later appeal, 206 Ga. 158, 56 S.E.2d 278 (1949) (decided under former Code 1933, § 38-502).

Through the proper admission of parol evidence, the intent of the parties can be determined and any ambiguity present can be resolved by the jury in the trial. Wright v. Piedmont Eng'r & Constr. Corp., 106 Ga. App. 401, 126 S.E.2d 865 (1962) (decided under former Code 1933, § 38-502).

If a release is ambiguous on the question of whether a plaintiff released a defendant from claims arising out of defendant's relationship with a corporation, parol evidence may be introduced on the issue of the parties' intent. Southern Stone Co. v. Singer, 665 F.2d 698 (5th Cir. 1982) (decided under former O.C.G.A. § 24-6-3).

Trial court was authorized to construe the commercial lease and the shareholder buyout agreements between a lessor and a lessee together as multiple documents executed during the course of a single transaction; in so doing, the court's finding that the agreement was linked to the lease's 10-year term upheld the contract as a whole, reflected the parties' intent as expressed in the testimony and documentary evidence offered at trial, and was supported by all the attendant and surrounding circumstances proved in this case. Allen v. Harkness Stone Co., 271 Ga. App. 397, 609 S.E.2d 647 (2004) (decided under former O.C.G.A. § 24-6-3).

Contract of goods over $50.00. — Law applies to a contract of goods over $50.00, even in view of the statute of frauds. Wilson v. Coleman & Ray, 81 Ga. 297, 6 S.E. 693 (1888) (decided under former Code 1882, § 3801).

Contract with contradictory terms. — When a contract embodied in two separate written instruments, simultaneously executed and delivered, contains contradictory and ambiguous terms, parol evidence is admissible to explain the contradiction and remove the ambiguity. Cable Co. v. McFeeley, 7 Ga. App. 435, 66 S.E. 1103 (1910) (decided under former Civil Code 1895, § 5202).

When the clause of sales contract referring to the amount of the purchase price is rendered ambiguous by contradictory statements as to the amount, the trial judge does not err in permitting defendant purchaser to testify, in explanation of the ambiguity, that at the time the defendant entered into the contract, the defendant had a conversation with the seller's agent and that it was distinctly understood that the items of insurance, carrying charges, and interest were included. Wood v. Phoenix Ins. Co., 199 Ga. 461, 34 S.E.2d 688 (1945) (decided under former Code 1933, § 38-502).

If a written contract incorporates an ambiguous condition, parol evidence is admissible to aid in the construction of the condition. Columbia Nitrogen Corp. v. Dean's Power Oil Co., 136 Ga. App. 879, 222 S.E.2d 602 (1975) (decided under former Code 1933, § 38-502).

Effect of "whole agreement" clause in contract. — If a contract is in fact ambiguous as to some matters, a stipulation in the contract to the effect that the contract expresses "the whole agreement" and that there is no agreement or modification of any kind in connection therewith that is not expressly set forth therein, will not prevent explanation in the usual manner. Wood v. Phoenix Ins. Co., 199 Ga. 461, 34 S.E.2d 688 (1945) (decided under former Code 1933, § 38-502); Baker v. Jellibeans, Inc., 252 Ga. 458, 314 S.E.2d 874 (1984) (decided under former O.C.G.A. § 24-6-3).

Descriptions in instruments. — If, for want of fullness of statement, the writing be indefinite or uncertain, parol evidence is admissible, not to vary, add to, or take from the writing, but to explain and so illuminate the writing as to make the real intention of the parties apparent. So parol evidence is admissible to explain

ambiguous descriptive terms in a written instrument and to apply the same to their subject matter. Georgia Iron & Coal Co. v. Ocean Accident & Guarantee Corp., 133 Ga. 326, 65 S.E. 775 (1909) (decided under former Civil Code 1895, § 5202). See also Walnut Creek Milling Co. v. Smith Bros. Co., 178 Ga. 341, 173 S.E. 95, answer conformed to, 49 Ga. App. 116, 174 S.E. 255 (1934) (decided under former Code 1933, § 38-502).

Names. — When a grant was issued to a name and there was no such person, this made a case of latent ambiguity, and aliunde evidence was admissible to show who was the person meant. Bowen v. Slaughter, 24 Ga. 338, 71 Am. Dec. 135 (1858) (decided under former law).

It is admissible to apply, by parol testimony, the description given in an instrument so as to ascertain the particular person or persons intended to be embraced in that description. Indeed, parol evidence is admissible to explain all such ambiguities. Houston v. Bryan, 78 Ga. 181, 1 S.E. 252, 6 Am. St. R. 252 (1887) (decided under former Code 1882, § 3801).

Parol evidence admissible for goods. — Parol evidence was admissible to show that contract for sale of "Snoflour" contemplated a grade of flour equal to another brand with which the vendee was familiar. Walnut Creek Milling Co. v. Smith Bros. Co., 178 Ga. 341, 173 S.E. 95, answer conformed to, 49 Ga. App. 116, 174 S.E. 255 (1934) (decided under former Code 1933, § 38-502).

Receipts. — Parol evidence was admissible to show whether the parties intended the receipt given to the defendant by the assignee of the leased contract, to be a settlement of all future liability of the defendants for rent, or was only meant as a discharge of whatever the assignee could claim by the transfer to them, and was not to affect the rights of the lessor under a reassignment of the lease to the lessor. Bell v. Boyd & Brumby, 53 Ga. 643 (1875) (decided under former Code 1873, § 3801).

Whether a receipt of a promissory note amounts to the payment of a preexisting debt depends upon the intention of the parties. If such intention can be gathered with certainty from the papers themselves, resort need not be had to the attending circumstances. If the papers are ambiguous, parol evidence is admissible to establish intent. Hall's Self-Feeding Cotton Gin Co. v. Black, 71 Ga. 450 (1883) (decided under former Code 1882, § 3801).

Receipt in full given by the administrator de bonis non with the will annexed, to the administratrix of the deceased executor, was open to explanation in view of the parol evidence rule. Watts v. Baker, 78 Ga. 622, 3 S.E. 773 (1887) (decided under former Code 1882, § 3801).

Release. — Parol evidence is admissible to explain ambiguous language in a release. In determining the existence of an ambiguity in a release, reference is permitted only to the face of the document. Southern Stone Co. v. Singer, 665 F.2d 698 (5th Cir. 1982) (decided under former O.C.G.A. § 24-6-3).

Bill of sale. — Court erred in admitting parol evidence that a "bill of sale" was not intended to transfer ownership of a boat, the bill being executed on the regular required Coast Guard form, and all language therein relating to a sale and conveyance, the other provisions merely relating to the method of payment. Peterson v. Lexington Ins. Co., 753 F.2d 1016 (11th Cir. 1985) (decided under former O.C.G.A. § 24-6-3).

Construction of insurance policy is for the court, generally. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566 (1981) (decided under former Code 1933, § 38-502).

Auctioneer's memorandum of sale. — Rule as to the admissibility of parol evidence to explain a patent ambiguity in a deed to land applies with equal force to an auctioneer's memorandum of the sale of land. Mohr v. Dillon, 80 Ga. 572, 5 S.E. 770 (1888) (decided under former Code 1882, § 3801); Wilson v. Coleman & Ray, 81 Ga. 297, 6 S.E. 693 (1888) (decided under former Code 1882, § 3801).

Submission to award. — Ambiguities in a submission to award which describes the subject matter of controversy are explainable by parol evidence. Riley v. Hicks, 81 Ga. 265, 7 S.E. 173 (1888) (decided under former Code 1882, § 3801).

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Whether lease included in contract. — Parol evidence was admissible to explain an ambiguity as to whether the lease of a building was also included in the terms of the contract sued on. Vaughn v. Castleberry, 24 Ga. App. 496, 101 S.E. 299 (1919) (decided under former Civil Code 1910, § 5789).

Lease ambiguous as to time may be explained by parol. Carmichael v. Brown, 97 Ga. 486, 25 S.E. 357 (1895) (decided under former Code 1882, § 3801).

If the date of an entry is uncertain because of illegibility of the handwriting, this would constitute an ambiguity, and make a jury question. Bolton v. Keys, 38 Ga. App. 573, 144 S.E. 406 (1928) (decided under former Civil Code 1910, § 5789).

Phrase "value received". — Expression, "value received," is a patent ambiguity, and the expression may be explained, and failure of consideration shown by parol. Pitts v. Allen, 72 Ga. 69 (1883) (decided under former Code 1882, § 3801); Waller v. Martin-Senour Co., 45 Ga. App. 808, 166 S.E. 53 (1932) (decided under former Civil Code 1910, § 5789); Building Assocs. v. Crider, 141 Ga. App. 825, 234 S.E.2d 666 (1977) (decided under former Code 1933, § 38-502).

Phrase "as hereafter agreed". — One clause in a written contract providing for the payment of a certain sum "as hereafter agreed," parol evidence was admissible to explain the ambiguity, and to show not only the date but the conditions, if any, on which such payment was to be made. Morrison v. Dickey, 119 Ga. 698, 46 S.E. 863 (1904) (decided under former Civil Code 1895, § 5202). See also Morrison v. Dickey, 122 Ga. 417, 50 S.E. 178 (1905) (decided under former Civil Code 1895, § 5202).

Phrase "good cotton". — Term "good cotton" was subject to parol explanation to show the term's meaning as used in the contract. Ford & Co. v. Lawson, 133 Ga. 237, 65 S.E. 444 (1909) (decided under former Civil Code 1895, § 5202).

Determining meaning of ambiguous language. — If the language of an instrument in writing is ambiguous and may be fairly understood in more ways than one, it should be taken in the sense put upon it by the parties at the time of its execution, and the court will hear evidence as to the facts and surroundings, and decree according to the truth of the matter. Irwin v. Young, 212 Ga. 1, 90 S.E.2d 22 (1955) (decided under former Code 1933, § 38-502).

Unpriced, unexecuted damages provision. — In a claim for damages resulting from delays in the performance of a construction contract, parol evidence was relevant to construe the intent of the parties to incorporate and be bound by an unexecuted contract form containing an unpriced damages provision. Atlanta Economic Dev. Corp. v. Ruby-Collins, Inc., 206 Ga. App. 434, 425 S.E.2d 673 (1992) (decided under former O.C.G.A. § 24-6-3).

Parol evidence inadmissible for guaranty. — Lessor was not entitled to recover on an equipment lease guaranty because the guaranty was unenforceable since the guaranty omitted essential elements and under former O.C.G.A. § 24-6-3(a) the lease could not supply the missing elements since this required consideration of parol evidence, which was inadmissible for a contract required by the statute of frauds to be in writing. Dabbs v. Key Equip. Fin., Inc., 303 Ga. App. 570, 694 S.E.2d 161 (2010) (decided under former O.C.G.A. § 24-6-3).

Consent judgment. — Trial court erred in determining that a corporation was not a party to a consent judgment because the consent judgment was ambiguous, and the provision stating that judgment was not entered against the corporation "at this time" since the corporation was in bankruptcy implied that the entry of judgment was contemplated at a later time; the surrounding circumstances showed that the corporation filed a dismissal of the corporation's counterclaim with prejudice contemporaneously with the filing of the consent judgment, thereby manifesting an understanding that the corporation was included in, and obligated by, the consent judgment, and the corporation was listed as a defendant in the style of the case on the face of the consent judgment. Duke Galish, LLC v. Manton, 308 Ga. App. 316, 707 S.E.2d 555 (2011)

(decided under former O.C.G.A. § 24-6-3).

Effect of part performance. — Acceptance of the benefits and part performance of the contract by plaintiff would preclude the defendant from attacking the alleged oral portion of a contract which appeared to be an explanation of the entire contract rather than conflicting with any written provisions. Consumers Fin. Corp. v. Lamb, 217 Ga. 359, 122 S.E.2d 101 (1961) (decided under former Code 1933, § 38-502).

Contract not ambiguous. — See McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945) (timber lease) (decided under former Code 1933, § 38-502).

Contemporaneous writing rule inapplicable to credit application. — Guaranty a principal executed as part of a credit application was unenforceable under the statute of frauds, O.C.G.A. § 13-5-30, because the guaranty failed to identify the principle debtor, and the application was unsigned, rendering the contemporaneous writing rule under former O.C.G.A. § 24-6-3(a) inapplicable. There was nothing in the application reflecting that the principal and a supplier formed a binding contract regarding the extension of credit, the supplier would have to introduce parol evidence to establish that the application was entered into at the same time and in the course of the same transaction as the guaranty, and such evidence was not permitted in that context. LaFarge Bldg. Materials, Inc. v. Pratt, 307 Ga. App. 767, 706 S.E.2d 131 (2011) (decided under former O.C.G.A. § 24-6-3).

Integration clause precluded consideration of parol evidence. — Court of appeals could not consider parol evidence to add to, take from, contradict, or vary an assignment contract containing the terms of an estoppel certificate because the contract's integration clause provided that the consent to assignment and all its exhibits, including the estoppel certificate, constituted the entire agreement of the parties and that all prior understandings and agreements among the parties concerning the matters were merged into the consent. Fundus Am. (Atlanta) L.P. v. RHOC Consolidation, LLC, 313 Ga. App. 118, 720 S.E.2d 176 (2011) (decided under former O.C.G.A. § 24-6-3).

Writings in Real Estate Transactions

Admissibility of parol evidence of site plan to show nonexistence of use restriction. — In a land use restriction action, a trial court erred by failing to consider a 1997 site plan, which allowed the parties to seek to amend the use of the land at issue and future development of the land; therefore, the trial court erred in enjoining a developer from constructing condominium towers since no such use restriction existed. CPI Phipps, LLC v. 100 Park Ave. Partners, L.P., 288 Ga. App. 614, 654 S.E.2d 690 (2007), cert. denied, No. S08C0618, 2008 Ga. LEXIS 286 (Ga. 2008) (decided under former O.C.G.A. § 24-6-3).

Dates on multiple real estate documents. — Note, warranty deed, and agreement concerning a real estate transaction were all dated on the same day; therefore, the note and deed could be considered to establish the missing property description in the agreement. Owenby v. Holley, 256 Ga. App. 13, 567 S.E.2d 351 (2002) (decided under former O.C.G.A. § 24-6-3).

Deed construed with petition. — Deed by a wife to her husband was construed together with a petition that she be allowed to execute the deed. McCreary v. Gewinner, 103 Ga. 528, 29 S.E. 960 (1898) (decided under former Civil Code 1895, § 5202).

Use restriction in easement not applicable to deeds. — As there were no restrictions on use in warranty deeds that a property owner conveyed to a city, a restrictive use that was in a contemporaneously-executed easement could not be imposed on the deeds pursuant to former O.C.G.A. § 24-6-3(a). White House Inn & Suites, Inc. v. City of Warm Springs, 285 Ga. 322, 676 S.E.2d 178 (2009) (decided under former O.C.G.A. § 24-6-3).

Description in lease. — If a lease contains a general descriptive phrase, the meaning of which was presumably well known to both the contracting parties, parol evidence is admissible for the purpose of applying the description to the subject matter, but any attempt to prove

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that at the time of the execution of the contract the parties had an oral understanding as to the meaning of such phrase would clearly violate the statute of frauds, as well as the parol evidence rule. Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783 (1947) (decided under former Code 1933, § 38-502).

Descriptions in real property transactions. — If there is a discrepancy as to a party's name in a plat and grant, this is a patent ambiguity and explainable by parol evidence. Ferrell v. Hurst, 68 Ga. 132 (1881) (decided under former Code 1873, § 3801).

If the description in a deed is ambiguous but sufficient to furnish a key to the boundary, extrinsic evidence may be used to correctly apply the description to the true boundary intended by the parties. Miller v. Rackley, 199 Ga. 370, 34 S.E.2d 438 (1945) (decided under former Code 1933, § 38-502).

When the descriptive averments contained in a deed are sufficient to furnish a key whereby the land which the grantor intended to convey may be ascertained, parol evidence which does not add to, enlarge, or in any way change the description is admissible for the purpose of identifying the conveyed land. Gainsville M.R.R. v. Tyner, 204 Ga. 535, 50 S.E.2d 108 (1948) (decided under former Code 1933, § 38-502). See also Haygood v. Duncan, 204 Ga. 540, 50 S.E.2d 214 (1948) (decided under former Code 1933, § 38-502).

If a property description in a written contract is ambiguous, in that it can be interpreted as referring to more than one piece of property, parol evidence is admissible to explain the ambiguity and the contract is not rendered unenforceable for vagueness. Tuggle v. Wilson, 248 Ga. 335, 282 S.E.2d 110 (1981) (decided under former Code 1933, § 38-502).

Claim of title in deed. — Any ambiguities in a deed may be explained by parol, if the evidence can be applied to elucidate the claim of title. Daniels v. Cagle, 180 Ga. 853, 181 S.E. 178 (1935) (decided under former Code 1933, § 38-502).

RESEARCH REFERENCES

Am. Jur. 2d. — 17A Am. Jur. 2d, Contracts, §§ 329 et seq., 350, 356. 29A Am. Jur. 2d, Evidence, § 1145 et seq.

C.J.S. — 32A C.J.S., Evidence, §§ 1207, 1221, 1246, 1248, 1265, 1266.

ALR. — Admissibility of parol evidence as to amount of commodity specified in written contract of sale, 8 ALR 747.

Parol evidence as to whether one whose name appears on the face of a note signed as a witness or as maker, 15 ALR 197.

Parol evidence rule as applied to lease, 25 ALR 787; 88 ALR 1380; 151 ALR 279.

Admissibility of parol evidence to explain ambiguity in description of land in deed or mortgage, 68 ALR 4.

"Contractual" consideration as regards parol evidence rule, 100 ALR 17.

Admissibility of parol evidence to show whether particular word or phrase was intended to connote a chattel mortgage or conditional sale, 101 ALR 625.

Rule that latent ambiguities may be explained by parol evidence but that patent ambiguities may not, 102 ALR 287.

Admissibility of oral or extrinsic evidence on question of liability on bill of exchange, promissory note, or other contract where signature is followed by word or abbreviation which may be either descriptive or indicative of contracting character, 113 ALR 1364.

Election by beneficiary to take under or against will as predictable upon initiation of, or participation in, court proceedings, 166 ALR 316.

Extrinsic evidence regarding character and size of trees contemplated by written timber contract or lease, 173 ALR 518.

Parol evidence to show duration of written contract for support or maintenance, 14 ALR2d 897.

Admissibility of parol evidence to connect signed and unsigned documents relied upon as memorandum to satisfy statute of frauds, 81 ALR2d 991.

Wills: admissibility of extrinsic evidence to determine whether fee or absolute interest, or only estate for life or years, was given, 21 ALR3d 778.

The parol evidence rule and admissibility of extrinsic evidence to establish and clarify ambiguity in written contract, 40 ALR3d 1384.

Admissibility of parol evidence to show whether guaranty of corporation's obligation was signed in officer's representative or individual capacity, 70 ALR3d 1276.

24-3-4. Circumstances surrounding execution of contracts.

The surrounding circumstances shall always be proper subjects of proof to aid in the construction of contracts. (Code 1981, § 24-3-4, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, "Supplementing Written Agreements: Restating the Parol Evidence Rule in Terms of Credibility and Relative Fault," see 34 Emory L.J. 93 (1985).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3727, former Code 1868, § 3751, former Code 1873, § 3804, former Code 1882, § 3804, former Civil Code 1895, § 5205, former Civil Code 1910, § 5792, former Code 1933, § 38-505, and former O.C.G.A. § 24-6-4 are included in the annotations for this Code section.

When former statute applied. — Former statute applied only if a contract was of doubtful meaning; but a plain and unambiguous contract cannot be contradicted by parol. Ward v. Campbell, 73 Ga. 97 (1884) (decided under former Code 1882, § 3804); Kellos v. Parker-Sharpe, Inc., 245 Ga. 130, 263 S.E.2d 138 (1980) (decided under former Code 1933, § 38-505).

Ambiguities are explainable by the surrounding circumstances. Armistead v. McGuire, 46 Ga. 232 (1872) (decided under former Code 1868, § 3751); National Manufacture & Stores Corp. v. Dekle, 48 Ga. App. 515, 173 S.E. 408 (1934) (decided under former Code 1933, § 38-505).

When the language of the written instrument may be fairly understood in more ways than one, it should be taken in the sense put upon it by the parties at the time of its execution, and the court will hear evidence as to the facts and surroundings. National Manufacture & Stores Corp. v. Dekle, 48 Ga. App. 515, 173 S.E. 408 (1934) (decided under former Code 1933, § 38-505); Irwin v. Young, 212 Ga. 1, 90 S.E.2d 22 (1955) (decided under former Code 1933, § 38-505).

Circumstances accompanying making of note. — Parol evidence was admissible to show the circumstances under which notes were made, and to explain the consideration and show the year in which the consideration appearing on the face of the notes was actually advanced. Anderson v. Brown, 72 Ga. 713 (1884) (decided under former Code 1882, § 3804); Camp v. Matthews, 143 Ga. 393, 85 S.E. 196 (1915) (decided under former Civil Code 1910, § 5792).

Admissibility of parol evidence of site plan to show nonexistence of use restriction. — In a land use restriction action, a trial court erred by failing to consider a 1997 site plan, which allowed the parties to seek to amend the use of the land at issue and future development of the land; therefore, the trial court erred in enjoining a developer from constructing condominium towers since no such use restriction existed. CPI Phipps, LLC v. 100 Park Ave. Partners, L.P., 288 Ga. App. 614, 654 S.E.2d 690 (2007), cert. denied, No. S08C0618, 2008 Ga. LEXIS 286 (Ga. 2008) (decided under former O.C.G.A. § 24-6-4).

Improper admission. — If surrounding circumstances were improperly admitted, it was harmless error since substan-

tially the same facts had already been established by the evidence of the plaintiff. Wells v. Gress, 118 Ga. 566, 45 S.E. 418 (1903) (decided under former Civil Code 1895, § 5205).

RESEARCH REFERENCES

Am. Jur. 2d. — 17A Am. Jur. 2d, Contracts, § 351 et seq. 29A Am. Jur. 2d, Evidence, §§ 1112, 1150, 1151.

ALR. — Parol evidence rule; right to show fraud in inducement or execution of written contract, 56 ALR 13.

Competency of parol evidence to vary, contradict, or add to terms of ticket or token issued by carrier for transportation or accommodation of passenger, 62 ALR 655.

"Contractual" consideration as regards parol evidence rule, 100 ALR 17.

Admissibility of parol evidence to show that a bill or note was conditional, or given for a special purpose, 105 ALR 1346.

Admissibility of subsequent declarations of settlor to aid interpretation of trust, 51 ALR2d 820.

Admissibility of evidence of value or extent of decedent's estate in action against estate for reasonable value of services furnished decedent, 65 ALR2d 945.

Admissibility of oral evidence to show that a writing was a sham agreement not intended to create legal relations, 71 ALR2d 382.

Admissibility of parol evidence to connect signed and unsigned documents relied upon as memorandum to satisfy statute of frauds, 81 ALR2d 991.

24-3-5. Known usage.

Evidence of known and established usage shall be admissible to aid in the construction of contracts as well as to annex incidents. (Code 1981, § 24-3-5, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3728, former Code 1868, § 3752, former Code 1873, § 3805, former Code 1882, § 3805, former Civil Code 1895, § 5206, former Civil Code 1910, § 5793, former Code 1933, § 38-506, and former O.C.G.A. § 24-6-5 are included in the annotations for this Code section.

To make a proof of a custom as such proper testimony, it should appear by the proof itself that such custom is a general one, and that it is so well known and recognized within the sphere of the custom's operation, as to be usually considered a part of all contracts made in that particular locality in business transactions to which such custom relates. Hardeman v. English, 79 Ga. 387, 5 S.E. 70 (1887) (decided under former Code 1882, § 3805).

Custom can only be proved by word of mouth from the men engaged in the business. Wood v. Frank Graham Co., 91 Ga. App. 621, 86 S.E.2d 691 (1955) (decided under former Code 1933, § 38-506).

Evidence thereof is necessarily in parol. Wood v. Frank Graham Co., 91 Ga. App. 621, 86 S.E.2d 691 (1955) (decided under former Code 1933, § 38-506).

Testimony of custom as matter of fact. — If a witness is shown to have knowledge of a custom, the witness can state what it is, not as a matter of opinion or law, but as a fact. Farmers Ginnery & Mfg. Co. v. Thrasher, 144 Ga. 598, 87 S.E. 804 (1916) (decided under former Civil Code 1910, § 5793).

Custom is inadmissible when agreement is unambiguous. — Custom or usage, while admissible to explain an ambiguous written agreement, is inadmissible if repugnant to or inconsistent with a clear, express agreement. Stamey v.

Western Union Tel. Co., 92 Ga. 613, 18 S.E. 1008, 44 Am. St. R. 95 (1894) (decided under former Code 1882, § 3805).

When the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing. Newark Fire Ins. Co. v. Smith, 176 Ga. 91, 167 S.E. 79 (1932) (decided under former Civil Code 1910, § 5793); TBS v. Europe Craft Imports, Inc., 186 Ga. App. 286, 367 S.E.2d 99 (1988) (decided under former O.C.G.A. § 24-6-5).

While proof of a custom is sometimes admissible to aid in the construction of a contract, such proof is not admissible when the contract is clear and unambiguous. Atlantic Fertilizer Co. v. Southern States Phosphate & Fertilizer Co., 53 Ga. App. 798, 187 S.E. 237 (1936) (decided under former Code 1933, § 38-506).

Law cannot be changed. — Custom may sometimes be invoked as entering into a contract or supplying incidents, but not to change the law. Fidelity & Deposit Co. v. Butler, 130 Ga. 225, 60 S.E. 851, 16 L.R.A. (n.s.) 994 (1908) (decided under former Civil Code 1895, § 5206); Happ Bros. Co. v. Hunter Mfg. & Comm'n Co., 145 Ga. 836, 90 S.E. 61 (1916) (decided under former Civil Code 1910, § 5793).

Usage cannot make a contract when there is none nor prevent the effect of the settled rules of law. Newark Fire Ins. Co. v. Smith, 176 Ga. 91, 167 S.E. 79 (1932) (decided under former Civil Code 1910, § 5793).

In the absence of knowledge of the existence of the custom, it cannot be said that there was any meeting of the minds on this item. Franco v. Bank of Forest Park, 118 Ga. App. 700, 165 S.E.2d 593 (1968) (decided under former Code 1933, § 38-506).

If there was no evidence tending to show a contract by known and established usage, it was error to charge on known usage or custom. Craig v. Augusta Roofing & Metal Works, Inc., 78 Ga. App. 514, 51 S.E.2d 565 (1949) (decided under former Code 1933, § 38-506).

Signing other party's name to contract. — It was not admissible to show that it was the custom in a particular business for one party making sales, or its agent representing it in such a transaction, to sign the name of the other party to a contract therefor, so as to bind the latter. Happ Bros. Co. v. Hunter Mfg. & Comm'n Co., 145 Ga. 836, 90 S.E. 61 (1916) (decided under former Civil Code 1910, § 5793).

Time of performance of contract. — Usage in business as to time of performance of contract for services is admissible in suit for breach thereof. Beck v. Thompson & Taylor Spice Co., 108 Ga. 242, 33 S.E. 894 (1899) (decided under former Civil Code 1895, § 5206).

Customs of warehousemen. — On the trial of a suit against warehousemen to recover the value of certain cotton which had been burned, and which plaintiff alleged the warehousemen had agreed to keep insured for plaintiff's benefit, but had failed to do so, proof, in their behalf, that it was their custom to insure cotton only to the extent of the advances the warehousemen had made thereon and for the warehousemen's own benefit, unless instructed by the customer to insure for full value, was primarily inadmissible; but after testimony had been allowed, without objection, in favor of plaintiff, tending to show it was the warehousemen's custom to insure cotton on which the warehousemen had made advances to its full value, such proof was properly admitted. Hardeman v. English, 79 Ga. 387, 5 S.E. 70 (1887) (decided under former Code 1882, § 3805).

If a general custom existed on the part of the warehouses in a certain municipality to insure to its full value the cotton of patrons stored with them with the necessary characteristics, patrons who stored cotton with one of such warehousemen, knowing of the custom, and relying upon the custom, can assert a duty on the part of such warehouseman to so insure one's cotton. Farmers Ginnery & Mfg. Co. v. Thrasher, 144 Ga. 598, 87 S.E. 804 (1916) (decided under former Civil Code 1910, § 5793).

It was not necessary that a witness should be a warehouseman in order to have sufficient knowledge to render the witness competent to testify as to the existence of such usage or custom among the warehouses of a particular town or city. If a person has been accustomed to

deal with such warehouses, and to deposit cotton with those warehouses, so as to know those warehouses usage or custom on that subject, the witness was competent to testify as to that usage or custom. Farmers Ginnery & Mfg. Co. v. Thrasher, 144 Ga. 598, 87 S.E. 804 (1916) (decided under former Civil Code 1910, § 5793).

Customs of insurance companies. — It was well settled that insurers were bound to know the customs of a place where insurers transact business; and were assumed to have made contracts in reference to such customs. Todd v. German-American Ins. Co., 2 Ga. App. 789, 59 S.E. 94 (1907) (decided under former Civil Code 1895, § 5206).

In this state, when life insurance companies deal with the assured for a time sufficient to make it their usage and custom to give notice to the assured of the date when the premiums fall due, and fail to give notice thereof, the policy will not be forfeited if, within a period so reasonably short as to show an intent to continue one's policy, the assured take steps to inquire and pay the premium. Grant v. Alabama Gold Life Ins. Co., 76 Ga. 575 (1886) (decided under former Code 1882, § 3805).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 1112, 1151, 1154 et seq.

C.J.S. — 32A C.J.S., Evidence, § 1207.

ALR. — "Contractual" consideration as regards parol evidence rule, 100 ALR 17.

Validity and construction of "zoning with compensation" regulation, 41 ALR3d 636.

24-3-6. Rebuttal of equity; discharge of contract; proof of subsequent agreement; change of time or place of performance.

Parol evidence shall be admissible to rebut an equity, to discharge an entire contract, to prove a new and distinct subsequent agreement, to enlarge the time of performance, or to change the place of performance. (Code 1981, § 24-3-6, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Analysis

Discharge of Contract
Subsequent Agreement

Discharge of Contract

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3729, former Code 1868, § 3753, former Code 1873, § 3806, former Code 1882, § 3806, former Civil Code 1895, § 5207, former Civil Code 1910, § 5794, former Code 1933, § 38-507, and former O.C.G.A. § 24-6-6 are included in the annotations for this Code section.

Plea of accord and satisfaction may be supported by parol evidence that the notes sued on were paid in full and satisfied by the surrender of the property described in the mortgage deed (given to secure the debt) in full and complete satisfaction of the debt; that the owner and holder of the note accepted the property in settlement of the notes sued on; and that the settlement was beneficial to the then owners and the holders of the notes, in that it enabled the owners to obtain property without the expense of foreclosure. Butts v. Maryland Cas. Co., 52 Ga. App. 838, 184 S.E. 774 (1936) (decided under former Code 1933, § 38-507).

Subsequent Agreement

Admissible testimony generally. — When there is strong presumptive evidence that, subsequently to the execution of a written contract, the parties agreed orally upon a new contract, which was a modification of the former, testimony may be received of negotiations and conversations between these parties previous to the written contract for the purpose of throwing light upon, and showing more clearly, the nature and character of the subsequent agreement. Collins v. Lester, 16 Ga. 410 (1954) (decided under former Code 1933, § 38-507).

Agreement must be based on valuable consideration. — While parol evidence was admissible to prove a new and distinct agreement subsequent to the original written contract in reference to the same subject matter, such new agreement must be based upon a valuable consideration. Phelps v. Belle Isle, 29 Ga. App. 571, 116 S.E. 217 (1923) (decided under former Civil Code 1910, § 5794); Guthrie v. Rowan, 34 Ga. App. 671, 131 S.E. 93 (1925) (decided under former Civil Code 1910, § 5794); Moon Motor Car Co. v. Savannah Motor Car Co., 41 Ga. App. 231, 152 S.E. 611 (1930) (decided under former Civil Code 1910, § 5794); Alexander Film Co. v. Brittain, 63 Ga. App. 384, 11 S.E.2d 66 (1940) (decided under former Code 1933, § 38-507); P & O Mach. Works, Inc. v. Pollard, 115 Ga. App. 96, 153 S.E.2d 631 (1967) (decided under former Code 1933, § 38-507); American Century Mtg. Investors v. Bankamerica Realty Investors, 246 Ga. 39, 268 S.E.2d 609 (1980) (decided under former Code 1933, § 38-507); Llop v. National Bank, 154 Ga. App. 504, 268 S.E.2d 777 (1980) (decided under former Code 1933, § 38-507).

Agreement must embody essentials of new contract. Phelps v. Belle Isle, 29 Ga. App. 571, 116 S.E. 217 (1923) (decided under former Civil Code 1910, § 5794); Guthrie v. Rowan, 34 Ga. App. 671, 131 S.E. 93 (1925) (decided under former Civil Code 1910, § 5794).

All previous verbal negotiations respecting a sale were merged in the subsequently written contract, and it was not permissible to prove a prior or contemporaneous parol agreement which had the effect of varying the terms of the written contract. Cottle v. Tomlinson, 192 Ga. 704, 16 S.E.2d 555 (1941) (decided under former Code 1933, § 38-507).

Agreement to give collateral security. — Parol agreement of parties subsequent to the execution of a contract of sale that the purchaser would turn over to the vendor a certain paper as collateral security was admissible. Loveless v. Bridges, 136 Ga. 338, 71 S.E. 166 (1911) (decided under former Civil Code 1910, § 5794).

Agreement as to time of delivery. — When a written contract for the purchase and sale of goods fixed no time for performance, it will be construed as implying that delivery will be made and accepted within a reasonable time, but parol evidence was admissible to prove a new and distinct subsequent agreement, mutually acted upon, that the deliveries would be made in installments at certain stated intervals. Breman v. Rodbell, 31 Ga. App. 358, 120 S.E. 697 (1923) (decided under former Civil Code 1910, § 5794).

Evidence of agreement to rescind contract held admissible. — See Manry v. Selph, 77 Ga. App. 808, 50 S.E.2d 27 (1948) (decided under former Code 1933, § 38-507); Flatauer v. Goodman, 84 Ga. App. 881, 67 S.E.2d 794 (1951) (decided under former Code 1933, § 38-507).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1125.

C.J.S. — 32A C.J.S., Evidence, § 1213 et seq.

ALR. — "Contractual" consideration as regards parol evidence rule, 100 ALR 17.

Provision in sale contract to effect that only conditions incorporated therein shall be binding, 127 ALR 132; 133 ALR 1360.

Performance of work previously contracted for as consideration for promise to pay greater or additional amount, 12 ALR2d 78; 85 ALR3d 259.

Application of parol evidence rule in

action on contract for architect's services, 69 ALR3d 1353.

Enforceability of voluntary promise of additional compensation because of unforeseen difficulties in performance of existing contract, 85 ALR3d 259.

24-3-7. Proof of mistake in deed or written contract.

Parol evidence shall be admissible to prove a mistake in a deed or any other contract required by law to be in writing. (Code 1981, § 24-3-7, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3063, former Code 1873, § 3118, former Code 1882, § 3118, former Civil Code 1895, § 3975, former Civil Code 1910, § 4572, former Code 1933, § 38-510, and former O.C.G.A. § 24-6-7 are included in the annotations for this Code section.

In general. — If the description in a deed is unambiguous, extrinsic evidence cannot be resorted to, except for the purpose of reforming the deed so as to make the deed express the real intention of the parties and correct a mutual mistake of fact. Miller v. Rackley, 199 Ga. 370, 34 S.E.2d 438 (1945) (decided under former Code 1933, § 38-510).

Resort to parol evidence is necessary to reform an instrument. — Written instrument is evidence of what the parties intend to do; but when a party seeks information of an instrument, the instrument is not the best evidence in such controversy. The very purpose of resorting to parol evidence is to contradict the instrument. Nelson v. Spence, 129 Ga. 35, 58 S.E. 697 (1907) (decided under former Civil Code 1895, § 3975); Gaulding v. Baker, 9 Ga. App. 578, 71 S.E. 1018 (1911) (decided under former Civil Code 1910, § 4572); Green v. Johnson, 153 Ga. 738, 113 S.E. 402 (1922) (decided under former Civil Code 1910, § 4572); Sapp v. Ritch, 169 Ga. 33, 149 S.E. 636 (1929) (decided under former Civil Code 1910, § 4572); Head v. Stephens, 215 Ga. 184, 109 S.E.2d 772 (1959), later appeal, 218 Ga. 191, 126 S.E.2d 623 (1962) (decided under former Code 1933, § 38-510).

Because the decedent's offspring sought reformation of the option contract entered into with the decedent on the basis of mutual mistake of fact due to a scrivener's error mistakenly describing the property to be sold, parol evidence of the real terms of the agreement was admissible. Morris v. Morris, 282 Ga. App. 127, 637 S.E.2d 838 (2006) (decided under former O.C.G.A. § 24-6-7).

Parol evidence admissible. — Grant of summary judgment to a corporation was vacated as reformation was a possible remedy against a corporation since an owner's warranty deed to a buyer contained a mistaken descriptor; the owner could seek reformation against the corporation as the corporation bought the property from the buyer under the same mistake and parol evidence was admissible in such a reformation action, even though the owner and the corporation were never parties to the same transaction. Amin v. Guruom, Inc., 280 Ga. 873, 635 S.E.2d 105 (2006) (decided under former O.C.G.A. § 24-6-7).

Trial court erred in granting a bank's motion for summary judgment in the bank's action for breach of a guaranty because parol testimony was admissible and created a genuine issue of material fact over whether the guaranty was executed after the bank had already extended credit to the underlying debtor, and thus over whether the guaranty was void for lack of consideration; as in the context of a deed, a witness is entitled to offer parol testimony that the guaranty was executed on a date other than the date inserted on the guaranty. Helton v. Jasper Banking Co., 311 Ga. App. 363, 715 S.E.2d 765 (2011) (decided under former O.C.G.A. § 24-6-7).

Deed reformed. — See West Lumber Co. v. Moore, 179 Ga. 302, 175 S.E. 642

(1934) (stipulation as to assumption of liens) (decided under former Code 1933, § 38-510); Smith v. Smith, 223 Ga. 560, 156 S.E.2d 901 (1967) (date of execution of deed) (decided under former Code 1933, § 38-510).

Contract reformed. — See West Lumber Co. v. Moore, 179 Ga. 302, 175 S.E. 642 (1935) (stipulation as to assumption of liens) (decided under former Code 1933, § 38-510).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1123.

C.J.S. — 32A C.J.S., Evidence, §§ 1205, 1232, 1233, 1254.

ALR. — Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir, 33 ALR 51.

Exception to rule of admissibility of parol evidence to show that deed absolute on its face was intended as a mortgage, 111 ALR 448.

Parol evidence rule as applied to lease, 151 ALR 279.

Admissibility of extrinsic evidence to identify person or persons intended to be designated by the name in which a contract is made, 80 ALR2d 1137.

Application of parol evidence rule in action on contract for architect's services, 69 ALR3d 1353.

24-3-8. Original or subsequent voidness of writing.

Parol evidence shall be admissible to show that a writing either was originally void or subsequently became void. (Code 1981, § 24-3-8, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3725, former Code 1868, § 3749, former Code 1882, § 3802, former Civil Code 1895, § 5203, former Civil Code 1910, § 5790, former Code 1933, § 38-503, and former O.C.G.A. § 24-6-8 are included in the annotations for this Code section.

Failure of consideration. — It may be shown that a note sued on was in fact without legal consideration of any kind, and that the actual basis of the undertaking was wholly illegal and the resultant promise absolutely void. Simmons v. International Harvester Co. of Am., 22 Ga. App. 358, 96 S.E. 9 (1918) (decided under former Civil Code 1910, § 5790). See also Miller v. Whitesburg Banking Co., 58 Ga. App. 84, 197 S.E. 906 (1938) (decided under former Code 1933, § 38-503); S. & S. Bldrs., Inc. v. Equitable Inv. Corp., 219 Ga. 557, 134 S.E.2d 777 (1964) (decided under former Code 1933, § 38-503).

Writing which undertakes to contract about a fictitious thing, even though it be denominated a consideration in the writing is in fact without consideration, is void, and the fact that it is void may be shown by parol under the rule of evidence. Jewell v. Norrell, 66 Ga. App. 11, 16 S.E.2d 797 (1941) (decided under former Code 1933, § 38-503).

When the promise as stated in the writing is admitted, the promisor can show that there was no consideration or that there was a consideration which has failed wholly or in part, and therefore the promise is no longer supported, and must fail either in whole or in part, according to the facts. First Nat'l Bank v. Harrison, 408 F. Supp. 137 (N.D. Ga. 1975), aff'd, 529 F.2d 1350 (5th Cir. 1976) (decided under former Code 1933, § 38-503).

Consideration of a contract may be always inquired into in order to show that the promise is no longer binding according to its tenor; but in inquiring into the

consideration the promisor cannot deny that the promisor made the promise evidenced by the writing. First Nat'l Bank v. Harrison, 408 F. Supp. 137 (N.D. Ga. 1975), aff'd, 529 F.2d 1350 (5th Cir. 1976) (decided under former Code 1933, § 38-503).

Different consideration may be shown by parol evidence. Harris v. Tisereau, 52 Ga. 153 (1874) (decided under former Code 1863, § 3725).

Nonperformance of condition precedent. — Written document may by parol or other extrinsic evidence be shown not to be a contract at all because of the nonperformance of a condition precedent as to which the writing is silent. Rudder v. Belle Isle, 46 Ga. App. 336, 167 S.E. 753 (1933) (decided under former Civil Code 1910, § 5790).

Violation of public policy. — When a contract apparently valid on the contract's face was attacked on the ground that the contract was entered into in violation of public policy, a court, when called upon to approve such a contract, will closely examine the terms of the contract and the circumstances under which the contract was entered into, before permitting the agreement to be made the judgment of the court. Beverly v. Beverly, 209 Ga. 468, 74 S.E.2d 89 (1953) (decided under former Code 1933, § 38-503); Funderburk v. Funderburk, 229 Ga. 457, 192 S.E.2d 262 (1972) (decided under former Code 1933, § 38-503).

Fraud. — Parol evidence was admissible to show that a writing was void on account of fraud. Hinkle v. Hixon, 154 Ga. 193, 113 S.E. 805 (1922) (decided under former Civil Code 1910, § 5790); Johnson v. Sherrer, 197 Ga. 392, 29 S.E.2d 581 (1944) (decided under former Code 1933, § 38-503); S. & S. Bldrs., Inc. v. Equitable Inv. Corp., 219 Ga. 557, 134 S.E.2d 777 (1964) (decided under former Code 1933, § 38-503); Hinson v. Hinson, 221 Ga. 291, 144 S.E.2d 381 (1965) (decided under former Code 1933, § 38-503); Cone Mills Corp. v. A.G. Estes, Inc., 399 F. Supp. 938 (N.D. Ga. 1975) (decided under former Code 1933, § 38-503); Lewis v. Citizens & S. Nat'l Bank, 139 Ga. App. 855, 229 S.E.2d 765 (1976) (decided under former Code 1933, § 38-503); Thompson v. Wilkins, 143 Ga. App. 739, 240 S.E.2d 183 (1977) (decided under former Code 1933, § 38-503).

Trial court erred by granting summary judgment to a child in a suit brought by a sibling seeking a determination that the sibling was the sole beneficiary of their parent's life insurance policy as the sibling sufficiently alleged fraud and/or forgery with regard to a second beneficiary designation form allegedly signed by the parent. As such, the trial court should have permitted the sibling to introduce two affidavits that supported the sibling's allegations that the second beneficiary designation form was void. Weatherly v. Weatherly, 292 Ga. App. 879, 665 S.E.2d 922 (2008) (decided under former O.C.G.A. § 24-6-8).

Promise by bank not to enforce promissory note. — There is no confidential relationship between a bank and a customer borrowing funds and therefore an oral agreement not to enforce a promissory note, which is a contract in writing, is not a type of fraud constituting an exception to the parol evidence rule. Boatman v. Citizens & S. Nat'l Bank, 155 Ga. App. 848, 273 S.E.2d 190 (1980) (decided under former Code 1933, § 38-503).

Colorable scheme between husband and wife. — If a wife did not in fact purchase and was not to receive the machinery under the contract sued on, but the whole transaction was merely a colorable scheme or device by which the wife was induced by the plaintiff to assume the previous debt of the husband, without any consideration flowing to her, she would have the right to repudiate the entire illegal and void transaction, no matter by what device its true inwardness and purpose had been concealed. Simmons v. International Harvester Co. of Am., 22 Ga. App. 358, 96 S.E. 9 (1918) (decided under former Civil Code 1910, § 5790).

Evidence that party signed blank paper. — Evidence tending to prove that a party only signed a blank sheet of paper, instead of signing a written and printed contract, was admissible. Chicago Bldg. & Mfg. Co. v. Butler, 139 Ga. 816, 78 S.E. 244 (1913) (decided under former Civil Code 1910, § 5790).

Contract to evade usury, penalty, or forfeiture. — Parol evidence was admis-

sible to show the circumstances attending the execution of papers and the sayings of the parties at the time for the purpose of ascertaining their intention as to a shipment of the cotton and enabling a jury to determine whether the contract of shipment was a device to evade the law relating to usury. Dwelle & Daniel v. Blackwood, 106 Ga. 486, 32 S.E. 593 (1899) (decided under former Civil Code 1895, § 5203).

While a valid written contract cannot be contradicted or varied by parol, it is competent by such evidence to show that the writing is but a cover for usury, penalty, or forfeiture. Lytle v. Scottish Am. Mtg. Co., 122 Ga. 458, 50 S.E. 402 (1905) (decided under former Civil Code 1895, § 5203).

What is called rent may be shown to have been really a part of the purchase money, or a device to obtain a penalty. Lytle v. Scottish Am. Mtg. Co., 122 Ga. 458, 50 S.E. 402 (1905) (decided under former Civil Code 1895, § 5203).

It was always permissible to show by parol evidence that a paper was but a cover for usury, penalty, forfeiture, or other illegal advantage to one of the parties. For if the law did not sedulously disregard form and seek for substance, nothing would be easier than the law's evasion by giving innocent names to prohibited acts. Flood v. Empire Inv. Co., 35 Ga. App. 266, 133 S.E. 60 (1926) (decided under former Civil Code 1910, § 5790).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1119 et seq.

C.J.S. — 32A C.J.S., Evidence, §§ 1207, 1221, 1224 et seq., 1234 et seq.

ALR. — Parol evidence rule; right to show fraud in inducement or execution of written contract, 56 ALR 13.

"Contractual" consideration as regards parol evidence rule, 100 ALR 17.

Parol evidence rule as applied to lease, 151 ALR 279.

Election by beneficiary to take under or against will as predictable upon initiation of, or participation in, court proceedings, 166 ALR 316.

Admissibility of declarations by testator on issue of revocation of will, 172 ALR 354.

Failure to object to parol evidence, or voluntary introduction thereof, as waiver of defense of statute of frauds, 15 ALR2d 1330.

Admissibility of oral evidence to show that a writing was a sham agreement not intended to create legal relations, 71 ALR2d 382.

24-3-9. Explanation or denial of receipts.

Receipts for money shall always be only prima-facie evidence of payment and may be denied or explained by parol. (Code 1981, § 24-3-9, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3754, former Code 1873, § 3807, former Code 1882, § 3807, former Civil Code 1895, § 5208, former Civil Code 1910, § 5795, former Code 1933, § 38-508, and former O.C.G.A. § 24-6-9 are included in the annotations for this Code section.

Definition. — Receipt was a written admission or acknowledgment of payment or delivery. It was not required by law to be in a particular form. Crider v. City Supply Co., 16 Ga. App. 377, 85 S.E. 350 (1915) (decided under former Civil Code 1910, § 5795).

Receipt was not a contract, but merely an admission in writing of the fact of payment or other settlement between a debtor and a creditor. Hamlin v. Lupo, 24 Ga. App. 408, 101 S.E. 5 (1919) (decided under former Civil Code 1910, § 5795).

Exception to general rule. — Receipt for money mentioned in the former provisions was, as a general rule, an exception to the principle that parol evidence was inadmissible to explain or contradict a writing. Dunagan v. Dunagan, 38 Ga. 554 (1868) (decided under former Code 1868, § 3754); Jewell v. Norrell, 66 Ga. App. 11, 16 S.E.2d 797 (1941) (decided under former Code 1933, § 38-508).

For admission rules when receipt was also contract, see Dunagan v. Dunagan, 38 Ga. 554 (1868) (decided under former Code 1868, § 3754).

If a receipt was a contract and not simply a receipt, there was no reason why the receipt should be susceptible of attack or explanation by parol more than any other contract. Jewell v. Norrell, 66 Ga. App. 11, 16 S.E.2d 797 (1941) (decided under former Code 1933, § 38-508).

No receipt was conclusive evidence, and evidence may be introduced to show the receipt did not correctly express the truth of the case. Parker v. Wellons, 43 Ga. App. 721, 160 S.E. 109 (1931) (decided under former Civil Code 1910, § 5795).

Receipt may be explained. — It was held not error to permit the maker of a receipt in evidence to explain the items in the receipt, or to cast upon the various amounts and testify to the sum total for which the receipt was given. Bigham v. Coleman, 71 Ga. 176 (1883) (decided under former Code 1882, § 3807).

Defendant may show that the defendant received less on certain promissory notes made by the defendant than the receipt shows. New England Mtg. Sec. Co. v. Gay, 33 F. 636 (S.D. Ga. 1888), dismissed for lack of jurisdiction, 145 U.S. 123, 12 S. Ct. 815, 36 L. Ed. 646 (1892) (decided under former Code 1882, § 3807).

On an action on an open account, the trial court did not violate the parol evidence rule by admitting evidence that explained a "paid" notation on invoices. An invoice for goods delivered on open account was not "a valid written instrument" as that term was used in former O.C.G.A. § 24-6-1 (see now O.C.G.A. § 24-3-1); furthermore, former O.C.G.A. § 24-6-9 specifically provided that receipts for money were always only prima facie evidence of payment and could be denied or explained by parol. Wheeler v. IDN-Armstrong's, Inc., 288 Ga. App. 253, 653 S.E.2d 835 (2007) (decided under former O.C.G.A. § 24-6-9).

Combination receipt and contract. — Written instrument may sometimes partake of the nature of both a receipt and a contract. Insofar as it was merely a receipt, the former statute was applicable; but insofar as it was a contract, it cannot be changed, modified, or have its terms enlarged by parol evidence. Southern Bell Tel. & Tel. Co. v. Smith, 129 Ga. 558, 59 S.E. 215 (1907) (decided under former Civil Code 1895, § 5208); Graham v. Peacock, 131 Ga. 785, 63 S.E. 348 (1909) (decided under former Civil Code 1895, § 5208). See also Riverside Milling & Power Co. v. Bank of Cartersville, 141 Ga. 578, 81 S.E. 892 (1914) (decided under former Civil Code 1910, § 5795).

Acknowledgment in form of affidavit. — Fact that an acknowledgment of payment was in the form of an affidavit did not render the affidavit inadmissible when offered in evidence as a receipt. Crider v. City Supply Co., 16 Ga. App. 377, 85 S.E. 350 (1915) (decided under former Civil Code 1910, § 5795).

Letter and a reply amounting to nothing more than a receipt was explainable by parol evidence. Halls Self-Feeding Cotton Gin Co. v. Black, 71 Ga. 450 (1883) (decided under former Code 1882, § 3807).

Ancient receipt. — When a receipt, as any other written instrument, was more than 30 years old, the receipt's execution need not be proved to admit the receipt in evidence, although the subscribing witness may be living. Settle v. Alison, 8 Ga. 201, 52 Am. Dec. 393 (1850) (decided under former law).

Administrator's receipt. — Receipt in full given by the administrator de bonis non with the will annexed, to the administratrix of the deceased executor, was open to explanation. Watts v. Baker, 78 Ga. 622, 3 S.E. 773 (1887) (decided under former Code 1882, § 3807).

Receipts by wards to guardian. — Receipts in full by wards to their guardian which, in express terms, discharge the guardian from all liability, may be ex-

plained by parol evidence. Alexander v. Alexander, 46 Ga. 283 (1872) (decided under former Code 1868, § 3754).

Attorney's receipts. — When an attorney gave a receipt for a note to collect, in which the note is described, but omitting the fact that the note was endorsed in an action for damages, it was competent to prove by parol the fact of the indorsement. Cox v. Sullivan, 7 Ga. 144, 50 Am. Dec. 386 (1849) (decided under former law); Barclay v. Hopkins, 59 Ga. 562 (1877) (decided under former Code 1873, § 3807).

Recital in lease that rent paid. — When a written lease states that the rent was a certain amount and contained a mere recital that it was paid, it was permissible to show by parol testimony that only a part of the rent was paid at the execution of the agreement and that the balance was still unpaid. Googe v. York, 38 Ga. App. 62, 142 S.E. 562 (1928) (decided under former Civil Code 1910, § 5795).

Words in a release placed upon a recorded security instrument importing payment of the secured indebtedness are not a contract but constitute a receipt, or evidence of payment of money, and can be contradicted by parol evidence. Security Fin. Corp. v. Blackwood, 111 Ga. App. 850, 143 S.E.2d 515 (1965) (decided under former Code 1933, § 38-508).

Parol agreement at variance with contract as to time of payment. — When a contract calls for the payment of money at a certain time, evidence of a parol agreement at variance with the writing as to such matter was not admissible. Googe v. York, 38 Ga. App. 62, 142 S.E. 562 (1928) (decided under former Civil Code 1910, § 5795).

Effect of accepting incorrect receipt. — When a passenger accepts an incorrect receipt for fare paid, the passenger was not estopped from asserting that the passenger paid a different amount. Atlantic C.L.R.R. v. Thomas, 14 Ga. App. 619, 82 S.E. 299 (1914) (decided under former Civil Code 1910, § 5795).

Province of jury to disregard receipt. — If an explanation given by authority of the law was satisfactory, the receipt may be disregarded by the jury. Atlantic Coast Line R.R. v. Blalock, 8 Ga. App. 44, 68 S.E. 743 (1910) (decided under former Civil Code 1910, § 5795).

As receipts for money were only prima facie evidence of payment and may be denied or explained by parol, if an explanation was given, the existence of the receipt may be disregarded by the trier of fact. Meadows v. Phillips, 188 Ga. App. 377, 373 S.E.2d 27 (1988) (decided under former O.C.G.A. § 24-6-9).

Instructions. — Court should instruct the jury, in addition to the statutory language, that it was a question for the jury to say whether or not the party's evidence sufficiently explained the receipts. McJenkin Ins. & Realty Co. v. Thompson, 79 Ga. App. 473, 54 S.E.2d 336 (1949) (decided under former Code 1933, § 38-508).

Application. — See Newsom v. Reynolds Chevrolet Co., 43 Ga. App. 376, 158 S.E. 763 (1931) (recital in written contract of sale of personalty concerning purchase-money) (decided under former Civil Code 1910, § 5795); Greeson v. Farmers' & Merchants' Bank, 50 Ga. App. 566, 179 S.E. 191 (1935) (deposit slip) (decided under former Code 1933, § 38-508).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1141.

C.J.S. — 32A C.J.S., Evidence, § 1206.

ALR. — Admissibility of parol evidence to vary or explain contract implied from the regular endorsement of a bill or note, 92 ALR 721.

Parol evidence rule as applied to deposit of funds in name of depositor and another, 33 ALR2d 569.

Admissibility of extrinsic evidence to explain or contradict bank deposit slips, deposit entries in passbooks, certificates of deposit, or similar instruments, 42 ALR2d 600.

24-3-10. Explanation of blank endorsements.

Blank endorsements of negotiable paper may always be explained between the parties themselves or those taking with notice of dishonor or of the actual facts of such endorsements. (Code 1981, § 24-3-10, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Effect of blank endorsement generally, § 11-3-204. Provision that signature on negotiable instrument is an endorsement unless instrument clearly indicates that signature was made in some other capacity, § 11-3-402.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3808, former Code 1882, § 3808, former Civil Code 1895, § 5209, former Civil Code 1910, § 5796, former Code 1933, § 38-509, and former O.C.G.A. § 24-6-10 are included in the annotations for this Code section.

Only blank endorsements affected by statute. — Law of blank endorsements changes the rule that even a blank endorsement was not subject to be modified in the endorsement's legal effect by parol evidence, but the law does not expose any other endorsements to like modification. Meador v. Dollar Sav. Bank, 56 Ga. 605 (1876) (decided under former Code 1873, § 3808); Jones v. Commercial Credit Co., 52 Ga. App. 796, 184 S.E. 652 (1936) (decided under former Code 1933, § 38-509).

Application to parties or those taking with notice. — As between the parties themselves, or those taking with notice of dishonor or of the actual facts of the endorsement, parol evidence was admissible to explain the endorsement. Pickett v. Bank of Ellijay, 182 Ga. 540, 186 S.E. 426, answer conformed to, 53 Ga. App. 607, 186 S.E. 746 (1936) (decided under former Code 1933, § 38-509); Hopkins Auto. Equip. Co. v. Lyon, 59 Ga. App. 468, 1 S.E.2d 460 (1939) (decided under former Code 1933, § 38-509). See also Massell v. Prudential Ins. Co. of Am., 57 Ga. App. 460, 196 S.E. 115 (1938) (decided under former Code 1933, § 38-509).

But not to innocent third parties. — Law was plain and emphatic that a blank endorsement may be explained by parol, except as against subsequent holders for value, bona fide and without notice. McMillan v. Fourth Nat'l Bank, 17 Ga. App. 590, 87 S.E. 843 (1916) (decided under former Civil Code 1910, § 5796).

Law had application between the parties, or those taking with notice of dishonor, or of the actual facts of such endorsement, and had no application to the rights of third parties. Pickett v. Bank of Ellijay, 182 Ga. 540, 186 S.E. 426, answer conformed to, 53 Ga. App. 607, 186 S.E. 746 (1936) (decided under former Code 1933, § 38-509).

As against a third party, the holder of the note before maturity, for value, and without notice of dishonor or of the actual facts of the endorsement, parol evidence was not admissible to contradict or explain the capacity in which such written endorsement was signed, but the construction thereof was for the court. Guaranty Mtg. Co. v. National Life Ins. Co., 55 Ga. App. 104, 189 S.E. 603 (1936), aff'd, 184 Ga. 644, 192 S.E. 298 (1937) (decided under former Code 1933, § 38-509). See also Hopkins Auto. Equip. Co. v. Lyon, 59 Ga. App. 468, 1 S.E.2d 460 (1939) (decided under former Code 1933, § 38-509).

Endorsements. — Former statute was not confined to technical endorsements, i.e., endorsements essential to transfer of title, but extended to endorsements in the broader sense which were irregular and unnecessary to pass title. Atkinson v. Bennett, 103 Ga. 508, 30 S.E. 599 (1898) (decided under former Civil Code 1895, § 5209).

Former statute was not confined merely to blank endorsements in the strict sense as when the endorser wrote only the en-

dorser's name upon the negotiable instrument; the former statute related to all endorsements which were not full or complete. McMillan v. Fourth Nat'l Bank, 17 Ga. App. 590, 87 S.E. 843 (1916) (decided under former Civil Code 1910, § 5796); Procter v. Royster Guano Co., 21 Ga. App. 617, 94 S.E. 821 (1918) (decided under former Civil Code 1910, § 5796); Bowden v. Owens, 33 Ga. App. 700, 127 S.E. 664 (1925) (decided under former Civil Code 1910, § 5796).

Agreement to endorse may be construed as a contract of guarantee. Georgia Cas. Co. v. Dixie Trust & Sec. Co., 23 Ga. App. 447, 98 S.E. 414 (1919) (decided under former Civil Code 1910, § 5796).

Endorsement in full. — If an endorsement in blank had been partially completed by a subsequent endorser writing the words, "without recourse," and signing the endorser's name, it was not an endorsement in full, and parol evidence was admissible. West Yellow Pine Co. v. Kendrick, 9 Ga. App. 350, 71 S.E. 504 (1911) (decided under former Civil Code 1910, § 5796).

When the endorsement was one "in full," though followed by the words "without recourse," parol evidence was not admissible to explain any unambiguous terms. Odom Realty Co. v. Central Trust Co., 22 Ga. App. 711, 97 S.E. 116 (1918) (decided under former Civil Code 1910, § 5796).

Endorsement for special purpose. — It may be shown by parol evidence that the endorsement of a note was made for a special purpose. Carhart Bros. & Co. v. Wynn, 22 Ga. 24 (1857) (decided under former law).

Transfer for collection. — When the payee of a note, payable to the payee or order, transfers the note in writing to a third person, without recourse, and signs the transfer, parol evidence was admissible, at the instance of the payee or the payee's executors to show that such transfer was made for collection. This was the rule at common law; and the former statute was not intended to abrogate this principle of the common law, the purpose of the former statute being, not to narrow the admission of parol evidence when it was permissible by common law, but to extend the admission of such evidence to the explanation of endorsements in blank, which was not permissible by that law. Sanders v. Ayers, 155 Ga. 630, 117 S.E. 651 (1923) (decided under former Civil Code 1910, § 5796).

Accommodation endorsements. — Former law applied to accommodation endorsements. Taff v. Larey, 29 Ga. App. 631, 116 S.E. 866 (1923) (decided under former Civil Code 1910, § 5796).

Accommodation endorser had the right to stipulate the character of the liability which the endorser assumed in signing a particular paper. Taff v. Larey, 29 Ga. App. 631, 116 S.E. 866 (1923) (decided under former Civil Code 1910, § 5796).

Endorsements to pass title merely. — Parol evidence was, in any given instance, admissible to show that such an endorsement upon a promissory note was made simply to pass title and not to create liability in the endorser. Bryan v. Windsor, 99 Ga. 176, 25 S.E. 268 (1896) (decided under former Civil Code 1895, § 5209); Cowart Co. v. Sheffield, 18 Ga. App. 512, 89 S.E. 1101 (1916) (decided under former Civil Code 1910, § 5796). See also Stapler v. Burns, 43 Ga. 382 (1871) (decided under former law); Galceran v. Noble, 66 Ga. 367 (1881) (suit by plaintiff who took note after dishonor) (decided under former Code 1873, § 3808).

In a suit by the payee of a promissory note signed in the name of a corporation as maker, a plea by certain individuals who had signed their names in blank upon the back of the note, to the effect that their names were so placed upon the instrument "only for the purpose of perfecting title and passing title, and upon the distinct understanding that they were not to be held liable thereon in any way," did not set up a good defense. Proctor v. Royster Guano Co., 21 Ga. App. 617, 94 S.E. 821 (1918) (decided under former Civil Code 1910, § 5796).

Assuming that the contract of suretyship or accommodation endorsement sued on should be taken as having been signed in blank, a plea merely denying all liability thereunder, without showing any bona fide reason why the endorsement was entered for a purpose other than that of incurring liability, cannot be taken as an

effort to explain the true nature and intent of the contract, as was permitted by the former statute, and did not set up a good defense. Pearce v. Swift & Co. Fertilizer Works, 21 Ga. App. 622, 94 S.E. 915 (1918) (see former Civil Code 1910, § 5796).

Capacity of signers. — When a promissory note was upon the note's face payable to the order of the payee at a chartered bank, though reading "we promise to pay," etc., and signed by one person only, the prima facie import of an endorsement thereon in blank by a third person was that such endorser undertook to be liable as a second endorser, and not as a joint maker. The true intent of the parties, however, in an action by the payee upon the instrument, was open to explanation by parol evidence. Neal & Co. v. Wilson, 79 Ga. 736, 5 S.E. 54 (1887) (decided under former Code 1882, § 3808).

Party signing negotiable paper in blank may show by parol that the party was a surety only. Sibley v. American Exch. Nat'l Bank, 97 Ga. 126, 25 S.E. 470 (1895) (decided under former Code 1882, § 3808).

When several parties are sued on a check, one as maker and the others as endorsers, the payee could show by parol that those signing apparently as endorsers were in fact sureties or joint makers. James v. Calder, 7 Ga. App. 707, 67 S.E. 1125 (1910) (decided under former Civil Code 1910, § 5796).

Evidence could not be introduced, as against third persons, to show a different capacity, but could be introduced to show as between the immediate parties, an agreement that the person signing should be bound in a capacity different from that shown by the instrument. Massell v. Prudential Ins. Co. of Am., 57 Ga. App. 460, 196 S.E. 115 (1938) (decided under former Code 1933, § 38-509).

Showing agency of drawer. — Agency of the drawer and knowledge by the payee and endorsee cannot be shown by parol in defense to a suit on a draft. Bedell v. Scarlett, 75 Ga. 56 (1885) (decided under former Code 1882, § 3808).

Endorsement of mortgage note. — Blank endorsement of a mortgage note may be explained by parol to show an agreement that an indebtedness of the mortgagee was to be first satisfied out of the mortgaged property. Willingham & Cone v. Huguenin, 129 Ga. 835, 60 S.E. 186 (1908) (decided under former Civil Code 1895, § 5209).

RESEARCH REFERENCES

ALR. — Endorsement, "to the order of any bank or banker," as a restrictive endorsement, 10 ALR 709.

Admissibility of parol evidence to vary or explain the contract implied from the regular endorsement of a bill or note, 35 ALR 1120; 54 ALR 999; 92 ALR 721.

Parol evidence as to liability of irregular endorser to payee, 37 ALR 1222.

CHAPTER 4

RELEVANT EVIDENCE AND ITS LIMITS

Sec.
24-4-401. "Relevant evidence" defined.
24-4-402. Relevant evidence generally admissible; irrelevant evidence not admissible.
24-4-403. Exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time.
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24-4-405. Methods of proving character.
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24-4-410. Inadmissibility of pleas, plea discussions, and related statements.
24-4-411. Liability insurance.
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24-4-414. Evidence of similar transaction crimes in child molestation cases.
24-4-415. Evidence of similar acts in civil or administrative proceedings concerning sexual assault or child molestation.
24-4-416. Statements of sympathy in medical malpractice cases.
24-4-417. Evidence of similar acts in prosecutions for violations of Code Section 40-6-391.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 enactment of this chapter, see 28 Ga. St. U.L. Rev. 1 (2011).

RESEARCH REFERENCES

ALR. — Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal injury or death action carries liability insurance, 4 ALR2d 761.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in action for personal injury or death, 81 ALR2d 733.

Admissibility on issue of value of real property of evidence of sale price of other real property, 85 ALR2d 110.

Evidence: use and admissibility of maps, plats, and other drawings to illustrate or express testimony, 9 ALR2d 1044.

Admissibility, in damage action arising out of explosion or blasting, of evidence of damage to other property in vicinity, 45 ALR2d 1121.

Admissibility of testimony of transferee as to his knowledge, purpose, intention, or good faith on issue whether conveyance was in fraud of transferor's creditors, 52 ALR2d 418.

Admissibility and conclusiveness, as against insured, of statements in proof of loss, 58 ALR2d 429.

Admissibility and effect, in criminal case, of evidence as to juror's statements, during deliberations, as to facts not introduced into evidence, 58 ALR2d 556.

Propriety and prejudicial effect of comment or evidence as to accused's willingness to take lie detector test, 95 ALR2d 819.

Price fixed in contract violating statute

of frauds as evidence of value in action on quantum meruit, 21 ALR3d 9.

Admissibility, in civil action, of disposal of property as bearing on question of liability, 38 ALR3d 996.

Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association, 58 ALR3d 148.

Admissibility on defendant's behalf, as matter in mitigation of punitive damages, of evidence as to his lack of financial resources, 79 ALR3d 1138.

Admissibility of evidence of character or reputation of party in civil action for sexual assault on issues other than impeachment, 100 ALR3d 569.

Admissibility, in criminal case, of results of residue detection test to determine whether accused or victim handled or fired gun, 1 ALR4th 1072.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place, 21 ALR4th 472.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 25 ALR4th 934.

Proof of mailing by evidence of business or office custom, 45 ALR4th 476.

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Thermographic tests: admissibility of test results in personal injury suits, 56 ALR4th 1105.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 ALR4th 897.

Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 ALR4th 576.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed. 541.

Admissibility of evidence not related to air travel security, disclosed by airport security procedures, 108 ALR Fed. 658.

24-4-401. "Relevant evidence" defined.

As used in this chapter, the term "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (Code 1981, § 24-4-401, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Test for relevant evidence, Fed. R. Evid. 401.

Law reviews. — For article, "The Myth of Conditional Relevancy," see 14 Ga. L. Rev. 435 (1980). For article, "'They Say He's Gay': The Admissibility of Evidence of Sexual Orientation," see 37 Ga. L. Rev. 793 (2003).

For note discussing the possible uses of video tape and its admissibility as evidence, see 5 Ga. St. B.J. 393 (1969).

For comment discussing the admissibility of ex parte affidavit in nonjury situations, in light of Camp v. Camp, 213 Ga. 65, 97 S.E.2d 125 (1957), see 20 Ga. B.J. 392 (1958). For comment discussing admissibility of relevant motion picture films, in light of Long v. General Elec. Co., 213 Ga. 809, 102 S.E.2d 9 (1958), see 22 Ga. B.J. 92 (1959).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5158, former Civil Code 1910, § 5744, former Code 1933, § 38-201, and former O.C.G.A. § 24-2-1 are included in the annotations for this Code section.

It is error to admit irrelevant evidence. Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475 (1983) (decided under former O.C.G.A. § 24-2-1).

Admission of irrelevant evidence is not a ground for reversal unless it can be shown the evidence was prejudicial. Hill v. State, 177 Ga. App. 850, 341 S.E.2d 322 (1986) (decided under former O.C.G.A. § 24-2-1).

Objecting party failed to carry burden of proving that admission of evidence unduly prejudicial to that party's rights. DOT v. 2.734 Acres of Land, 168 Ga. App. 541, 309 S.E.2d 816 (1983) (decided under former O.C.G.A. § 24-2-1).

When testimony is part material and in part irrelevant, a general objection to the whole is not well taken; if however, the objecting party points out the irrelevant portion of the testimony offered, it is not error for the court to reject the evidence in toto, when the party offering the evidence fails to segregate the relevant portions from those which are irrelevant; and when it is shown that designated portions of the evidence are irrelevant, but the court over such objection admits the testimony as a whole, a new trial will be granted provided such irrelevant testimony could have been harmful to the complaining party. Taintor v. Rogers, 197 Ga. 872, 30 S.E.2d 892 (1944) (decided under former Code 1933, § 38-201).

Relevancy Defined

Any evidence is relevant which logically tends to prove or disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. Sample v. Lipscomb, 18 Ga. 554 (1855) (decided under former law); Walker v. Roberts, 20 Ga. 15 (1856) (decided under former law); Alexander v. State, 7 Ga. App. 88, 66 S.E. 274 (1909) (decided under former Civil Code 1895, § 5158); Carter v. Marble Prods., Inc., 179 Ga. 122, 175 S.E. 480 (1934) (decided under former Code 1933, § 38-201); Rogers v. State, 80 Ga. App. 585, 56 S.E.2d 633 (1949) (decided under former Code 1933, § 38-201); MacNerland v. Johnson, 137 Ga. App. 541, 224 S.E.2d 431 (1976) (decided under former Code 1933, § 38-201); Citizens & S. Nat'l Bank v. Hodnett, 139 Ga. App. 839, 229 S.E.2d 792 (1976) (decided under former Code 1933, § 38-201); Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205 (1979) (decided under former Code 1933, § 38-201); Bunge v. State, 149 Ga. App. 712, 256 S.E.2d 23 (1979) (decided under former Code 1933, § 38-201); Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979) (decided under former Code 1933, § 38-201); Kelly v. Floor Bazaar, Inc., 153 Ga. App. 163, 264 S.E.2d 697 (1980) (decided under former Code 1933, § 38-201); Williams v. State, 153 Ga. App. 890, 267 S.E.2d 305 (1980) (decided under former Code 1933, § 38-201); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42 (1980) (decided under former Code 1933, § 38-201); Guest v. State, 155 Ga. App. 374, 270 S.E.2d 904 (1980) (decided under former Code 1933, § 38-201); DOT v. Delta Mach. Prods. Co., 157 Ga. App. 423, 278 S.E.2d 73 (1981) (decided under former Code 1933, § 38-201).

Every fact or circumstance serving to elucidate or throw light upon the issue being tried constitutes proper evidence in the case. A.A.A. Hwy. Express, Inc. v. Hagler, 72 Ga. App. 519, 34 S.E.2d 462 (1945) (decided under former Code 1933, § 38-201); Miller Serv., Inc. v. Miller, 76 Ga. App. 143, 45 S.E.2d 466 (1947), later appeal, 77 Ga. App. 413, 48 S.E.2d 761 (1948) (decided under former Code 1933, § 38-201); Hodnett v. Hodnett, 99 Ga. App. 285, 109 S.E.2d 285 (1959)

Relevancy Defined (Cont'd)

(decided under former Code 1933, § 38-201); DOT v. Delta Mach. Prods. Co., 157 Ga. App. 423, 278 S.E.2d 73 (1981) (decided under former Code 1933, § 38-201).

Evidence is relevant if the evidence renders the desired inference more probable than it would be without the evidence. Baker v. State, 246 Ga. 317, 271 S.E.2d 360 (1980) (decided under former Code 1933, § 38-201).

Any evidence is relevant which logically tends to prove or to disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. Owens v. State, 248 Ga. 629, 284 S.E.2d 408 (1981) (decided under former Code 1933, § 38-201).

Any fact is relevant which, when taken alone or in connection with another or others, would warrant the drawing by the jury of a logical inference with reference to the issue on trial. Pope v. Triangle Chem. Co., 157 Ga. App. 386, 277 S.E.2d 758 (1981) (decided under former Code 1933, § 38-201).

Evidence of witness's feelings towards parties. — Former O.C.G.A. §§ 24-2-1 and 24-9-68 (see now O.C.G.A. §§ 24-4-401 through 24-4-403 and 24-9-622) should be considered in pari materia; thus, even if testimony sought to be admitted relates to the feelings a witness has toward a party, if that particular feeling would have no relevance to the questions being tried by the jury, then such evidence may be excluded in the sound discretion of the trial court. Lockett v. State, 217 Ga. App. 328, 457 S.E.2d 579 (1995) (decided under former O.C.G.A. § 24-2-1).

Criteria of Admissibility

Questions as to the relevancy and admissibility of the testimony are properly for the court, and the question must be determined in each case according to the facts of that particular case and in accordance with the teachings of reason and judicial experience. Dumas v. State, 131 Ga. App. 79, 205 S.E.2d 119 (1974) (decided under former Code 1933, § 38-201); MacNerland v. Johnson, 137 Ga. App. 541, 224 S.E.2d 431 (1976) (decided under former Code 1933, § 38-201); Downs v. State, 145 Ga. App. 588, 244 S.E.2d 113 (1978) (decided under former Code 1933, § 38-201); Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979) (decided under former Code 1933, § 38-201); Henderson v. State, 153 Ga. App. 801, 266 S.E.2d 522 (1980) (decided under former Code 1933, § 38-201); Williams v. State, 153 Ga. App. 890, 267 S.E.2d 305 (1980) (decided under former Code 1933, § 38-201); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42 (1980) (decided under former Code 1933, § 38-201); Brand v. State, 154 Ga. App. 781, 270 S.E.2d 206 (1980) (decided under former Code 1933, § 38-201); Guest v. State, 155 Ga. App. 374, 270 S.E.2d 904 (1980) (decided under former Code 1933, § 38-201); Baker v. State, 246 Ga. 317, 271 S.E.2d 360 (1980) (decided under former Code 1933, § 38-201).

Admissibility of evidence is a matter which rests largely within the sound discretion of the trial court, and if an item of evidence has a tendency to help establish a fact in issue, that is sufficient to make the evidence relevant and admissible. Lewis v. State, 158 Ga. App. 586, 281 S.E.2d 331 (1981) (decided under former Code 1933, § 38-201).

Question for the jury. — When facts are such that the jury, if permitted to hear the facts, may or may not make an inference pertinent to the issue, according to the view which the jury may take of the facts, in connection with the other facts in evidence, the facts are such that the jury ought to be permitted to hear the facts. Williams v. State, 153 Ga. App. 890, 267 S.E.2d 305 (1980) (decided under former Code 1933, § 38-201); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42 (1980) (decided under former Code 1933, § 38-201); Brand v. State, 154 Ga. App. 781, 270 S.E.2d 206 (1980) (decided under former Code 1933, § 38-201); Paxton v. State, 160 Ga. App. 19, 285 S.E.2d 741 (1981) (decided under former Code 1933, § 38-201).

Relevant evidence cannot be kept

from the jury by admission of the fact or waiver of the requirement of proof. Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930, 100 S. Ct. 3029, 65 L. Ed. 2d 1124 (1980) (decided under former Code 1933, § 38-201); Dick v. State, 246 Ga. 697, 273 S.E.2d 124 (1980), cert denied, 451 U.S. 976, 101 S. Ct. 2059, 68 L. Ed. 2d 357 (1981) (decided under former Code 1933, § 38-201).

If the evidence offered by a party is of doubtful relevancy, the evidence should nevertheless be admitted and the weight of the evidence left to the jury. Continental Trust Co. v. Bank of Harrison, 36 Ga. App. 149, 136 S.E. 319 (1926) (decided under former Civil Code 1910, § 5744); Brown v. Wilson, 55 Ga. App. 262, 189 S.E. 860 (1937) (decided under former Code 1933, § 38-201); A.A.A. Hwy. Express, Inc. v. Hagler, 72 Ga. App. 519, 34 S.E.2d 462 (1945) (decided under former Code 1933, § 38-201); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237 (1947) (decided under former Code 1933, § 38-201); Miller Serv., Inc. v. Miller, 76 Ga. App. 143, 45 S.E.2d 466 (1947), later appeal, 77 Ga. App. 413, 48 S.E.2d 761 (1948) (decided under former Code 1933, § 38-201); Manners v. State, 77 Ga. App. 843, 50 S.E.2d 158 (1948) (decided under former Code 1933, § 38-201); Burton v. Campbell Coal Co., 95 Ga. App. 338, 97 S.E.2d 924 (1957) (decided under former Code 1933, § 38-201); Carroll v. Hayes, 98 Ga. App. 450, 105 S.E.2d 755 (1958) (decided under former Code 1933, § 38-201); Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639 (1959) (decided under former Code 1933, § 38-201); Citizens & S. Nat'l Bank v. Hodnett, 139 Ga. App. 839, 229 S.E.2d 792 (1976) (decided under former Code 1933, § 38-201); Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205 (1979) (decided under former Code 1933, § 38-201); Calhoun v. Branan, 149 Ga. App. 160, 253 S.E.2d 838 (1979) (decided under former Code 1933, § 38-201); Williams v. State, 153 Ga. App. 890, 267 S.E.2d 305 (1980) (decided under former Code 1933, § 38-201); DOT v. Delta Mach. Prods. Co., 157 Ga. App. 423, 278 S.E.2d 73 (1981) (decided under former Code 1933, § 38-201); Lewis v. State, 158 Ga. App. 586, 281 S.E.2d 331 (1981) (decided under former Code 1933, § 38-201); Owens v. State, 248 Ga. 629, 284 S.E.2d 408 (1981) (decided under former Code 1933, § 38-201).

Question as to admissibility of evidence is not to be determined by the evidence's weight; if the evidence has any probative value, however small, and is otherwise competent, the evidence should be admitted. Fuller v. State, 196 Ga. 237, 26 S.E.2d 281 (1943) (decided under former Code 1933, § 38-201).

Res gestae. — In a murder trial, the trial court did not err in admitting the defendant's own evidence that the defendant had been free-basing cocaine the night before the killing and again on the day of the killing; this evidence, as part and parcel of the crime and as res gestae, was admissible even though the killing did not appear to have directly involved drug usage and even though the evidence incidentally put the defendant's character in issue. Latham v. State, 195 Ga. App. 355, 393 S.E.2d 498 (1990) (decided under former O.C.G.A. § 24-2-1).

Mere circumstance that certain evidence may fall short of proving a fact is not a sufficient reason for excluding that evidence; unless otherwise objectionable, the evidence should be admitted, even though the evidence may only tend to prove the matter in issue. Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385 (1942) (decided under former Code 1933, § 38-201); Miller Serv., Inc. v. Miller, 76 Ga. App. 143, 45 S.E.2d 466 (1947), later appeal, 77 Ga. App. 413, 48 S.E.2d 761 (1948) (decided under former Code 1933, § 38-201); Rogers v. State, 80 Ga. App. 585, 56 S.E.2d 633 (1949) (decided under former Code 1933, § 38-201); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42 (1980) (decided under former Code 1933, § 38-201).

When the admissibility of evidence is doubtful, the burden is on the objecting party to show wherein it is inadmissible. Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639 (1959) (decided under former Code 1933, § 38-201).

When evidence is admitted for one purpose, it is not error for the court to fail to instruct the jury to limit the jury's consideration to the one purpose for which

Criteria of Admissibility (Cont'd)

the evidence is admissible, in the absence of a request to so instruct the jury. Tankersley v. State, 155 Ga. App. 917, 273 S.E.2d 862 (1980) (decided under former Code 1933, § 38-201).

Relevant evidence is not subject to an objection that the evidence might inflame the minds of the jury or prejudice the jury and this is true even when the offered evidence is only cumulative; this rule favors the admission of any relevant evidence, no matter how slight the probative value. Sprouse v. State, 242 Ga. 831, 252 S.E.2d 173 (1979) (decided under former Code 1933, § 38-201).

Evidence indirectly relevant. — Evidence which is only indirectly relevant to the issue on trial, but which tends somewhat to illustrate the issue, and to aid the jury in arriving at the truth of the matter, should be admitted. Brown v. Wilson, 55 Ga. App. 262, 189 S.E. 860 (1937) (decided under former Code 1933, § 38-201); A.A.A. Hwy. Express, Inc. v. Hagler, 72 Ga. App. 519, 34 S.E.2d 462 (1945) (decided under former Code 1933, § 38-201); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237 (1947) (decided under former Code 1933, § 38-201); Kalish v. King Cabinet Co., 140 Ga. App. 345, 232 S.E.2d 86 (1976) (decided under former Code 1933, § 38-201); Bituminous Cas. Corp. v. Mowery, 145 Ga. App. 45, 244 S.E.2d 573 (1978) (decided under former Code 1933, § 38-201).

Evidence of similar occurrences is admitted when it appears that all the essential physical conditions on two occasions are identical; for under such circumstances the observed uniformity of nature raises an inference that like causes will produce like results, even though there may be some dissimilarity of conditions in respect to matters which cannot reasonably be expected to have affected the result. McCrea v. Georgia Power Co., 46 Ga. App. 276, 167 S.E. 540 (1933) (decided under former Code 1933, § 38-201).

Evidence excludable. — It is not error to refuse to receive evidence not pertinent to the proceeding. Stalvey v. Varn Motors & Fin. Co., 56 Ga. App. 696, 193 S.E. 627 (1937) (decided under former Code 1933, § 38-201); Gaskill v. Brown, 103 Ga. App. 33, 118 S.E.2d 113 (1961) (decided under former Code 1933, § 38-201); Roberts v. Farmer, 127 Ga. App. 237, 193 S.E.2d 216 (1972) (decided under former Code 1933, § 38-201).

County was properly precluded from introducing evidence of a school district's condemnation of a landowner's property to indirectly show that the value of the property the county was condemning was less than that proposed by the landowner's expert. The admission of such evidence would have been improper because: (1) the landowner's compulsory sale of the property to the school district a year after the county initiated the county's condemnation action would not have affected the value of the land at the time of the county's taking a year earlier; and (2) the school district's inability to use the property as rezoned did not change the fact that the property was already in the process of being rezoned in a manner that affected the property's value for purposes of just and adequate compensation to the landowner at the time of the county's taking. Gwinnett County v. Howington, 280 Ga. App. 347, 634 S.E.2d 157 (2006) (decided under former O.C.G.A. § 24-2-1).

In a medical malpractice action, even if evidence of the doctor's professional liability policy, which a decedent's executrix sought as impeachment evidence, consisted of a prior inconsistent statement by the doctor, the trial court properly excluded evidence of the policy, as well as its inclusion in the court's instruction to the jury, as it involved a collateral matter and was more prejudicial than probative. King v. Zakaria, 280 Ga. App. 570, 634 S.E.2d 444 (2006) (decided under former O.C.G.A. § 24-2-1).

Grounds for new trial. — While generally the admission of irrelevant testimony or illegal evidence, which is wholly immaterial, will not be cause for the grant of a new trial, it will be such ground if it appears of sufficient consequence to injuriously affect the complaining party. Travelers Ins. Co. v. Thornton, 119 Ga. 455, 46 S.E. 678 (1904) (decided under former Civil Code 1895, § 5158); McGriff v. McGriff, 154 Ga. 560, 115 S.E. 21 (1922) (decided under former Civil Code 1910,

§ 5744); McDaniel v. State, 197 Ga. 757, 30 S.E.2d 612 (1944) (decided under former Code 1933, § 38-201); Dismuke v. State, 142 Ga. App. 381, 236 S.E.2d 12 (1977) (decided under former Code 1933, § 38-201); Drew v. Collins, 153 Ga. App. 794, 266 S.E.2d 570 (1980) (decided under former Code 1933, § 38-201); Murdock v. Godwin, 154 Ga. App. 824, 269 S.E.2d 905 (1980) (decided under former Code 1933, § 38-201).

In a negligent misrepresentation action filed by a business against the business's accountants, the business was entitled to a new trial as the trial court twice erred by admitting irrelevant and prejudicial evidence that: (1) the business was sold for $65.5 million in 2005, in order to establish the business's 1993 value, as the sale was too remote, the business had undergone physical changes since the sale, and the market conditions had also changed; and (2) the loans from a shareholder to purchase and operate the business were later reclassified as a shareholder investment of capital, and that the debt owed to the shareholder was forgiven in exchange for the issuance of additional stock in the business as such was irrelevant to the determination of whether the business was entitled to direct damages. Atlando Holdings, LLC v. BDO Seidman, LLP, 290 Ga. App. 665, 660 S.E.2d 463 (2008) (decided under former O.C.G.A. § 24-2-1).

Conjectural testimony not competent evidence. — Testimony as to what one thinks would have been the result of an occurrence had the occurrence happened in a particular way is not competent evidence, being merely conjectural and without probative value. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933) (decided under former Code 1933, § 38-201).

Foundation for introduction of evidence must be laid. — There is no legal ground to complain of the failure to admit certain evidence or testimony when it is not shown what the evidence or testimony would have been. Lakeview Estates Homeowners Corp. v. Hilltop Enters. of Ga., Inc., 153 Ga. App. 323, 265 S.E.2d 120 (1980) (decided under former Code 1933, § 38-201).

Relevant Evidence in Civil Cases

Evidence relevant. — See Benton v. Roberts, 41 Ga. App. 189, 152 S.E. 141 (1930) (issue not raised in pleadings) (decided under former Civil Code 1910, § 5744); Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933) (decided under former Civil Code 1910, § 5744); Miller v. Clermont Banking Co., 180 Ga. 556, 179 S.E. 718 (1935) (decided under former Code 1933, § 38-201); A.A.A. Hwy. Express, Inc. v. Hagler, 72 Ga. App. 519, 34 S.E.2d 462 (1945) (custom, practice, and habit) (decided under former Code 1933, § 38-201); Wade v. Drinkard, 76 Ga. App. 159, 45 S.E.2d 231 (1947); Norton v. Norton, 213 Ga. 384, 99 S.E.2d 139 (1957) (treatment of one spouse by another in divorce proceedings) (decided under former Code 1933, § 38-201); Gallant v. Gallant, 223 Ga. 397, 156 S.E.2d 61 (1967) (financial status of spouse in divorce proceedings) (decided under former Code 1933, § 38-201); Bituminous Cas. Corp. v. Mowery, 145 Ga. App. 45, 244 S.E.2d 573 (1978) (medical treatment for accidental injury) (decided under former Code 1933, § 38-201); Harley-Davidson Motor Co. v. Daniel, 244 Ga. 284, 260 S.E.2d 20 (1979) (manufacturer's recall letter) (decided under former Code 1933, § 38-201); Gwinnett Com. Bank v. Flake, 151 Ga. App. 578, 260 S.E.2d 523 (1979) (documentary evidence) (decided under former Code 1933, § 38-201); Sasser v. Lester, 153 Ga. App. 220, 264 S.E.2d 728 (1980) (insurance) (decided under former Code 1933, § 38-201); Ponder v. Ponder, 251 Ga. 323, 304 S.E.2d 61 (1983) (income tax returns) (decided under former Code 1933, § 38-201); Spencer v. Kyle Realty Co., 225 Ga. App. 203, 483 S.E.2d 639 (1997) (decided under former O.C.G.A. § 24-2-1).

Evidence of the abusive and violent relationship between a murder victim and a defendant was relevant under former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403) to show defendant's motive, intent, and bent of mind, and the remoteness of events relating to such relationship affected the weight of the evidence but not the admissibility of the evidence. Mote v. State, 277 Ga. 429, 588 S.E.2d 748 (2003), cert. de-

Relevant Evidence in Civil Cases (Cont'd)

nied, 541 U.S. 1066, 124 S. Ct. 2395, 158 L. Ed. 2d 968 (2004) (decided under former O.C.G.A. § 24-2-1).

Evidence that a college had removed credit hours from a student's transcript was relevant to the student's claim for breach of contract damages as the student could recover the cost of tuition for classes the student was forced to repeat due to the college's actions. Morehouse College, Inc. v. McGaha, 277 Ga. App. 529, 627 S.E.2d 39 (2005) (decided under former O.C.G.A. § 24-2-1).

In a dispute over two subdivision lots, the trial court did not err in admitting evidence that was cumulative to evidence showing a legal property owner's record title. The evidence was not hearsay, as alleged by a claimant who sought title to that property by prescription; further, the evidence was relevant to the issue of whether a claimant's adverse possession ripened into title by prescription. Smith v. Stacey, 281 Ga. 601, 642 S.E.2d 28 (2007) (decided under former O.C.G.A. § 24-2-1).

In a divorce case after the wife was awarded child support, the trial court did not abuse the court's discretion in overruling the husband's objection to the wife's questions regarding checks that had been paid to him but that he had not deposited into his bank account. The wife was entitled to inquire whether the deposited and undeposited checks matched the amount of income reported by the husband. Leggette v. Leggette, 284 Ga. 432, 668 S.E.2d 251 (2008) (decided under former O.C.G.A. § 24-2-1).

Homeowner countersued a contractor for fraud. Testimony by a subcontractor that the contractor's project supervisor told the subcontractor to increase the bid because the homeowner was "loaded" was not hearsay because the testimony was not admitted to show the truth of the matters asserted, and the testimony was a circumstance relevant to the fraud claim. Lumpkin v. Deventer N. Am., Inc., 295 Ga. App. 312, 672 S.E.2d 405 (2008) (decided under former O.C.G.A. § 24-2-1).

A trial court did not err in admitting evidence that a nursing home was short staffed, lacked various supplies, that residents, including the deceased patient, were observed soiled with urine and waste, and that residents, including the patient, were not turned as often as required, as relevant under former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403). The witnesses were certified nursing assistants who were directly involved in patient care while the patient was a resident, and the evidence showed both negligence and that the nursing home was aware of these conditions and did nothing to correct them. Tucker Nursing Ctr., Inc. v. Mosby, 303 Ga. App. 80, 692 S.E.2d 727 (2010) (decided under former O.C.G.A. § 24-2-1).

Evidence in legal malpractice cases. — Rules of the State Bar of Georgia, while not determinative of the standard of care applicable in a legal malpractice case, may be considered along with other facts and circumstances to determine whether an attorney treated a client with the requisite degree of skill and care. Watkins & Watkins, P.C. v. Williams, 238 Ga. App. 646, 518 S.E.2d 704 (1999) (decided under former O.C.G.A. § 24-2-1).

In a legal malpractice action arising from attorney's alleged filing of a voluntary dismissal based upon the erroneous and negligent assumption that the underlying medical malpractice case could be re-filed, the trial court abused its discretion in granting defendant attorneys' motion in limine effectively prohibiting plaintiffs from introducing expert testimony related to the issue of whether, but for the attorneys' negligence, the plaintiffs would have prevailed in the underlying action. It was an abuse of discretion to conlude that plaintiffs were categorically restricted to the evidence already in the record at the time the attorneys represented them. Blackwell v. Potts, 266 Ga. App. 702, 598 S.E.2d 1 (2004) (decided under former O.C.G.A. § 24-2-1).

Evidence in condemnation case. — Trial court erred in denying a housing authority's motion in limine in a condemnation case seeking to exclude evidence of the commercial value of the land at issue; since the property was restricted by a federal court order for use as a public playground, there was no basis for the

admission of evidence regarding any potential commercial value that the property could have had under other, non-existent circumstances. Housing Auth. of Macon v. Younis, 279 Ga. App. 599, 631 S.E.2d 802 (2006) (decided under former O.C.G.A. § 24-2-1).

Trial court properly granted the Georgia Department of Transportation's (DOT) motion in limine to preclude a property owner from questioning an expert witness about the fact that the expert had been originally hired by the DOT in the DOT's condemnation proceeding as that information was not relevant to the just and adequate compensation determination. H.D. McCondichie Props. v. Ga. DOT, 280 Ga. App. 197, 633 S.E.2d 558 (2006) (decided under former O.C.G.A. § 24-2-1).

In a condemnation action, the trial court erred in denying a lessor's motion in limine to exclude evidence of the lessor's entitlement to statutory pre-judgment interest under O.C.G.A. § 32-3-19 because the fact that the trial court could later instruct the jury to disregard irrelevant evidence was not a reason to allow the jury to hear the irrelevant evidence; under the statutory framework of § 32-3-19, the amount of pre-judgment interest due a condemnee is determined after the jury enters a verdict. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862 (2010) (decided under former O.C.G.A. § 24-2-1).

In a condemnation proceeding, the trial court did not abuse the court's discretion in denying the lessees' motion in limine to exclude evidence that the lessees and the lessor knew of the possible condemnation when the lessees sold the property to the lessor because the Georgia Department of Transportation (DOT) sought to use the evidence to discredit the estimate the lessees and lessor made of the property's market value at the time of the taking by challenging the use of the sale as a factor in reaching that estimate used in that way, the evidence of the knowledge of a possible condemnation would bear, at least indirectly, on the question of the just and adequate compensation due the condemnees. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862 (2010) (decided under former O.C.G.A. § 24-2-1).

In a condemnation proceeding, the trial court did not err in denying a motion in limine to exclude evidence of the rent a lessee charged a sublessee for use of the property before the lessee sold the property to a lessor because the evidence bore upon the property's market value. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862 (2010) (decided under former O.C.G.A. § 24-2-1).

In a condemnation proceeding, the trial court erred in denying the lessees' motion in limine to exclude evidence of the cause of the fire that damaged the restaurant that was on the real property at issue because evidence concerning the reasons giving rise to the uncertainty in insurance coverage (i.e., the cause of the fire), as opposed to the fact of uncertainty, was not relevant to the issue of just and adequate compensation. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862 (2010) (decided under former O.C.G.A. § 24-2-1).

Evidence in negligent construction cases. — Builder sued homeowners to recover for services rendered in constructing a house under a theory of quantum meruit; the homeowners alleged negligent construction. The trial court properly admitted evidence of the homeowners' listing price for the home as the court instructed the jury that this evidence could be considered only to show the homeowners' opinion of the home's value, in regard to the quantum meruit and negligent construction claims, not to show the home's fair market value. Biederbeck v. Marbut, 294 Ga. App. 799, 670 S.E.2d 483 (2008) (decided under former O.C.G.A. § 24-2-1).

Similar transaction evidence on failure to pay. — In an action alleging an automobile company's negligent design and placement of the fuel system in a car model, evidence relating to crash tests on vehicles from which the car model involved in the automobile collision evolved, a composite video tape of crash tests and related exhibits and internal documents were relevant to the issue of the automobile manufacturer's continuing negligence in regard to its knowledge of the safety hazard, its failure to warn the public of the danger and its continued marketing of the dangerous product, as well as to the

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issue of callous disregard upon which basis punitive damages were sought. Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984) (decided under former O.C.G.A. § 24-2-1).

In an action to recover expert fees, admitting evidence of defendant's failure to pay another expert was not error because of the similarity of the transactions involved and the issues of bad faith and fraud. Kent v. White, 238 Ga. App. 792, 520 S.E.2d 481 (1999) (decided under former O.C.G.A. § 24-2-1).

Contract damages. — In an action alleging that defendant company breached a sales representative agreement by removing areas from the representative's territory and by repeatedly reducing the commission rate below that provided in the agreement, evidence of actual commissions earned in the representative's territory was relevant to prove the representative's claim for damages. Douglas & Lomason Co. v. Hall, 212 Ga. App. 475, 441 S.E.2d 870 (1994) (decided under former O.C.G.A. § 24-2-1).

Summary judgment affidavit was not relevant to material issue. — Partial summary judgment pursuant to O.C.G.A. § 9-11-56 was properly granted to a labor supplier in a construction company's counterclaim alleging tortuous interference with the company's contractual relations, based on an allegedly illegal lien filed by the supplier against a property, when no factual basis was found for the counterclaim and, accordingly, it was dismissed; it was noted that the affidavit of the administrative manager of the company contained irrelevant matter which was properly excluded under former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403), as it related to the supplier's failure to sign a lien waiver and it had no logical bearing to the material fact in issue and, further, it was found to be inadmissible hearsay under former O.C.G.A. § 24-3-1(a) (see now O.C.G.A. §§ 24-8-801 and 24-8-802). Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418 (2003) (decided under former O.C.G.A. § 24-2-1).

Prior lease violations. — Trial court did not abuse the court's discretion by admitting evidence of previous lease violations in eviction proceedings instituted primarily for a tenant's child's criminal activity, but secondarily based on serious and repeated violations of the material terms of the tenant's lease with a public housing authority; the prior violations were relevant to the secondary reason for terminating the tenant's lease. Martinez v. Hous. Auth., 264 Ga. App. 282, 590 S.E.2d 245 (2003) (decided under former O.C.G.A. § 24-2-1).

Autopsy photographs. — In a wrongful death action, it was not error for the trial court to refuse to allow publication to the jury of autopsy pictures of the decedent's bowel. Cornelius v. Macon-Bibb County Hosp. Auth., 243 Ga. App. 480, 533 S.E.2d 420 (2000) (decided under former O.C.G.A. § 24-2-1).

Testimony by officer regarding merger. — Testimony by an officer and agent of the successor legal entity regarding the merger was relevant and material to explain the course of conduct and corporate intent of the successor corporation after the merger and how the official came to have custody of the records. NationsBank v. Tucker, 231 Ga. App. 622, 500 S.E.2d 378 (1998) (decided under former O.C.G.A. § 24-2-1).

Photos in condemnation cases. — Trial court properly refused to admit photos of a subdivision, tendered by a utility to rebut testimony by the condemnees' appraiser that property around power lines was usually the last piece of residential property to be developed, and was usually relegated to low income housing because the utility: (1) failed to authenticate the pictures by showing the identity or address of the subdivision; (2) failed to present any evidence as to the value of the property in the pictures; and (3) failed to demonstrate whether the subdivision was built before or after the power lines were installed. Ga. Power Co. v. Jones, 277 Ga. App. 332, 626 S.E.2d 554 (2006) (decided under former O.C.G.A. § 24-2-1).

Background and testimony about impact. — Trial court did not err in preventing an invitee from providing the jury with background information regard-

ing the effects of the injuries on the parties as: (1) the invitee cited no authorities to support this proposition; (2) lost wages were not an element of damages in a loss of consortium claim; (3) witness after witness testified about the effects of the invitee's injury on the invitee and the family; and (4) the issue was moot because a loss of consortium claim was derivative of the invitee's claim, and the jury declined to award the invitee any damages. Magill v. Edd Kirby Chevrolet, Inc., 277 Ga. App. 619, 627 S.E.2d 207 (2006) (decided under former O.C.G.A. § 24-2-1).

Breach of contract. — In a breach of contract suit brought by a contractor who was engaged to advertise a computer program, the trial court properly excluded as irrelevant evidence regarding the purported illegality of the sale of the program as the reason why the defendants stopped selling the program was irrelevant to the issue of whether the contractor was owed commissions from past sales; even if it was relevant, the trial court was authorized to conclude that the substantially prejudicial impact of the evidence far outweighed any probative value. Smith v. Saulsbury, 286 Ga. App. 322, 649 S.E.2d 344 (2007) (decided under former O.C.G.A. § 24-2-1).

With regard to debtor's claim against creditor for intentional infliction of emotional distress, trial court properly excluded as irrelevant the testimony of debtor's coworker that creditor had been calling coworker at work because it mistook coworker for debtor; this conduct did not affect debtor, who was not aware of it until after debtor had a confrontation with creditor and its employees, and thus the conduct was irrelevant to issue of whether creditor's and employees' conduct was extreme or outrageous. Cook v. Covington Credit of Ga., Inc., 290 Ga. App. 825, 660 S.E.2d 855 (2008) (decided under former O.C.G.A. § 24-2-1).

Evidence of bad faith excluded. — Trial court properly granted an insurer's motion in limine to exclude all evidence of bad faith and claims handling from the coverage trial because the trial court reasonably concluded that information involving bad faith and whether the insurer acted appropriately with respect to claims administration exceeded the scope of the coverage issues; the trial court found that issues regarding the insurer's handling of the claim and whether the insurer abided by the insurer's claims manual related to bad faith, not coverage, and thus could not be addressed by either party during the coverage phase. Saye v. Provident Life & Accident Ins. Co., 311 Ga. App. 74, 714 S.E.2d 614 (2011), cert. denied, No. S11C1857, 2011 Ga. LEXIS 984 (Ga. 2011) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err in refusing to permit record title holder's descendants to show that a developer agreed to pay a property owner for an easement on the property because the trial court correctly limited the evidence to the issue of adverse possession; the developer's offer to pay the owner was irrelevant to the issues decided by the jury. DeFoor v. DeFoor, 290 Ga. 540, 722 S.E.2d 697 (2012) (decided under former O.C.G.A. § 24-2-1).

Witness failure to appear for lack of timely subpoena service. — In a personal injury action, because a driver waited until the eve of trial to serve the doctor with a subpoena, the trial court: (1) did not abuse the court's discretion in determining that such service was not reasonable under former O.C.G.A. § 24-10-25(a) (see now O.C.G.A. § 24-13-26); and (2) did not err in refusing to grant the driver a continuance or citing the physician in contempt for failing to appear in court; moreover, since the subpoena was unenforceable, evidence surrounding the doctor's failure to appear became irrelevant under former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403). Buster v. Poole, 279 Ga. App. 828, 632 S.E.2d 680 (2006) (decided under former O.C.G.A. § 24-2-1).

Document which is not relevant to any issue in a civil action is properly excluded. Farris v. Pazol, 166 Ga. App. 760, 305 S.E.2d 472 (1983) (decided under former O.C.G.A. § 24-2-1); City of Dalton v. Smith, 210 Ga. App. 858, 437 S.E.2d 827 (1993) (decided under former O.C.G.A. § 24-2-1).

Evidence of settlements with other tortfeasors. — In an action against a vascular surgeon for medical negligence in ordering an arteriogram to be per-

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formed on a patient and in not being available to direct complications resulting therefrom, it was error to admit evidence of plaintiff's settlements with other alleged tortfeasors since the relevant issues were whether the defendant doctor was negligent and, if so, the damages for which the plaintiff should be compensated. Allison v. Patel, 211 Ga. App. 376, 438 S.E.2d 920 (1993) (decided under former O.C.G.A. § 24-2-1).

Fact and amount of a settlement with other parties is not relevant to the amount of damages to be awarded and were properly excluded from the jury's consideration. Bryant v. Haynie, 216 Ga. App. 430, 454 S.E.2d 533 (1995) (decided under former O.C.G.A. § 24-2-1).

Limine ruling not violated. — Trial court did not abuse the court's discretion in concluding that an insurer did not violate the court's limine ruling excluding all evidence of bad faith and claims handling by submitting evidence that an insured did not claim that a disability arose from injury until after the insured's benefits were terminated under the sickness clause of the insurance policy because evidence relating to how the insurer characterized the condition was relevant to whether the condition arose from an injury or a sickness; although the insurer's assertion that the insured received payment under the policy potentially touched on claims handling, it also gave the jury context for how the disability claim and the litigation arose. Saye v. Provident Life & Accident Ins. Co., 311 Ga. App. 74, 714 S.E.2d 614 (2011), cert. denied, No. S11C1857, 2011 Ga. LEXIS 984 (Ga. 2011) (decided under former O.C.G.A. § 24-2-1).

Testimony on date rape drug admitted. — Trial court did not abuse the court's discretion in denying an auto driver's motion in limine and in permitting a man, with whom the driver had been prior to an auto accident, to testify that the driver of the car, who collided the driver's car with another vehicle, had been at the man's residence to provide sex for money as the evidence was relevant to the driver's defense that the man had secretly slipped the driver a date rape drug, causing the driver to flee from the man. Further, the trial court did not abuse the court's discretion in granting the motion to the extent that the man could only testify as to the woman being a prostitute as impeachment evidence. Jackson v. Heard, 264 Ga. App. 620, 591 S.E.2d 487 (2003) (decided under former O.C.G.A. § 24-2-1).

Observations of teacher's conduct in student's class were relevant and material to the issue of the teacher's alleged mistreatment of the student. Houston v. Kinder-Care Learning Ctrs., Inc., 208 Ga. App. 235, 430 S.E.2d 24 (1993) (decided under former O.C.G.A. § 24-2-1).

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Character. — General character of the defendant and the defendant's conduct in other transactions is irrelevant unless the defendant chooses to put the defendant's character in issue. Bacon v. State, 209 Ga. 261, 71 S.E.2d 615 (1952) (decided under former Code 1933, § 38-201); Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185 (1968) (decided under former Code 1933, § 38-201); Dawson v. State, 120 Ga. App. 242, 170 S.E.2d 45 (1969) (decided under former Code 1933, § 38-201); Wooten v. State, 125 Ga. App. 635, 188 S.E.2d 409 (1972) (decided under former Code 1933, § 38-201); Nooner v. State, 131 Ga. App. 563, 206 S.E.2d 660 (1974) (decided under former Code 1933, § 38-201); Mikle v. State, 236 Ga. 748, 225 S.E.2d 275 (1976) (decided under former Code 1933, § 38-201); Brown v. State, 237 Ga. 467, 228 S.E.2d 853 (1976) (decided under former Code 1933, § 38-201).

For cases concerning evidence of state of mind, plan, intent, or motive. — See Thomas v. State, 244 Ga. 608, 261 S.E.2d 389 (1979) (decided under former Code 1933, § 38-201); Smith v. State, 151 Ga. App. 697, 261 S.E.2d 439 (1979) (decided under former Code 1933, § 38-201); Walker v. State, 156 Ga. App. 842, 275 S.E.2d 755 (1980) (decided under former Code 1933, § 38-201).

As defendant, a sheriff, was not empowered to use the sheriff's department as

defendant's personal domain, evidence of corruption in the sheriff's office was relevant and admissible, and the prosecution was well within bounds when the prosecution theorized that defendant killed the victim, a political opponent, to prevent the victim from uncovering evidence of defendant's corruption. Dorsey v. State, 279 Ga. 534, 615 S.E.2d 512 (2005) (decided under former O.C.G.A. § 24-2-1).

Defendant's demeanor at the time of arrest. — Trial court did not abuse the court's discretion by allowing a detective who arrested defendant after defendant took a woman's purse to testify that, when defendant was arrested, defendant was uncooperative, verbally combative, and smelled of alcohol. Moore v. State, 265 Ga. App. 511, 594 S.E.2d 734 (2004) (decided under former O.C.G.A. § 24-2-1).

Circumstances of defendant's arrest. — Gun was properly admitted into evidence at a trial on sex offenses because the gun was relevant to the issue of a witness's alleged bias and was also admissible as evidence of the circumstances of the defendant's arrest; on the night of the defendant's arrest, the witness told the police that the defendant had just raped the witness's niece and was carrying a 9mm gun. Ward v. State, 274 Ga. App. 511, 618 S.E.2d 154 (2005) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err in admitting evidence that police were at the defendant's residence to serve defendant with an arrest warrant because that evidence did not improperly place the issue of character into evidence, but was necessary to explain why police were able to detain, handcuff, and search the defendant. Moreover, a limiting instruction was also issued advising the jurors that they were not to consider the warrant for any purpose other than to explain the officers' presence at the defendant's home. Thrasher v. State, 289 Ga. App. 399, 657 S.E.2d 316 (2008) (decided under former O.C.G.A. § 24-2-1).

Commission of independent offenses. — Evidence which in any manner shows or tends to show that the accused has committed another crime separate and distinct from that for which the accused is on trial is generally irrelevant and inadmissible, unless there be shown some logical connection between the two from which it can be said that proof of the one tends to establish the other. Patterson v. State, 121 Ga. App. 159, 172 S.E.2d 873 (1970); Wooten v. State, 125 Ga. App. 635, 188 S.E.2d 409 (1972) (decided under former Code 1933, § 38-201); Banks v. State, 169 Ga. App. 645, 314 S.E.2d 480 (1984) (decided under former O.C.G.A. § 24-2-1).

Evidence which shows or tends to show that the defendant has committed another crime independent of the offenses for which defendant is on trial is irrelevant and inadmissible. Laney v. State, 159 Ga. App. 609, 284 S.E.2d 114 (1981) (decided under former O.C.G.A. § 24-2-1).

Evidence showing res gestae. — Trial court did not err in denying defendant's motion for mistrial after one of the child victims testified that defendant battered the child's grandmother shortly after the grandmother stumbled upon defendant molesting that child as the evidence supported a finding that this battering was part of the res gestae of the child molestation crime. Prather v. State, 279 Ga. App. 552, 631 S.E.2d 758 (2006) (decided under former O.C.G.A. § 24-2-1).

Because the evidence presented against both the defendants showed numerous connections between the crimes such that proof of the former tended to prove the latter, and a vehicle theft committed by both the defendants earlier in the day could be considered a continuation of a crime spree and therefore admissible as part of the res gestae, the trial court did not err in admitting the evidence as similar crimes evidence. Richard v. State, 287 Ga. App. 399, 651 S.E.2d 514 (2007) (decided under former O.C.G.A. § 24-2-1).

Evidence that the defendant was a drug dealer and gave the police a false name when questioned after the alleged crime was committed was admissible as relevant and part of the res gestae as the former was incidental to and followed directly from the defendant's participation in the sale of marijuana to the victim, and the latter was part of what transpired shortly after the commission of the victim's murder; moreover, this was true even if the defendant's character was incidentally placed in issue. Roberts v.

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168 Ga. App. 734, 310 S.E.2d 725 (1983) (decided under former O.C.G.A. § 24-2-1).

Evidence of defendant's 28 years of physical and psychological abuse by defendant's two former spouses was properly excluded at defendant's trial for murder since the defendant was permitted to adequately testify as to the facts in the defendant's relationship with the victim which allegedly caused the defendant's fear of the victim. Clenney v. State, 256 Ga. 116, 344 S.E.2d 216 (1986) (decided under former O.C.G.A. § 24-2-1).

Flight, even an escape from jail after the offense, is a circumstance which may be weighed by the jury in connection with other circumstances to determine the guilt of the accused. The fact that an escape from the courthouse during trial was involved does not remove such conduct from former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403). Smith v. State, 184 Ga. App. 739, 362 S.E.2d 384, cert. denied, 184 Ga. App. 910, 362 S.E.2d 384 (1987) (decided under former O.C.G.A. § 24-2-1).

Chain of custody and tampering. — In proving chain of custody, the state is not required to show that a substance is guarded each minute the substance is in one's custody, and in the absence of a showing to the contrary, the chain is not thereby broken. Williams v. State, 153 Ga. App. 421, 265 S.E.2d 341 (1980) (decided under former Code 1933, § 38-201).

When there is only a bare speculation of tampering, it is proper to admit the evidence and let what doubt remains go to the weight of the evidence. Williams v. State, 153 Ga. App. 421, 265 S.E.2d 341 (1980) (decided under former Code 1933, § 38-201); Mayfield v. State, 153 Ga. App. 459, 265 S.E.2d 366 (1980) (decided under former Code 1933, § 38-201); Thompson v. State, 154 Ga. App. 704, 269 S.E.2d 474 (1980) (decided under former Code 1933, § 38-201).

Because defendant produced no affirmative evidence of tampering, substitution, or mishandling of the methamphetamine at the crime lab, there was no error in treating the crime lab as a single link in the chain of custody for admissibility purposes. Eaton v. State, 294 Ga. App. 124, 668 S.E.2d 770 (2008) (decided under former O.C.G.A. § 24-2-1).

Exclusion of battered person's syndrome evidence. — If the defendant suffered from a psychological condition that caused the defendant to believe the defendant had to hurt the defendant's child to help the child, the only way the jury could know about such a condition was through expert testimony, and thus, it was error to exclude the defendant's proffered expert testimony of battered person syndrome; however, such error was harmless given the overwhelming weight of evidence which established that the defendant's conduct was knowing, if not intentional. Pickle v. State, 280 Ga. App. 821, 635 S.E.2d 197 (2006), cert. denied, No. S06C2150, 2007 Ga. LEXIS 110, 111 (Ga. 2007) (decided under former O.C.G.A. § 24-2-1).

Refusal to allow defendant to stipulate to intercourse in rape trial. — Trial court did not abuse the court's discretion when the court refused to allow a defendant to stipulate to having sex with a rape victim in an effort to keep evidence of the victim's rape related pregnancy, her subsequent abortion, and DNA evidence that showed that there was a 99.9969% probability that the defendant had fathered the aborted fetus from being presented to the jury; the evidence was relevant to the state's case against the defendant, particularly because the defendant had denied any sexual contact with the victim, and the defendant could not selectively choose which incriminating evidence the defendant would admit to. Mims v. State, 291 Ga. App. 777, 662 S.E.2d 867 (2008), cert. denied, No. S08C1691, 2008 Ga. LEXIS 768 (Ga. 2008) (decided under former O.C.G.A. § 24-2-1).

For cases concerning photographic and diagrammatic evidence. — See Smith v. State, 202 Ga. 851, 45 S.E.2d 267 (1947) (general admissibility) (decided under former Code 1933, § 38-201); Crittenden v. State, 98 Ga. App. 329, 105 S.E.2d 778 (1958) (skid marks) (decided under former Code 1933, § 38-201); Brooks v. State, 244 Ga. 574, 261 S.E.2d

379 (1979) (photograph of rape victim's injuries) (decided under former Code 1933, § 38-201); Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979) (videotape recording) (decided under former Code 1933, § 38-201); Williams v. State, 151 Ga. App. 683, 261 S.E.2d 430 (1979) (shoes and footprints) (decided under former Code 1933, § 38-201); Wofford v. State, 152 Ga. App. 739, 263 S.E.2d 707 (1979) (diagrams of scene of crime) (decided under former Code 1933, § 38-201); Miller v. State, 94 Ga. App. 259, 94 S.E.2d 120 (1956) (photographs of liquor) (decided under former Code 1933, § 38-201); Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979) (photograph of teeth marks on victim's breast) (decided under former Code 1933, § 38-201); City Council v. Lee, 153 Ga. App. 94, 264 S.E.2d 683 (1980) (movie film) (decided under former Code 1933, § 38-201); Craft v. State, 154 Ga. App. 682, 269 S.E.2d 490 (1980) (authentication) (decided under former Code 1933, § 38-201); Craft v. State, 154 Ga. App. 682, 269 S.E.2d 490 (1980) (change in scene photographed) (decided under former Code 1933, § 38-201); Tatum v. State, 206 Ga. 171, 56 S.E.2d 518 (1949) (photographs of deceased after death) (decided under former Code 1933, § 38-201); Blount v. State, 214 Ga. 433, 105 S.E.2d 304 (1958) (photographs of deceased, an ax, and wooden bar) (decided under former Code 1933, § 38-201); Williams v. State, 151 Ga. App. 765, 261 S.E.2d 487 (1979) ("gruesome" photographs of deceased victim) (decided under former Code 1933, § 38-201); Moses v. State, 245 Ga. 180, 263 S.E.2d 916 (1980), overruled on other grounds, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993) (photograph of deceased) (decided under former Code 1933, § 38-201); Gaylor v. State, 247 Ga. 759, 279 S.E.2d 207 (1981) (photograph of deceased) (decided under former Code 1933, § 38-201); Williams v. State, 255 Ga. 97, 335 S.E.2d 553 (1985) (photograph of child in hospital bed surrounded by medical equipment) (decided under former O.C.G.A. § 24-2-1); Gosdin v. State, 176 Ga. App. 381, 336 S.E.2d 261 (1985) (photograph of defendant printed from negative taken from camera allegedly stolen by defendant) (decided under former O.C.G.A. § 24-2-1); Pittman v. State, 178 Ga. App. 693, 344 S.E.2d 511 (1986) (anatomically correct diagram of child molestation victim's body) (decided under former O.C.G.A. § 24-2-1).

Exhibits properly admitted. — There was no prejudice to the defendant in the admission of exhibits which merely showed the lead fragments, displayed against a neutral background, that were removed from the victim's head; admission of evidence of "prior difficulties" between the two groups was proper to explain how two people became the innocent victims of the two groups' hostilities. Perry v. State, 276 Ga. 836, 585 S.E.2d 614, rev'd, 276 Ga. 839, 584 S.E.2d 253 (2003) (decided under former O.C.G.A. § 24-2-1).

Photographs of the victim of a crime are admissible when the photographs are relevant on the issues in the case, although the photographs may be inflammatory and prejudicial to the accused. Whitaker v. State, 246 Ga. 163, 269 S.E.2d 436 (1980) (decided under former Code 1933, § 38-201).

When defendants contended defendants were not responsible for the injuries and poor physical condition of deceased child, 12 photos of the body and one of clothing were relevant to the issues in the case to show the unlikelihood that these injuries would have been self-inflicted or accidental, as were autopsy photographs of a fractured rib. Lackey v. State, 246 Ga. 331, 271 S.E.2d 478 (1980) (decided under former Code 1933, § 38-201).

Photographs of body of victim showing the body's location when found and various aspects of the wounds causing death were relevant and material to show that the victim was bludgeoned and shot twice in the head. Knowles v. State, 246 Ga. 378, 271 S.E.2d 615 (1980) (decided under former Code 1933, § 38-201); Dick v. State, 246 Ga. 697, 273 S.E.2d 124 (1980) (decided under former Code 1933, § 38-201); Strickland v. State, 247 Ga. 219, 275 S.E.2d 29, cert. denied, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 192 (1981) (photographs of victims of crime, wounds, location) (decided under former Code 1933, § 38-201).

In a prosecution for a violation of

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O.C.G.A. § 16-5-21(a)(2), as the indictment alleged that the aggravated assault was committed with objects likely to cause serious bodily injury (a broom handle and the defendant's feet and hands), photos depicting the condition of the victim, one of which depicted the defendant's foot print on the victim's face, were relevant to establish the nature and extent of the injury. Massey v. State, 278 Ga. App. 303, 628 S.E.2d 706 (2006) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err by admitting three photographs of a victim's bullet wound to the head and two photographs of defendant's handgun as the photographs were not repetitive or cumulative, and the photographs presented the evidence from different distances and vantage points in order to accurately depict the nature and location of the victim's wound and the location of the weapon when the weapon was found; moreover, the victim's injuries and the weapon used to inflict those injuries were obviously relevant to the charges against defendant. Smith v. State, 279 Ga. App. 211, 630 S.E.2d 833 (2006) (decided under former O.C.G.A. § 24-2-1).

Defendant's motion for a mistrial based on the admission of a photograph of the victim's head was not an abuse of discretion as: (1) if pre-autopsy photographs were relevant and material to any issue in the case, those photographs were admissible even if those photographs were duplicative and might inflame the jury; (2) photographs showing the extent and nature of the victim's wounds were material and relevant, even if the cause of death was not in dispute; (3) the state had the burden to prove beyond a reasonable doubt that the defendant caused the death of the victim with malice aforethought; and (4) the photograph was relevant to the state's claim that the defendant had done so by shooting a single shot into the victim's head. Bradley v. State, 281 Ga. 173, 637 S.E.2d 19 (2006) (decided under former O.C.G.A. § 24-2-1).

Trial court properly admitted one of three photographs of the victim's body which showed an exterior mark of strangulation as such was not overly gruesome and inflammatory; moreover, pre-incision photos of a victim which depicted the location and nature of the victim's wounds were admissible as both relevant and material. McWilliams v. State, 280 Ga. 724, 632 S.E.2d 127 (2006) (decided under former O.C.G.A. § 24-2-1).

Photographs of a victim's body, after the body had been taken to the crime lab, were material, relevant, and admissible as the photographs showed the location, nature, and extent of the victim's multiple gunshot wounds. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006) (decided under former O.C.G.A. § 24-2-1).

Photograph showing the victim's vagina and bloody underwear was relevant to show that the victim had been raped and to refute the defendant's assertion that her injuries resulted from a kick to the groin. Smith v. State, 291 Ga. App. 545, 662 S.E.2d 323 (2008) (decided under former O.C.G.A. § 24-2-1).

Skeletal remains. — Trial court did not err in admitting the victim's skeletal remains in a murder trial since the remains were used to illustrate portions of the testimony of an expert forensic anthropologist. Quedens v. State, 280 Ga. 355, 629 S.E.2d 197 (2006) (decided under former O.C.G.A. § 24-2-1).

Tape of prior telephone conversation with witness admissible for impeachment. — In a trial for theft by deception, the trial court erred in ruling inadmissible the tape recording of a telephone conversation between a witness and defendant's father after a determination was made, through questions posed to the witness and defendant's father, that it was authentic, accurate and complete and since it was offered for impeachment by showing discrepancies between the witness's representations about certain facts made during the telephone conversation and the witness's trial testimony regarding those same facts pertaining to the issues of whether defendant intended to deceive clients. Riceman v. State, 166 Ga. App. 825, 305 S.E.2d 595 (1983) (decided under former O.C.G.A. § 24-2-1).

Trial court properly disallowed forensic pathologist (as defense witness) to testify: (1) why neurologists and

neurosurgeons consulted with the pathologist; and (2) that many cases of suspected child abuse in which the pathologist had been consulted had been determined to be accidental; as neither response would have tended to show the guilt or innocence of the defendant of the offense of aggravated battery for which defendant was being tried. Cohn v. State, 186 Ga. App. 816, 368 S.E.2d 572 (1988) (decided under former O.C.G.A. § 24-2-1).

Police dogs. — Even when it is shown that a dog is of pure blood and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. O'Quinn v. State, 153 Ga. App. 467, 265 S.E.2d 824 (1980) (decided under former Code 1933, § 38-201).

Prior verdict of not guilty by reason of insanity irrelevant in subsequent prosecution. — Defendant's mental state at defendant's previous trial for burglary and assault to commit rape at which defendant was found not guilty by reason of insanity was irrelevant to any issue in defendant's subsequent trial for another rape and thus was properly excluded. Crapse v. State, 180 Ga. App. 321, 349 S.E.2d 190 (1986) (decided under former O.C.G.A. § 24-2-1).

Prior acquittals irrelevant in perjury trial. — Prior acquittals in two trials for child molestation had no probative value in a trial for perjury committed at those trials because evidence of the acquittals was neither relevant nor material to any issue in the perjury case. West v. State, 228 Ga. App. 713, 492 S.E.2d 576 (1997) (decided under former O.C.G.A. § 24-2-1).

Pretrial identifications. — Victim's pretrial identifications of defendant and codefendant, as being the persons riding together in the automobile in which they ultimately were arrested and in which a .25 caliber pistol was found, were relevant within the meaning of former O.C.G.A. § 24-2-1 (see now O.C.G.A. §§ 24-4-401 through 24-4-403). If evidence is relevant, no matter how slightly, the evidence generally should be admitted and the weight of the evidence left to the jury. Buckner v. State, 209 Ga. App. 107, 433 S.E.2d 94 (1993) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err in denying a motion in limine to exclude the testimony of a state witness that allegedly placed the defendant's character in issue because the testimony was relevant to establish the defendant's identity and appearance on that date of the charged crime, and was not rendered inadmissible merely because the testimony incidentally placed the defendant's character in issue. Moreover, the defendant's trial counsel conceded that the witness's testimony regarding the description was admissible. Buice v. State, 289 Ga. App. 415, 657 S.E.2d 326 (2008) (decided under former O.C.G.A. § 24-2-1).

Movie about body disposal. — In a joint trial of two defendants, the trial court did not err in showing the jury portions of a movie which depicted a method of disposing of a murdered victim's body as: (1) such was relevant to show a bent of mind, despite the fact that it could have placed the first defendant's character in issue; and (2) the jury could have made the permissible inference that the first defendant was encouraged by the movie to order the manner of disposing of the victim's body; moreover, because the second defendant failed to request a cautionary instruction to adequately protect from this inference, the second defendant could not complain of the inference on appeal. Oree v. State, 280 Ga. 588, 630 S.E.2d 390 (2006) (decided under former O.C.G.A. § 24-2-1).

Expert testimony on Chinese culture which defendant claimed would have cast light on the defendant's motivations, state of mind, and actions was properly excluded since such evidence would not have aided the jury in the jury's search for the truth. Lee v. State, 262 Ga. 593, 423 S.E.2d 249 (1992) (decided under former O.C.G.A. § 24-2-1).

Relevance of evidence found. — See Posey v. State, 46 Ga. App. 290, 167 S.E. 340 (1933) (exhibit of child) (decided under former Code 1933, § 38-201); Miller v. State, 53 Ga. App. 275, 185 S.E. 372

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(1936) (burglary) (decided under former Code 1933, § 38-201); Wynes v. State, 182 Ga. 434, 185 S.E. 711 (1936) (experiments) (decided under former Code 1933, § 38-201); Bryant v. State, 197 Ga. 641, 30 S.E.2d 259 (1944) (other person as guilty party) (decided under former Code 1933, § 38-201); Ledbetter v. State, 51 Ga. App. 560, 181 S.E. 120 (1935) (possession of liquor) (decided under former Code 1933, § 38-201); Rogers v. State, 80 Ga. App. 585, 56 S.E.2d 633 (1949) (chain of circumstances) (decided under former Code 1933, § 38-201); Hatcher v. State, 94 Ga. App. 270, 94 S.E.2d 110 (1956) (unlawful possession of whiskey) (decided under former Code 1933, § 38-201); Yawn v. State, 94 Ga. App. 400, 94 S.E.2d 769 (1956) (stolen goods) (decided under former Code 1933, § 38-201); Duffey v. State, 151 Ga. App. 673, 261 S.E.2d 421 (1979) (photograhic lineup in armed robbery) (decided under former Code 1933, § 38-201); Gray v. State, 151 Ga. App. 684, 261 S.E.2d 402 (1979) (identification procedure) (decided under former Code 1933, § 38-201); Riden v. State, 151 Ga. App. 654, 261 S.E.2d 409 (1979) (documentary evidence) (decided under former Code 1933, § 38-201); Flynt v. State, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980) (statement indicating consciousness of guilt) (decided under former Code 1933, § 38-201); Hudgins v. State, 153 Ga. App. 601, 266 S.E.2d 283 (1980) (escape from confinement) (decided under former Code 1933, § 38-201); Clark v. State, 149 Ga. App. 641, 255 S.E.2d 110 (1979) (deadly weapons) (decided under former Code 1933, § 38-201); Whitacre v. State, 155 Ga. App. 359, 270 S.E.2d 894 (1980) (drug paraphernalia) (decided under former Code 1933, § 38-201); Marshall v. State, 153 Ga. App. 198, 264 S.E.2d 718 (1980) (contents of paper bag) (decided under former Code 1933, § 38-201); Herron v. State, 155 Ga. App. 791, 272 S.E.2d 756 (1980) (child molestation case) (decided under former Code 1933, § 38-201); Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1983) (identity and background of murder victim) (decided under former Code 1933, § 38-201); Wortham v. State, 158 Ga. App. 19, 279 S.E.2d 287 (1981) (drug paraphernalia) (decided under former Code 1933, § 38-201); Kelley v. State, 160 Ga. App. 343, 287 S.E.2d 68 (1981) (value of stolen items) (decided under former Code 1933, § 38-201); Harrell v. State, 249 Ga. 48, 288 S.E.2d 192 (1982) (psychiatric testimony) (decided under former O.C.G.A. § 24-2-1); Williams v. State, 250 Ga. 553, 300 S.E.2d 301 (1983) (murder case) (decided under former O.C.G.A. § 24-2-1); Ponder v. Ponder, 251 Ga. 323, 304 S.E.2d 61 (1983) (dispute between parents and family member) (decided under former O.C.G.A. § 24-2-1); Hubbard v. State, 167 Ga. App. 32, 305 S.E.2d 849 (1983) (theft by taking case) (decided under former O.C.G.A. § 24-2-1); Griffin v. State, 243 Ga. App. 282, 531 S.E.2d 175 (2000) (fingerprints) (decided under former O.C.G.A. § 24-2-1).

Testimony of medical examiner relevant. — Trial court did not err in permitting a medical examiner to testify that inasmuch as the victim's body was discovered in a wooded area approximately 20 miles from the victim's house, the victim's death was "most likely" a homicide; defendant did not object to the testimony and the testimony was not improper under the circumstances of the case. Watson v. State, 278 Ga. 763, 604 S.E.2d 804 (2004) (decided under former O.C.G.A. § 24-2-1).

Hypnotic session was relevant evidence. — Witness was properly permitted to testify even though the recording of the witness's hypnotic session was unavailable and the witness's pre-hypnotic oral statement was not reduced contemporaneously to a writing as the trial court went to great lengths to ensure that the witness's testimony was not tainted or corrupted by hypnotic suggestion and all of the testimony was cumulative of other evidence admitted. Watson v. State, 278 Ga. 763, 604 S.E.2d 804 (2004) (decided under former O.C.G.A. § 24-2-1).

Officer's testimony relevant. — Trial court properly admitted a police officer's testimony that the officer learned from independent sources that the officer was

searching for a suspect named "Little B" as several witnesses referred to defendant by the defendant's nickname and it was necessary to establish that "Little B" and defendant were the same person. Lewis v. State, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005) (decided under former O.C.G.A. § 24-2-1).

Although the state prematurely bolstered a child victim's testimony, the parties knew that the victim's credibility would be immediately undermined; evidence that defendant told the victim that a relative had been imprisoned for improper "touching" and that defendant masturbated with the victim's underwear were admissible as relevant. Robinson v. State, 275 Ga. App. 537, 621 S.E.2d 770 (2005) (decided under former O.C.G.A. § 24-2-1).

Defendant did not receive ineffective assistance of counsel for the failure of counsel to object to a passing reference to defendant's incarceration as the reason for defendant not being arrested sooner and to the initial arrest as being part of a "roundup"; all of the circumstances connected with a defendant's arrest were admissible, even those that established the commission of another criminal offense, if they were relevant and the testimony was relevant to counter any accusation that defendant's arrest was delayed due to lack of identification. Butler v. State, 277 Ga. App. 57, 625 S.E.2d 458 (2005) (decided under former O.C.G.A. § 24-2-1).

Testimony of nurse treating child relevant. — In a defendant's trial for cruelty to a child, a nurse's testimony as to the nurse's decision to report an incident to explain the hospital's course of conduct regarding a child services agency was relevant to the child's care and future well-being; the trial court had wide discretion in determining relevancy and materiality and, where relevancy was doubtful, the evidence was properly admitted and the weight of the evidence left for the jury's determination. Revells v. State, 283 Ga. App. 59, 640 S.E.2d 587 (2006) (decided under former O.C.G.A. § 24-2-1).

Written note relevant. — Because a note found in the defendant's truck contained information that could have linked the note's author to the armed robbery charged, such was properly admitted as relevant; any issue as to whether the note was written by the defendant or by someone else was an issue affecting the weight of the evidence, not the admissibility of the evidence, and therefore was for the jury to decide. Clark v. State, 283 Ga. App. 884, 642 S.E.2d 900 (2007) (decided under former O.C.G.A. § 24-2-1).

Possession of a handgun was relevant. — Evidence that the defendant was in possession of a handgun "around the time of the shooting" was relevant and material to a charge of possession of a weapon by a convicted felon. Jones v. State, 282 Ga. 306, 647 S.E.2d 576 (2007) (decided under former O.C.G.A. § 24-2-1).

In an assault trial, after the defendant claimed that the victim had raped the defendant's sibling, evidence that one of the defendant's parents was indicted for extortion and other offenses in connection with the rape charge and that the parent pled guilty to some charges was properly admitted; the indictment and plea, as well as the fact that the indictment led to the dismissal of the rape charges, were relevant to the issue of the victim's credibility. Gonzales v. State, 286 Ga. App. 821, 650 S.E.2d 401 (2007), cert. denied, No. S07C1765, 2008 Ga. LEXIS 70 (Ga. 2008) (decided under former O.C.G.A. § 24-2-1).

Because the trial court erroneously excluded evidence relevant to the defendant's claim that there was provocation sufficient to excuse the use of the fighting words the defendant uttered and made the basis of a disorderly conduct charge, the defendant's conviction was reversed; moreover, in determining whether or not there was sufficient provocation for the defendant's use of the fighting words uttered, the jury was entitled to consider all the facts and circumstances tending to prove provocation, not just facts and circumstances contemporaneous with the use of the fighting words. Talmadge v. State, 287 Ga. App. 332, 651 S.E.2d 469 (2007) (decided under former O.C.G.A. § 24-2-1).

Testimony about drugs was relevant. — In a child molestation case, the victim's testimony that the defendant gave the victim drugs and that this al-

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ways led up to sexual intercourse was relevant, as the testimony had some bearing on the issues being tried. Boynton v. State, 287 Ga. App. 778, 653 S.E.2d 110 (2007) (decided under former O.C.G.A. § 24-2-1).

Evidence that a drug defendant went to a hotel room to have sex was relevant and admissible to support the state's theory that the defendant was at the hotel room to exchange sex for drugs. Gassett v. State, 289 Ga. App. 792, 658 S.E.2d 366 (2008) (decided under former O.C.G.A. § 24-2-1).

Testimony about blood test relevant. — Trial court did not abuse the court's discretion in allowing an arresting officer to testify that the defendant had requested and received an independent blood test in accordance with the defendant's rights under implied consent laws as the defendant contested the results of the state's blood test, arguing that the results were skewed and unreliable due to the unknown storage conditions of the defendant's blood sample while in route to a lab. Consequently, the fact that the defendant requested and received an independent test which the defendant failed to produce at trial was relevant to a material issue in the case. Schlanger v. State, 290 Ga. App. 407, 659 S.E.2d 823 (2008) (decided under former O.C.G.A. § 24-2-1).

Admission of weapon relevant. — There was no merit to the defendant's claim that it was error to admit a knife into evidence. The fact that a knife was found on the defendant's person at the time of the defendant's arrest was clearly relevant to the issue of whether the defendant, who was convicted of aggravated assault, had assaulted the victim with a deadly weapon. Brown v. State, 293 Ga. App. 224, 666 S.E.2d 600 (2008) (decided under former O.C.G.A. § 24-2-1).

Because the crimes committed by defendant following the shooting of the victim were relevant to show defendant's attempt to obtain money and vehicles to flee following the shooting, the trial court did not err in admitting the evidence in question. Hardnett v. State, 285 Ga. 470, 678 S.E.2d 323 (2009) (decided under former O.C.G.A. § 24-2-1).

Discovery of relevant evidence properly allowed. — In a prosecution for DUI, the trial court did not err in denying the defendant's motion to suppress the blood test evidence, as the trial court properly allowed the discovery of notes, memoranda, graphs, or computer printouts pertaining to the blood sample taken, as well as all chain of custody documentation, because they were the only items deemed relevant to the prosecution; suppression of the blood test results was not required as the defendant waived error on appeal as to the absence of one of the two lab testers. Cottrell v. State, 287 Ga. App. 89, 651 S.E.2d 444 (2007), cert. denied, No. S07C1894, 2007 Ga. LEXIS 816 (Ga. 2007) (decided under former O.C.G.A. § 24-2-1).

Evidence cumulative of defendant's testimony. — Trial court did not err by limiting the testimony of a witness because the defendant did not establish that the witness's testimony was relevant to the aggravated stalking offenses as charged; the excluded evidence would have been cumulative of the defendant's trial testimony that the defendant was not personally following or watching the victim. Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012) (decided under former O.C.G.A. § 24-2-1).

Molestation allegations not relevant. — Trial court did not err by excluding the proffered testimony of a witness concerning allegations of abuse by the victim's son against the daughter of the defendant and the victim because the trial court was authorized to conclude that the substantive molestation allegations were not relevant to the aggravated stalking charges against the defendant; the defendant was otherwise allowed to challenge the victim's motives and truthfulness without interjecting immaterial matter at the trial. Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29 (2012), cert. denied, No. S12C0974, 2012 Ga. LEXIS 1035 (Ga. 2012) (decided under former O.C.G.A. § 24-2-1).

Requirements for Appeal

Error waived unless objected to at trial. — Defendants are not entitled to appellate review of the issue of relevancy when the defendants fail to raise the issue at trial. Fain v. State, 165 Ga. App. 188, 300 S.E.2d 197 (1983) (decided under former O.C.G.A. § 24-2-1).

Specific objection showing harmful error must be offered at the time irrelevant and immaterial evidence is presented, and it is too late to set forth for the first time in a ground of a motion for new trial, even though valid. McDaniel v. State, 197 Ga. 757, 30 S.E.2d 612 (1944) (decided under former Code 1933, § 38-201).

In order to raise on appeal contentions concerning admissibility of evidence, the specific ground of objection must be made at the time the evidence is offered, and a failure to do so will be considered as a waiver; all evidence is admitted as a matter of course unless a valid ground of objection is interposed. Sutphin v. McDaniel, 157 Ga. App. 732, 278 S.E.2d 490 (1981) (decided under former Code 1933, § 38-201).

Objection to evidence on grounds of prejudice and irrelevancy does not constitute a proper objection and does not therefore present the Court of Appeals with an issue for review. Bynum v. Standard (Chevron) Oil Co., 157 Ga. App. 819, 278 S.E.2d 669, cert. dismissed, 248 Ga. 429, 285 S.E.2d 186 (1981) (decided under former Code 1933, § 38-201).

Erroneous admission of evidence not grounds for reversal. — Judgment will not be reversed because of the erroneous admission of evidence since at a subsequent stage of the trial, the evidence became relevant and admissible upon an issue later injected into the case. Fuller v. State, 197 Ga. 714, 30 S.E.2d 608 (1944) (decided under former Code 1933, § 38-201).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 301, 537.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 11.

Am. Jur. Trials. — Excluding Illegally Obtained Evidence, 5 Am. Jur. Trials 331.

The Daubert Challenge to the Admissibility of Scientific Evidence, 60 Am. Jur. Trials 1.

C.J.S. — 31A C.J.S., Evidence, § 245 et seq. 32 C.J.S., Evidence, § 808 et seq.

ALR. — Evidence of intemperate habits on question of damages from death or personal injuries, 9 ALR 1405.

Admissibility of evidence as to insurance on issue of negligence in operation or care of automobile, 28 ALR 516.

Competency or qualification of witness who had not seen or examined property before fire to testify as to damage by fire, 33 ALR 297.

Evidence of experience with intruders on other occasions as admissible on issue of justification in defending premises, 45 ALR 1418.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal-injury or death action carries liability insurance, 56 ALR 141; 74 ALR 849; 95 ALR 388; 105 ALR 1319; 4 ALR2d 761.

Evidence as to what was seen by use of mirror, 57 ALR 409.

Evidence as to threats made to keep witness away from criminal trial, 62 ALR 136.

Admissibility of expressions of pain or suffering by person injured, 64 ALR 557.

Admissibility on question of justification for dismissal or discharge of officer or employee for incompetency, of evidence as to his experience in other similar office or employment, 65 ALR 1096.

Admissibility on question as to quality, condition, or capacity of articles, machines, or apparatus, of evidence in regard to similar things manufactured or sold by the same person, 66 ALR 81.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.

Admissibility of declarations by one involved in an accident in relation to his employment by or agency for other person, 67 ALR 170; 150 ALR 623.

Relevancy of race, color, nationality, sex, age, etc., of person whose conduct is in question, 71 ALR 1301; 145 ALR 1362.

Admissibility of test or experiment after accident as bearing on condition of automobile at time of accident, 72 ALR 863.

Admissibility in behalf of defendant in action for libel or slander of similar charges made by other persons against plaintiff, 74 ALR 732.

Physical condition of place before or after event as evidence of condition at time of event, 80 ALR 446.

Admissibility of evidence of other accidents on issue of negligence in respect of maintenance of electric wires, rails, etc., 81 ALR 685.

Admissibility of statements or declarations of plaintiff's spouse in an action for alienation of affections for the purpose of showing his or her mental state, 82 ALR 825.

Admissibility and weight on issue of mental capacity or undue influence in respect of will or conveyance, of instruments previously executed by the person in question, 82 ALR 963.

Right of expert to give an opinion based on testimony of other witnesses not incorporated in a hypothetical question, 82 ALR 1460.

Admissibility in prosecution for homicide of declarations indicating suicidal disposition on part of deceased, 83 ALR 434.

Admissibility, and effect of admission, in condemnation proceedings of plans and specifications as regards the work to be done on, or the particular use to be made of, the land in question, 89 ALR 879.

Admissibility in action for slander or libel of evidence of aversion or contempt manifested as consequence of libelous or slanderous publication, to show its hurtful tendency, 105 ALR 944.

Admissibility and weight on question of materiality of misrepresentation, of testimony of officers or employees of insurer to effect that application would not have been accepted but for the misrepresentation, or that there was a rule or policy to reject risks of the kind that would have been shown but for the misrepresentation, 115 ALR 100.

Liability as for malpractice as affected by failure to take or advise the taking of an X-ray picture after operation, or to resort to other means of determining advisability of a supplementary operation or special treatment, 115 ALR 298.

Necessity of expert evidence to warrant submission to jury of issue as to permanency of injury or as to future pain and suffering, or to sustain award of damages on that basis, 115 ALR 1149.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 ALR 1510.

Admissibility in criminal prosecution of evidence of motive of one other than defendant to commit the crime, 121 ALR 1362.

Evidence which indirectly or incidentally suggests poverty or wealth of party not in itself proper matter of proof, 122 ALR 1408.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 123 ALR 119; 91 ALR2d 1046.

Discretion of trial court in criminal case as to permitting or denying view of premises where crime was committed, 124 ALR 841.

Admissibility on issue of negligence or contributory negligence of statements warning one of danger, 125 ALR 645.

Right, in civil action for malicious prosecution, to prove or rely on facts not known to defendant when he began prosecution or action which show or tend to show guilt or liability of plaintiff, 125 ALR 897.

Admissibility against defendant in criminal case of evidence, otherwise competent, as to other offense as affected by fact that a charge for such offense is pending against him, 125 ALR 1036.

Admissibility, in action against manufacturer, packer, or bottler for personal injury due to defective or injurious condition of article, of evidence that like products were free from, or were subject to, defective or injurious conditions, 127 ALR 1194.

Admissibility in action for death of evidence as to pecuniary condition of deceased, 128 ALR 1084.

Admissibility, to show bias or interest of

witness, of evidence that he or his employer had compensated the party for whom he testified, in circumstances creating right to subrogation, 128 ALR 1110.

Expert and opinion evidence as regards fire, 131 ALR 1113.

Admissibility, in support of general credibility of an accomplice-witness who has not been impeached, of evidence from nonaccomplice witness not otherwise relevant or of probative value as against defendant, 138 ALR 1266.

Admissibility, in prosecution for burglary, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements, 143 ALR 1199.

Conduct of jury in nature of demonstration, test, or experiment during authorized view, 150 ALR 958.

Motive in bringing action or choosing the forum or venue as proper matter for cross-examination, 157 ALR 604.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, 159 ALR 1413; 73 ALR2d 769.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident, 170 ALR 7; 64 ALR2d 1151.

Admissibility of declarations by testator on issue of revocation of will, 172 ALR 354.

Application of statute excluding testimony of one person because of death of another when invoked by or against one who sues or defends in two capacities, only one of which is within the statute, 172 ALR 714.

Admissibility against beneficiary of life or accident insurance policy of statements of third persons included in or with proof of death, 1 ALR2d 365.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal-injury or death action carries liability insurance, 4 ALR2d 761.

Admissibility of evidence as to financial condition of debtor on issue as to payment of debt, 9 ALR2d 205.

Proof of prospective earning capacity of student or trainee, or of its loss, in action for personal injury or death, 15 ALR2d 418.

Admissibility of declaration of persons other than members of family as to pedigree, 15 ALR2d 1412.

Admissibility of evidence that defendant in negligence action has paid third persons on claims arising from the same transaction or incident as plaintiff's claim, 20 ALR2d 304.

Admissibility of evidence as to tire tracks or marks on or near highway, 23 ALR2d 112.

Physiological or psychological truth and deception tests, 23 ALR2d 1306.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary, 28 ALR2d 857.

Reference by counsel for prosecution in opening statement to matters which he does not later attempt to prove as ground for new trial, reversal, or modification, 28 ALR2d 972.

Mode of establishing that information obtained by illegal wire tapping has or has not led to evidence introduced by prosecution, 28 ALR2d 1055.

Lack of proper automobile registration or operator's license as evidence of operator's negligence, 29 ALR2d 963.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 31 ALR2d 190.

Footprints as evidence, 35 ALR2d 856.

Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent, 42 ALR2d 1055.

Admissibility, in railroad crossing accident case, of evidence of other functional failures of railroad crossing devices and appliances of the same kind at other times, 46 ALR2d 935.

Blood grouping tests, 46 ALR2d 1000.

Prejudicial effect of prosecuting attorney's misconduct in physically exhibiting to jury objects or items not introduced as evidence, 46 ALR2d 1423.

Admissibility in evidence of rules of defendant in action for negligence, 50 ALR2d 16.

Admissibility in evidence of colored photographs, 53 ALR2d 1102.

Admissibility of evidence as to experiments or tests in civil action for death,

injury, or property damage against electric power company or the like, 54 ALR2d 922.

Admissibility and permissible use, in malicious prosecution action, of documentary evidence showing that prior criminal proceedings against instant plaintiff were terminated in his favor, 57 ALR2d 1086.

Admissibility in evidence of aerial photographs, 57 ALR2d 1351.

Propriety, in trial of civil action, of use of skeleton or model of human body or part, 58 ALR2d 689.

Prejudicial effect of admission, in personal injury action, of evidence as to financial or domestic circumstances of plaintiff, 59 ALR2d 371.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children, and the like, 62 ALR2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix, 62 ALR2d 1083.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident, 64 ALR2d 1151.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident, 64 ALR2d 1296; 15 ALR5th 119.

Admissibility of evidence of value or extent of decedent's estate in action against estate for reasonable value of services furnished decedent, 65 ALR2d 945.

Propriety of permitting plaintiff in personal injury action to exhibit his person to jury, 66 ALR2d 1334.

Admissibility, in civil case involving usury issue, of evidence of other assertedly usurious transactions, 67 ALR2d 232.

Admissibility and propriety, in homicide prosecution, of evidence as to deceased's spouse and children, 67 ALR2d 731.

Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing, 68 ALR2d 903.

Admissibility, on issue of defendant's negligence in respect of condition of place where plaintiff was injured, of evidence of prior accidents or injuries at same place, 70 ALR2d 167; 21 ALR4th 472.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, 73 ALR2d 769.

Counsel's right in arguing civil case to read medical or other learned treatises to the jury, 72 ALR2d 931.

Admissibility, in wrongful death action, of photograph of decedent made in his lifetime, 74 ALR2d 928.

Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance, 76 ALR2d 354.

Admissibility of experimental evidence as to explosion, 76 ALR2d 402.

Admissibility of experimental evidence to show visibility or line of vision, 78 ALR2d 152.

Admissibility of experimental evidence, skidding tests, or the like, relating to speed or control of motor vehicle, 78 ALR2d 218.

Admissibility, in wrongful death action brought for benefit of minor children, of evidence of decedent's desertion, nonsupport, abandonment, or the like, of said children, 79 ALR2d 819.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 ALR2d 1224.

Counsel's use, in trial of condemnation proceeding, of chart, diagram or blackboard, not introduced in evidence, relating to damages or the value of the property condemned, 80 ALR2d 1270.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in an action for personal injury or death, 81 ALR2d 733.

Propriety, in trial of criminal case, of use of skeleton or model of human body or part, 83 ALR2d 1097.

Admissibility in evidence of braces, crutches, or other prosthetic or orthopedic devices used by injured party, 83 ALR2d 1271.

Propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident, 85 ALR2d 512.

Propriety of reopening criminal case in order to present omitted or overlooked evidence, after submission to jury but before return of verdict, 87 ALR2d 849.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 ALR2d 926.

Admissibility of evidence of accused's good reputation as affected by remoteness of time to which it relates, 87 ALR2d 968.

Suspension or revocation of driver's license for refusal to take sobriety test, 88 ALR2d 1064.

Ruling on offer of proof as error, 89 ALR2d 279.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 91 ALR2d 1046.

Admissibility in evidence of sample or samples of article or substance of which the quality, condition, or the like is involved in litigation, 95 ALR2d 681.

Admissibility, in wrongful death action for pecuniary loss suffered by next of kin, etc., of evidence as to decedent's personal qualities with respect to sobriety or morality, 99 ALR2d 972.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages, 9 ALR3d 692.

Admissibility, in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent payments made by accused to victim, 10 ALR3d 572.

Workmen's compensation: use of medical books or treatises as independent evidence, 17 ALR3d 993.

Eminent domain: admissibility of photographs or models of property condemned, 23 ALR3d 825.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land in issue of value in eminent domain proceedings, 26 ALR3d 780.

Race or color of child as admissible in evidence on issue of legitimacy or paternity, or as basis of rebuttal or exception to presumption of legitimacy, 32 ALR3d 1303.

Admissibility of evidence of family circumstances of parties in personal injury actions, 37 ALR3d 1082.

Products liability: admissibility of evidence of other accidents to prove hazardous nature of product, 42 ALR3d 780.

Admissibility of evidence that injured plaintiff received benefits from a collateral source, on issue of malingering or motivation to extend period of disability, 47 ALR3d 234.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

Admissibility of lie detector test taken upon stipulation that the result will be admissible in evidence, 53 ALR3d 1005.

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity, 59 ALR3d 659.

Admissibility of evidence of subsequent repairs or other remedial measures in products liability cases, 74 ALR3d 1001; 38 ALR4th 583.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely, 79 ALR3d 1156.

Municipal corporation's safety rules or regulations as admissible in evidence in action by private party against municipal corporation or its officers or employees for negligent operation of vehicle, 82 ALR3d 1285.

Products liability: admissibility, against manufacturer, of product recall letter, 84 ALR3d 1220.

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case, 86 ALR3d 1170.

Propriety and prejudicial effect of informing jury that accused has taken polygraph test, where results of test would be inadmissible in evidence, 88 ALR3d 227.

Admissibility of evidence of, or propriety of comment as to, plaintiff spouse's remarriage, or possibility thereof, in action for damages for death of other spouse, 88 ALR3d 926.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases, 89 ALR3d 783.

Admissibility of hypnotic evidence at criminal trial, 92 ALR3d 442.

Admissibility of evidence of subsequent criminal offenses as affected by proximity as to time and place, 92 ALR3d 545.

Admissibility of photographs of stolen property, 94 ALR3d 357.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix, 2 ALR4th 330.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases, 2 ALR4th 500.

Admissibility of evidence of accused's drug addiction or use to show motive for theft of property other than drugs, 2 ALR4th 1298.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 ALR4th 374.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief, 16 ALR4th 810.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place, 21 ALR4th 472.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution of sexual offense, 31 ALR4th 120.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 ALR4th 229.

Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 ALR4th 877.

Admissibility of bare footprint evidence, 45 ALR4th 1178.

Products liability: admissibility of defendant's evidence of industry custom or practice in strict liability action, 47 ALR4th 621.

Admissibility of voice stress evaluation test results or of statements made during test, 47 ALR4th 1202.

Products liability: admissibility of evidence of absence of other accidents, 51 ALR4th 1186.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains, 66 ALR4th 588.

Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 ALR4th 131.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 ALR4th 469.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 10 ALR5th 371.

Admissibility of evidence of polygraph test results, or offer or refusal to take test, in action for malicious prosecution, 10 ALR5th 663.

Admissibility of evidence in homicide case that victim was threatened by other than defendant, 11 ALR5th 831.

Ineffective assistance of counsel: battered spouse syndrome as defense to homicide or other criminal offense, 11 ALR5th 871.

Admissibility of evidence of repairs, change of conditions, or precautions taken after accident—modern state cases, 15 ALR5th 119.

Sufficiency of evidence that witness in criminal case was hypnotized, for purposes of determining admissibility of testimony given under hypnosis or of hypnotically enhanced testimony, 16 ALR5th 841.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 ALR5th 672.

Admissibility of government factfinding in products liability actions, 29 ALR5th 534.

Admissibility of evidence relating to accused's attempt to commit suicide, 73 ALR5th 615.

Evidence of trailing by dogs in criminal cases, 81 ALR5th 563.

Admissibility of results of presumptive tests indicating presence of blood on object, 82 ALR5th 67.

Admissibility of computer-generated animation, 111 ALR5th 529.

Admissibility and use of evidence of nonuse of bicycle helmets, 2 ALR6th 429.

Admissibility in state criminal case of results of polygraph (lie detector) test Post *Daubert* cases, 10 ALR6th 463.

Admissibility of evidence of prior accidents or injuries at same place, 15 ALR6th 1.

Admissibility and effect of evidence or comment on party's military service or lack thereof, 24 ALR6th 747.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed. 541.

24-4-402. Relevant evidence generally admissible; irrelevant evidence not admissible.

All relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules, as prescribed pursuant to constitutional or statutory authority, applicable in the court in which the matter is pending. Evidence which is not relevant shall not be admissible. (Code 1981, § 24-4-402, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — General admissibility of relevant evidence, Fed. R. Evid. 402.

Editor's notes. — In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Sections 24-4-401 and 24-4-403, which may also be applicable to this Code section.

JUDICIAL DECISIONS

Analysis

General Consideration
Irrelevant Evidence in Civil Cases
Irrelevant Evidence in Criminal Cases

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5744, former Code 1933, § 38-201, and former O.C.G.A. § 24-2-1 are included in the annotations for this Code section.

Irrelevant evidence is inadmissible. — Evidence which does not in any reasonable degree tend to establish the probability of the issues of fact in controversy is irrelevant and inadmissible. Horne v. State, 125 Ga. App. 40, 186 S.E.2d 542 (1971) (decided under former Code 1933, § 38-201).

Most acceptable test for relevancy is whether the evidence offered renders the desired inference more probable than it would be without the evidence. Southern Ry. v. Lawson, 256 Ga. 798, 353 S.E.2d 491 (1987) (decided under former O.C.G.A. § 24-2-1).

Even when irrelevant evidence is admitted over timely objection, it affords no cause for a new trial, unless the nature of the evidence is such as reasonably to prejudice the rights of the objecting party. Continental Trust Co. v. Bank of Harrison, 36 Ga. App. 149, 136 S.E. 319 (1926) (decided under former Civil Code 1910, § 5744).

It is not reversible error to admit evidence that is merely irrelevant and immaterial. Mickle v. Moore, 188 Ga. 444, 4 S.E.2d 217 (1939) (decided under former Code 1933, § 38-201); Henderson v. State, 153 Ga. App. 801, 266 S.E.2d 522 (1980) (decided under former Code 1933, § 38-201).

Evidence immaterial. — If evidence is offered to prove a fact not in issue, the evidence is then properly said to be immaterial. MacNerland v. Johnson, 137 Ga. App. 541, 224 S.E.2d 431 (1976) (decided under former Code 1933, § 38-201).

Immateriality need not require reversal. — Mere fact that evidence is "immaterial" does not necessarily mean that its admission into evidence constitutes reversible error. Evidence which is immaterial will not always require reversal, since prejudice also must appear. Clarke v. State, 159 Ga. App. 843, 285 S.E.2d 270

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(1981) (decided under former Code 1933, § 38-201).

Irrelevant Evidence in Civil Cases

Evidence not relevant. — See Atlantic Coca-Cola Bottling Co. v. Shipp, 170 Ga. 817, 154 S.E. 243, answer conformed to, 41 Ga. App. 705, 154 S.E. 385 (1930) (race) (decided under former Civil Code 1910, § 5744); Gaskill v. Brown, 103 Ga. App. 33, 118 S.E.2d 113 (1961) (decided under former Code 1933, § 38-201); Taylor v. Marsh, 107 Ga. App. 575, 130 S.E.2d 770 (1963) (decided under former Code 1933, § 38-201); DeFreese v. Beasley, 114 Ga. App. 832, 152 S.E.2d 772 (1966) (decided under former Code 1933, § 38-201); Schaefer v. Mayor of Athens, 120 Ga. App. 301, 170 S.E.2d 339 (1969) (decided under former Code 1933, § 38-201); Butler v. Garrison, 123 Ga. App. 645, 182 S.E.2d 185 (1971) (materialman's dealing with contractor unrelated to case) (decided under former Code 1933, § 38-201); Lane v. Morrison, 124 Ga. App. 316, 183 S.E.2d 533 (1971) (documentary evidence) (decided under former Code 1933, § 38-201); City Council v. Lee, 153 Ga. App. 94, 264 S.E.2d 683 (1980); Ideal Pool Corp. v. Champion, 157 Ga. App. 380, 277 S.E.2d 753 (1981) (insurance) (decided under former Code 1933, § 38-201); Auto Rental & Leasing, Inc. v. Blizzard, 159 Ga. App. 533, 284 S.E.2d 47 (1981) (net worth) (decided under former Code 1933, § 38-201); Wyatt v. State, 179 Ga. App. 327, 346 S.E.2d 387 (1986) (nonsuspension of driver's license in DUI case) (decided under former O.C.G.A. § 24-2-1); Craig v. State, 205 Ga. App. 691, 423 S.E.2d 417 (1992) (defendant's previous encounters with arresting officers) (decided under former O.C.G.A. § 24-2-1).

Ethnic identity of unknown driver not irrelevant. — In a wrongful death case where the jury determined that an unknown third driver was 90 percent at fault in causing an accident, it was not error to allow a witness to characterize the third driver as Hispanic. The evidence was relevant to show that the witness was paying sufficient attention and was close enough to the vehicle to identify the driver, and the court would not assume that characterizing someone as Hispanic was prejudicial or that the jurors acted out of prejudice. State Farm v. Nelson, 296 Ga. App. 47, 673 S.E.2d 588 (2009) (decided under former O.C.G.A. § 24-2-1).

Irrelevant Evidence in Criminal Cases

Evidence not relevant. — See Walker v. State, 86 Ga. App. 875, 72 S.E.2d 774 (1952) (decided under former Code 1933, § 38-201); Davis v. State, 115 Ga. App. 338, 154 S.E.2d 462 (1967) (decided under former Code 1933, § 38-201); Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185 (1968) (decided under former Code 1933, § 38-201); Dawson v. State, 120 Ga. App. 242, 170 S.E.2d 45 (1969) (decided under former Code 1933, § 38-201); Mikle v. State, 236 Ga. 748, 225 S.E.2d 275 (1976) (prior criminal record) (decided under former Code 1933, § 38-201); Strickland v. State, 247 Ga. 219, 275 S.E.2d 29, cert. denied, 454 U.S. 882, 102 S. Ct. 365, 70 L. Ed. 2d 192 (1981) (mental capability of accused to stand trial at a future date) (decided under former Code 1933, § 38-201).

Because the trial court properly found that testimony tending to show that the defendant's daughter possessed the methamphetamine the defendant was charged with possessing was hearsay, and testimony from the defendant's grandson was irrelevant, the defendant's conviction for possession was affirmed on appeal. Corbin v. State, 287 Ga. App. 194, 651 S.E.2d 101 (2007) (decided under former O.C.G.A. § 24-2-1).

Results of drug test irrelevant. — Trial court did not err in disallowing defendant's testimony as to results of a test for use of illegal drugs. Whether defendant tested negative for drug use at any time is not relevant to, and did not tend to prove or disprove, whether defendant trafficked in or possessed cocaine as charged in the indictment. Montgomery v. State, 204 Ga. App. 534, 420 S.E.2d 67 (1992) (decided under former O.C.G.A. § 24-2-1).

Name of bookie irrelevant. — Even though inquiry concerning a victim's gambling activities in general may have been

relevant, the name of the bookie's bookie had no direct or indirect relevancy to defendant's guilt or innocence. Sorrells v. State, 236 Ga. 571, 476 S.E.2d 571 (1996) (decided under former O.C.G.A. § 24-2-1).

Expert's testimony on Intoxilyzer 5000 irrelevant. — Trial court did not err when it excluded an expert witness's testimony about the Intoxilyzer 5000 and the proper procedures pertaining to refusals of the breath test because the state was simply required to show that the defendant was a less safe driver as a result of alcohol that the defendant had consumed and the expert's testimony about the breath test was irrelevant. Stone v. State, 248 Ga. App. 190, 546 S.E.2d 787 (2000) (decided under former O.C.G.A. § 24-2-1).

Trial court did not abuse the court's discretion in excluding expert evidence defendant sought to introduce that allegedly would have attacked the results of defendant's breath test in defendant's driving while under the influence of alcohol case as the expert evidence was too remote and uncertain to be relevant to the issue for which defendant sought to introduce the evidence, that of whether the breath test machine malfunctioned. Viau v. State, 260 Ga. App. 96, 579 S.E.2d 52 (2003) (decided under former O.C.G.A. § 24-2-1).

Videotape evidence irrelevant and excluded. — In action alleging obstruction of an officer, the trial court did not err in excluding a videotape of the party from evidence as not relevant because the videotape could not have been used to impeach the deputy's testimony; the videotape did not depict the encounter between the deputy and defendant but only depicted events prior to the deputy's arrival at defendant's home. Schroeder v. State, 261 Ga. App. 879, 583 S.E.2d 922 (2003) (decided under former O.C.G.A. § 24-2-1).

Trial court did not err in excluding a videotape of a statement defendant gave to a detective at the time of the defendant's arrest as the statement was not offered to rebut a charge of recent fabrication, improper influence, or improper motive and was pure hearsay. Watson v. State, 278 Ga. 763, 604 S.E.2d 804 (2004) (decided under former O.C.G.A. § 24-2-1).

Threadbare evidence based on bare suspicion of a third party held inadmissible and excluded. — Defendant's proffered evidence that a third party told the proffered witness that the third party had killed people before and buried the people in the woods and that the third party then asked the witness if the witness remembered a policeman, who did not work for the city anymore, was properly excluded as it was too threadbare to be admissible and did nothing more than toss a bare suspicion in the direction of a third party. Watson v. State, 278 Ga. 763, 604 S.E.2d 804 (2004) (decided under former O.C.G.A. § 24-2-1).

Questions about drug involvement irrelevant. — Trial court properly limited defendant's cross-examination of a drug dealer who defendant claimed was the actual shooter who killed the victim by excluding all questions about the drug dealer's involvement in selling drugs as those questions were irrelevant to the murder trial. Lewis v. State, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005) (decided under former O.C.G.A. § 24-2-1).

While a defendant was entitled to introduce relevant and admissible testimony tending to show that another person committed the crime for which the defendant was tried, the trial court did not abuse the court's discretion in excluding evidence that an individual the defendant went to go visit on the night of the arrest was a known drug dealer and had been arrested on drug charges, as there was no evidence tending to connect that person to the marijuana found in the defendant's vehicle; hence, the evidence failed to raise a reasonable inference of the defendant's innocence, and did not directly connect the other person with the corpus delicti, or show that the other person recently committed a crime of the same or similar nature. Gerlock v. State, 283 Ga. App. 229, 641 S.E.2d 240 (2007) (decided under former O.C.G.A. § 24-2-1).

Questions about relationship with nondefendant irrelevant. — Trial court did not abuse the court's discretion in disallowing a defendant's cross-examination of a victim's mother, about her marriage to the defendant's son as to whether the mother was "debating" with her husband "over someone giving

Irrelevant Evidence in Criminal Cases (Cont'd)

the other person venereal disease," on relevancy grounds as the line of questioning involved the mother's relationship with her husband, rather than with the defendant. Brown v. State, 280 Ga. App. 884, 635 S.E.2d 240 (2006) (decided under former O.C.G.A. § 24-2-1).

Expert on alco-sensor test properly excluded. — Trial court did not abuse the court's discretion in refusing to admit the testimony of a defendant's expert because the mistake charged to an arresting officer in administering an alco-sensor test too soon after the officer first stopped the defendant would not have affected the test result to which the arresting officer testified since the defendant admitted that defendant had been drinking, and the trial court admitted only the officer's testimony that the alco-sensor produced a positive result. Oliver v. State, 294 Ga. App. 299, 669 S.E.2d 162 (2008) (decided under former O.C.G.A. § 24-2-1).

Admission of challenged evidence deemed harmless error. — In a prosecution against the defendant for child molestation, enticing a child for indecent purposes, and exhibiting pornography to a minor, even if the appeals court assumed that the word "catheter" should have been redacted from what the defendant apparently conceded was an otherwise relevant list of items found in a search, the trial court's failure to do so was harmless error, because it was highly improbable that such failure contributed to the verdict given the overwhelming evidence of the defendant's guilt. Goldey v. State, 289 Ga. App. 198, 656 S.E.2d 549 (2008) (decided under former O.C.G.A. § 24-2-1).

Evidence of abuse of victim's sibling irrelevant. — In a child molestation case involving the defendant's child, the trial court properly excluded as irrelevant evidence that the child's stepparent had sexually molested the child's sibling. There was no evidence that the child had been molested by the stepparent or by anyone else besides the defendant, and the defendant did not show how the child might have been affected or improperly influenced by the sibling's allegations. French v. State, 288 Ga. App. 775, 655 S.E.2d 224 (2007) (decided under former O.C.G.A. § 24-2-1).

24-4-403. Exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (Code 1981, § 24-4-403, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons, Fed. R. Evid. 403

Editor's notes. — In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Sections 24-4-401 and 24-4-402, which may also be applicable to this Code section.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-201 and former O.C.G.A. § 24-2-1 are included in the annotations for this Code section.

Evidence which is relevant may be excluded because the probative worth or value of the evidence is outweighed by the tendency of the evidence confuse the issues, or the jury. MacNerland v. Johnson, 137 Ga. App. 541, 224 S.E.2d 431 (1976)

(decided under former Code 1933, § 38-201).

Trial court properly excluded the patients' request to admit photographs of their stillborn fetus in their medical malpractice action as there was no dispute that the fetus suffered from skin peeling, and while the issue was slightly probative in the case, it was substantially outweighed by the danger of unfair prejudice. Steele v. Atlanta Maternal-Fetal Med., P.C., 271 Ga. App. 622, 610 S.E.2d 546 (2005), overruled on other grounds, Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009) (decided under former O.C.G.A. § 24-2-1).

Federal interpretation on exclusion of relevant evidence for "unfair prejudice". — The Fifth Circuit held that a trial court's exclusion of evidence under Fed. R. Evid. 403 as prejudicial in a bench trial was improper; excluding relevant evidence in a bench trial because the evidence is cumulative or a waste of time is clearly a proper exercise of the judge's power, but excluding relevant evidence on the basis of 'unfair prejudice' is a useless procedure since Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. In a bench trial, the same judge can also exclude those improper inferences from the judge's mind in reaching a decision. Gulf States Utilities Co. v. Ecodyne Corp., 635 F.2d 517 (5th Cir. 1981).

Evidence in medical malpractice cases. — In a medical malpractice action, given that the admission of expert testimony that the doctor breached the standard of care in performing two 1998 surgeries on the patient would have arguably forced that doctor to defend against time-barred malpractice claims, the trial court was authorized to conclude that the substantially prejudicial impact of that evidence far outweighed any probative value. Miller v. Cole, 289 Ga. App. 471, 657 S.E.2d 585 (2008) (decided under former O.C.G.A. § 24-2-1).

Evidence of FTC order as to medical procedures may be admissible when the probative value of the evidence is not substantially outweighed by the fact that the admission of the evidence will create undue prejudice, confuse the issues, or mislead the jury. Pound v. Medney, 176 Ga. App. 756, 337 S.E.2d 772 (1985) (decided under former O.C.G.A. § 24-2-1).

Prejudicial impact outweighed probative value in contract action. — In a breach of contract suit brought by a contractor who was engaged to advertise a computer program, the trial court properly excluded as irrelevant evidence regarding the purported illegality of the sale of the program as the reason why the defendants stopped selling the program was irrelevant to the issue of whether the contractor was owed commissions from past sales; even if it was relevant, the trial court was authorized to conclude that the substantially prejudicial impact of the evidence far outweighed any probative value. Smith v. Saulsbury, 286 Ga. App. 322, 649 S.E.2d 344 (2007) (decided under former O.C.G.A. § 24-2-1).

Prejudicial effect of evidence of insurance coverage. — Pedestrian and the pedestrian's spouse sued a driver over an auto accident. The trial court properly refused to allow plaintiffs to ask whether the driver had entered into an agreement with their uninsured motorist (UM) carrier in exchange for testifying as the trial court could have reasonably concluded that the prejudice resulting from revealing the UM policy outweighed any probative value of evidence of the carrier's waiver of subrogation claims against the driver. McClellan v. Evans, 294 Ga. App. 595, 669 S.E.2d 554 (2008) (decided under former O.C.G.A. § 24-2-1).

Federal interpretation on discretion afforded for admission of evidence. — The Eleventh Circuit noted that, in making the Fed. R. Evid. 403 determination as to whether the probative value of evidence is substantially outweighed by its prejudicial effect, the trial court is accorded broad discretion that will be reviewed only for clear abuse. United States v. King, 713 F.2d 627 (11th Cir. 1983).

24-4-404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) Evidence of a person's character or a trait of character shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion, except for:

(1) Evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under paragraph (2) of this subsection, evidence of the same trait of character of the accused offered by the prosecution;

(2) Subject to the limitations imposed by Code Section 24-4-412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same; or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; or

(3) Evidence of the character of a witness, as provided in Code Sections 24-6-607, 24-6-608, and 24-6-609.

(b) Evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The prosecution in a criminal proceeding shall provide reasonable notice to the defense in advance of trial, unless pretrial notice is excused by the court upon good cause shown, of the general nature of any such evidence it intends to introduce at trial. Notice shall not be required when the evidence of prior crimes, wrongs, or acts is offered to prove the circumstances immediately surrounding the charged crime, motive, or prior difficulties between the accused and the alleged victim. (Code 1981, § 24-4-404, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Character evidence; crimes or other acts, Fed. R. Evid. 404. Notice of prosecution's intent to present evidence of similar transactions, Ga. Sup. Ct. R. 31.3.

Law reviews. — For article, "Admissibility of Evidence of a Party's Prior Intemperate Habits on the Issue of Intoxication at the Time of An Accident," see 17 Mercer L. Rev. 347 (1966). For annual survey of law on evidence, see 62 Mercer L. Rev. 125 (2010).

For note discussing res gestae, see 3 Ga. B.J. 69 (1940).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3680, former Code 1868, § 3704, former Code 1873, § 3757, former Code 1882, § 3757, former Civil Code 1895, § 5159, former Penal Code 1895, § 993, former Civil Code 1910, § 5745, former Penal Code 1910, § 1019, former Code 1933, § 38-202, and former O.C.G.A. § 24-2-2 are included in the annotations for this Code section.

Character defined. — Character in legal parlance has the same meaning as reputation; that is, what one's fellows say about one. Simpkins v. State, 149 Ga. App. 763, 256 S.E.2d 63 (1979) (decided under former Code 1933, § 38-202).

Character evidence restricted to general reputation. — Admissibility of character evidence depends upon the general reputation of the person in the community, not what the witness knows personally about the subject. Smith v. State, 153 Ga. App. 519, 265 S.E.2d 852 (1980) (decided under former Code 1933, § 38-202).

Use of character evidence. — Evidence as to character is irrelevant and inadmissible unless the evidence is used to show the character of the witness for veracity, or intended specifically to be used in the impeachment of witnesses for bad character, or equally to rebut an attempt at impeachment by a showing of good character. Edwards v. Simpson, 123 Ga. App. 44, 179 S.E.2d 266 (1970) (decided under former Code 1933, § 38-202).

Evidence regarding the character of a defendant is generally inadmissible unless the defendant puts defendant's character in issue, and evidence of independent offenses committed by a defendant is generally inadmissible due to the inherently prejudicial nature and minimal probative value of the evidence. Henderson v. State, 204 Ga. App. 884, 420 S.E.2d 813 (1992) (decided under former O.C.G.A. § 24-2-2).

General character of parties and especially their conduct in other transactions are irrelevant matters unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct. Vaughn v. Metro. Prop. & Cas. Ins. Co., 260 Ga. App. 573, 580 S.E.2d 323 (2003) (decided under former O.C.G.A. § 24-2-2).

When character is relevant, it must be the general character and not one specific act. Stanley v. Hudson, 78 Ga. App. 834, 52 S.E.2d 567 (1949) (decided under former Code 1933, § 38-202); Taylor v. Marsh, 107 Ga. App. 575, 130 S.E.2d 770 (1963) (decided under former Code 1933, § 38-202).

Introduction of character by defendant. — Defendant may offer proof of defendant's good character as a relevant fact tending to make defendant's guilt doubtful. Rentfrow v. State, 123 Ga. 539, 51 S.E. 596 (1905) (decided under former Penal Code 1895, § 993); Ware v. State, 18 Ga. App. 107, 89 S.E. 155 (1916) (decided under former Penal Code 1910, § 1019).

Introduction of character by prosecution. — State cannot put the general character of the defendant in a criminal case in issue. Moulder v. State, 9 Ga. App. 438, 71 S.E. 682 (1911) (decided under former Penal Code 1910, § 1019).

When defendant puts the defendant's character in issue, it is the right of the state to show that the character is bad. Strickland v. State, 12 Ga. App. 640, 77 S.E. 1070 (1913) (decided under former Penal Code 1910, § 1019).

General Consideration (Cont'd)

Trial court properly allowed a prosecutor to question defendant about any prior positive drug screens as the purpose was to impeach defendant's unsolicited assertion that the drug screen that was the basis of defendant's prosecution was defendant's only positive drug screen; accordingly, although character and conduct in other transactions is generally irrelevant unless defendant first puts defendant's character in issue, pursuant to former O.C.G.A. §§ 24-2-2 and 24-9-20(b) (see now O.C.G.A. §§ 24-4-404, 24-4-405 and 24-5-506), evidence may be used for impeachment purposes in order to disprove facts testified to by defendant pursuant to former O.C.G.A. § 24-9-82 (see now O.C.G.A. § 24-6-621). Lockaby v. State, 265 Ga. App. 527, 594 S.E.2d 729 (2004) (decided under former O.C.G.A. § 24-2-2).

Questioning of witness about potential offer by defendant to pay for testimony. — Trial court properly denied a motion for mistrial based on the prosecution's question to a witness as to whether a defendant offered money to the witness to testify on the defendant's behalf because evidence that the defendant attempted to influence the witness's testimony could be offered to show consciousness of guilt, and in any event, any harm was mitigated by the fact that the witness answered in the negative. Branton v. State, 292 Ga. App. 104, 663 S.E.2d 414 (2008), cert. denied, No. S08C1771, 2008 Ga. LEXIS 873 (Ga. 2008) (decided under former O.C.G.A. § 24-2-2).

Admitting evidence of independent offenses. — Evidence of independent offenses may be admitted if the state introduces the evidence for a proper purpose, if there is sufficient evidence to establish that the defendant actually committed the independent offenses, and if there is sufficient similarity between the charged offense and the independent offenses. Henderson v. State, 204 Ga. App. 884, 420 S.E.2d 813 (1992) (decided under former O.C.G.A. § 24-2-2).

Transactions of a similar nature or like character to those charged in the petition in which the defendant had engaged previously to the one in question are admissible in evidence. Deckner-Willingham Lumber Co. v. Turner, 171 Ga. 240, 155 S.E. 1 (1930) (decided under former Civil Code 1910, § 5745).

Similar acts are admissible in evidence, if committed or proposed at or about the same time, and when the same motive reasonably may be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against the defendant in the petition; this is so in transactions of similar nature or like character in which the defendant had engaged previously to the one in question. Tapley v. Youmans, 95 Ga. App. 161, 97 S.E.2d 365 (1957) (decided under former Code 1933, § 38-202).

Similar acts or omissions on other and different occasions are not generally admissible to prove like acts or omissions at a different time and place. Genins v. Geiger, 144 Ga. App. 244, 240 S.E.2d 745 (1977), cert. denied, 444 U.S. 991, 100 S. Ct. 521, 62 L. Ed. 2d 420 (1979) (decided under former Code 1933, § 38-202).

Cross-examination as to specific acts or transactions. — When the good character of a defendant is put in issue, evidence as to general bad character with respect to the particular trait may be shown in rebuttal; but in so doing it is not permissible to prove specific acts, except on crossexamination for the purpose of testing the knowledge of the defendant's witnesses, and except for the purpose of impeaching knowingly false statements made by the defendant personally to the jury or by the defendant's witnesses on cross-examination. Mimbs v. State, 189 Ga. 189, 5 S.E.2d 770 (1939) (decided under former Code 1933, § 38-202); Johnson v. State, 84 Ga. App. 745, 67 S.E.2d 246 (1951) (decided under former Code 1933, § 38-202); Underwood v. Atlanta & W. Point R.R., 105 Ga. App. 340, 124 S.E.2d 758, aff'd in part and rev'd in part, 218 Ga. 193, 126 S.E.2d 785 (1962) (decided under former Code 1933, § 38-202); Horton v. State, 228 Ga. 690, 187 S.E.2d 677 (1972) (decided under former Code 1933, § 38-202); Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311 (1973) (decided under former Code 1933, § 38-202);

Compher v. Georgia Waste Sys., 155 Ga. App. 819, 273 S.E.2d 200 (1980) (decided under former Code 1933, § 38-202); Curry v. State, 155 Ga. App. 829, 273 S.E.2d 411 (1980) (decided under former Code 1933, § 38-202).

Transactions with third parties. — It was error for the court to permit the defendant, over objection, to be interrogated on cross-examination about a transaction between the defendant and a third party, which was entirely separate and distinct. Head v. John Deere Plow Co., 71 Ga. App. 276, 30 S.E.2d 662 (1944) (decided under former Code 1933, § 38-202); Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 164 S.E.2d 318 (1968) (decided under former Code 1933, § 38-202); Dennis v. Dennis, 227 Ga. 164, 179 S.E.2d 238 (1971) (decided under former Code 1933, § 38-202).

"Mug shots" and other court appearances. — Admission in evidence of a "mug shot" of the defendant does not inject the defendant's character into evidence nor does the mere presence of the defendant on trial in some other court without more inject the defendant's character into evidence. Creamer v. State, 229 Ga. 704, 194 S.E.2d 73 (1972) (decided under former Code 1933, § 38-202); Tankersley v. State, 155 Ga. App. 917, 273 S.E.2d 862 (1980) (decided under former Code 1933, § 38-202); Jones v. State, 156 Ga. App. 56, 274 S.E.2d 99 (1980) (decided under former Code 1933, § 38-202); Price v. State, 159 Ga. App. 662, 284 S.E.2d 676 (1981) (decided under former Code 1933, § 38-202).

Bolstering of testimony. — It is permissible to strengthen a witness's testimony by evidence of matters showing its consistency and reasonableness, and tending to indicate that the facts probably were as stated by the witness. Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 164 S.E.2d 318 (1968) (decided under former Code 1933, § 38-202).

Evidence of a compromise is inherently harmful in spite of anything a judge might say in instructing a jury as to the weight to be given such evidence, and to allow testimony concerning evidence of compromise deprives a defendant of a fair and impartial trial. Boyd v. State, 146 Ga. App. 359, 246 S.E.2d 396 (1978), overruled on other grounds, Sabel v. State, 250 Ga. 640, 300 S.E.2d 663 (1983) (decided under former Code 1933, § 38-202).

Similar transaction hearing sufficient despite only summary of testimony. — Similar transaction hearing was sufficient even though, instead of calling a witness to testify, the state merely proffered a summary of a witness's testimony; the state introduced no hearsay evidence during trial, and the defendant had ample opportunity to cross-examine the similar transaction witness at trial. Ellis v. State, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, No. S07C0324, 2007 Ga. LEXIS 66 (2007) (decided under former O.C.G.A. § 24-2-2).

Standard of review. — Absent an abuse of discretion, a trial court's ruling as to the admissibility of similar transaction evidence will not be disturbed. Hostetler v. State, 261 Ga. App. 237, 582 S.E.2d 197 (2003) (decided under former O.C.G.A. § 24-2-2).

Appellate court will not disturb a trial court's determination that similar transaction evidence is admissible absent an abuse of discretion. Cain v. State, 268 Ga. App. 39, 601 S.E.2d 415 (2004) (decided under former O.C.G.A. § 24-2-2).

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Question established credibility. — Testimony was not prejudicial to the plaintiff when defense counsel asked the defendants' expert witness whether the expert had participated in a particular religious program and to describe the program. This question served only to help introduce the witness to the jury and to contribute to establishment of the expert's credibility; it did not present a basis for reversing the jury's verdict. Brannen v. Prince, 204 Ga. App. 866, 421 S.E.2d 76 (1992), overruled on other grounds, Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence on failure to pay. — In a complaint alleging failure to pay pursuant to a contract for accounting services, it was not an abuse of discretion to allow testimony which stated that the charges of other accountants and

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attorneys who worked for the defendant on the same project were approximately twice as much as their original estimates and that the defendant had failed to pay when the plaintiffs claimed that their charges were also double the amount originally estimated due to delays caused by the defendant in light of the similarity of the transactions involved and the issue of bad faith. Candler v. Davis & Upchurch, 204 Ga. App. 167, 419 S.E.2d 69 (1992) (decided under former O.C.G.A. § 24-2-2).

In an action involving an insurer's attempt to cancel a policy for nonpayment of a premium, evidence of the insured's history of tardy payment of bills was properly excluded. State Farm Mut. Auto. Ins. Co. v. Drury, 222 Ga. App. 196, 474 S.E.2d 64 (1996) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in ruling that a widow could not introduce evidence of an insurer's conduct towards insureds in two prior cases in which the court refused to honor incontestability clauses to demonstrate bad faith because the trial court was entitled to find that the prior cases were materially dissimilar from the widow's case, given that neither of those cases involved coverage under the group policy at issue and the revisions to the certificate of insurance forms made that year. Flynt v. Life of the South Ins. Co., 312 Ga. App. 430, 718 S.E.2d 343 (2011), cert. denied, 2012 Ga. LEXIS 305 (Ga. 2012) (decided under former O.C.G.A. § 24-2-2).

Evidence of defendant's character is admissible in fraud cases. German Am. Mut. Life Ass'n v. Farley, 102 Ga. 720, 29 S.E. 615 (1897) (decided under former Civil Code 1895, § 5159); Mays v. Mays, 153 Ga. 835, 113 S.E. 154 (1922), aff'd on other grounds, 33 Ga. App. 335, 126 S.E. 299 (1924) (decided under former Civil Code 1910, § 5745); Wimberly v. Toney, 175 Ga. 416, 165 S.E. 257 (1932) (decided under former Civil Code 1910, § 5745); Lawler v. Life Ins. Co. of Ga., 90 Ga. App. 481, 83 S.E.2d 281, rev'd on other grounds, 211 Ga. 246, 85 S.E.2d 1 (1954) (decided under former Code 1933, § 38-202); Kilgore v. United States, 467 F.2d 22 (5th Cir. 1972) (decided under former Code 1933, § 38-202).

While evidence of the insured's general good character is relevant and admissible in a suit on the insured's policy of insurance, since the insurer defends on the ground that the insured perpetrated a fraud on the insurer in procuring the insured's policy; yet, in a case where such fraud is shown by witnesses who swear positively to facts sustaining the defense of fraud, the jury is not authorized to find from evidence of the insured's good character alone that the plaintiff has shown plaintiff's right to recover by a preponderance of evidence. Life Ins. Co. v. Lawler, 211 Ga. 246, 85 S.E.2d 1 (1954) (decided under former Code 1933, § 38-202).

Other transactions showing fraud. — Evidence that parties charged with having been engaged in a fraudulent scheme to defraud laborers and materialmen in a building transaction had proposed, or had been engaged in, similar fraudulent schemes, is admissible to show fraudulent intent in the transaction in controversy, if it is shown that the other transactions were fraudulent and that the transactions were so connected in point of time and otherwise with the one in issue as to make it apparent that all were proposed or carried out in pursuance of a common fraudulent purpose. Deckner-Willingham Lumber Co. v. Turner, 171 Ga. 240, 155 S.E. 1 (1930) (decided under former Civil Code 1910, § 5745).

Other transactions showing fraud are admissible to show intent. Tapley v. Youmans, 95 Ga. App. 161, 97 S.E.2d 365 (1957) (decided under former Code 1933, § 38-202).

In an action for fraud involving a construction contract, evidence of unrelated contract disputes that defendant had purportedly evincing fraudulent intent was admissible. John W. Rooker & Assocs., Inc. v. Wilen Mfg. Co., 211 Ga. App. 519, 439 S.E.2d 740 (1993) (decided under former O.C.G.A. § 24-2-2).

Character irrelevant in negligence cases. — In actions arising out of automobile collisions, the issue is the negligence or nonnegligence of the operator at the time and place of the event, and each such

transaction is to be ascertained by its own circumstances and not by the reputation or character of the parties. Grannemann v. Salley, 95 Ga. App. 778, 99 S.E.2d 338 (1957) (decided under former Code 1933, § 38-202).

Reputation of a defendant or defendant's employee for exercising care in the defendant's actions is not admissible to show that due care was exercised on the occasion in question. Georgia Ports Auth. v. Mitsubishi Int'l Corp., 156 Ga. App. 304, 274 S.E.2d 699 (1980) (decided under former Code 1933, § 38-202).

In an action arising out of an auto accident, evidence of deceased's prior drug and alcohol use and prior conduct was irrelevant to the question of liability and the issue of damages. Taylor v. RaceTrac Petroleum, Inc., 238 Ga. App. 761, 519 S.E.2d 282 (1999) (decided under former O.C.G.A. § 24-2-2).

Evidence of quality of work from other employees. — In a suit to recover commissions advanced to an agent prior to termination of the agent's employment, testimony from the agent's other employers that the service the agent had rendered the agent's customers was not valuable, was properly excluded; the agent's conduct in transactions involving other employers was not relevant, and would unduly prejudice the jury. Duggan Ins. Agency, Inc. v. Altschul, 195 Ga. App. 458, 394 S.E.2d 119 (1990) (decided under former O.C.G.A. § 24-2-2).

Evidence physician failed board exam irrelevant. — In a medical malpractice case, the court's refusal to allow evidence that a physician did not pass the physician's board examination was not an abuse of discretion. Williams v. Memorial Medical Ctr., Inc., 218 Ga. App. 107, 460 S.E.2d 558 (1995) (decided under former O.C.G.A. § 24-2-2).

Evidence on lack of CPA license. — Trial court did not err in precluding the corporation's purported impeachment evidence about why the investor had not obtained the investor's CPA license as the evidence was irrelevant to the issues being tried. Kothari v. Patel, 262 Ga. App. 168, 585 S.E.2d 97 (2003) (decided under former O.C.G.A. § 24-2-2).

Evidence in legal malpractice cases. — Rules of the State Bar of Georgia, while not determinative of the standard of care applicable in a legal malpractice case, may be considered along with other facts and circumstances to determine whether an attorney treated a client with the requisite degree of skill and care. Watkins & Watkins, P.C. v. Williams, 238 Ga. App. 646, 518 S.E.2d 704 (1999) (decided under former O.C.G.A. § 24-2-2).

Outdated financial affidavit was relevant to claim that a spouse hid or dissipated assets. — In a divorce proceeding, it was not an abuse of discretion to reject the relevancy objection of a spouse to the admission of a financial affidavit that the spouse prepared several months before the trial on the ground that the affidavit was prejudicial because the affidavit made it appear that the spouse had attempted to hide assets; the relevancy objection was properly rejected because it was the position of the other spouse that the spouse had hidden or dissipated assets during the pendency of the divorce proceedings. Moxley v. Moxley, 281 Ga. 326, 638 S.E.2d 284 (2006) (decided under former O.C.G.A. § 24-2-2).

Evidence of similar acts in negligence cases. — Allegation that the defendant in a personal injury suit was aware that other persons had slipped and fallen under substantially the same circumstances was not subject to special demurrer as immaterial and irrelevant matter. Belk-Matthews Co. of Macon v. Thompson, 94 Ga. App. 331, 94 S.E.2d 516 (1956) (decided under former Code 1933, § 38-202).

It is a general rule that in a suit for negligence, evidence of similar acts or omissions on other and different occasions is not admissible. Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715 (1970) (decided under former Code 1933, § 38-202); (but see CSX Transp. v. Trism Specialized Carriers, 9 F. Supp. 2d 1374 (N.D. Ga. 1998) (decided under former O.C.G.A. § 24-2-2)).

As a general rule in all negligence actions, evidence of similar acts or omissions is not admissible; however, if proof of a similar accident or similar method of acting tends to prove some fact of the case on trial, the testimony falls within an exception — such as to show knowledge of a

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defect or causation, or to rebut a contention that it was impossible for the accident to happen in the manner claimed, or to show the prior existence of a dangerous condition or hazardous situation. Gunthorpe v. Daniels, 150 Ga. App. 113, 257 S.E.2d 199 (1979) (decided under former Code 1933, § 38-202).

In an action alleging that the owner of an apartment complex breached a duty to keep the premises safe, the trial court did not abuse the court's discretion when the court refused to admit evidence of a carjacking that occurred near the complex because the carjacking occurred on a public street and in a location of unknown proximity to the complex. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135 (2011), cert. denied, No. S12C0436, 2012 Ga. LEXIS 270 (Ga. 2012) (decided under former O.C.G.A. § 24-2-2).

Evidence of absence of similar acts in negligence cases. — If evidence of prior similar acts of negligence is not admissible, it follows that evidence of the absence of any such prior acts is equally inadmissible. Williams v. Naidu, 168 Ga. App. 539, 309 S.E.2d 686 (1983) (decided under former O.C.G.A. § 24-2-2).

Evidence of injuries sustained by other parties on prior occasions may be admitted for the purpose of showing that the defendant had been given notice of a dangerous condition and was thus negligent in allowing the condition to continue. Norfolk S. Ry. v. Thompson, 208 Ga. App. 240, 430 S.E.2d 371 (1993) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior impairment from injuries admissible. — Trial court properly denied a nurse's motion in limine to exclude evidence of injuries that the nurse sustained in a prior car accident pursuant to former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) in an action against a medical practice, arising from alleged injuries that the nurse sustained when an office door opened and hit the nurse in the face and head, as the injuries in the doorway accident were related to the prior injuries because the nurse claimed a permanent impairment to the nurse's ability to work in both situations; the nurse's claim that the permanent impairment claims from the injuries were not substantially similar went to the weight of the evidence and not to the admissibility. Kilday v. Kennestone Physicians Ctr., L.P., 296 Ga. App. 818, 676 S.E.2d 271 (2009) (decided under former O.C.G.A. § 24-2-2).

Evidence of subsequent careless occurrence excluded. — Testimony of a police officer, regarding the subsequent occurrence of a dog breaking loose and running into a bite-victim's yard, should have been excluded since the only logical purpose of such testimony was to raise the inference that if the dog owners were careless in their management of the dog on one occasion, the owners were probably careless on the occasion in question. Torrance v. Brennan, 209 Ga. App. 65, 432 S.E.2d 658 (1993) (decided under former O.C.G.A. § 24-2-2).

In product liability actions, evidence of other incidents involving the product is admissible and relevant to the issues of notice of a defect and punitive damages, provided there is a showing of substantial similarity; without a showing of substantial similarity, the evidence is irrelevant as a matter of law. Uniroyal Goodrich Tire Co. v. Ford, 218 Ga. App. 248, 461 S.E.2d 877 (1995), aff'd, 276 Ga. 226, 476 S.E.2d 565 (1996) (decided under former O.C.G.A. § 24-2-2).

Evidence plaintiff filed prior lawsuit not irrelevant. — Testimony elicited from plaintiff in a negligence action during cross-examination which showed that plaintiff had been involved in a single lawsuit 22 years prior to trial was not irrelevant or prejudicial because it was not indicative of litigiousness. Wages v. Sibran, Inc., 171 Ga. App. 14, 318 S.E.2d 679 (1984) (decided under former O.C.G.A. § 24-2-2).

Evidence of continuing process. — Preparation of 125 turkeys was a continuous process which took some time to complete. The jury could properly infer from the evidence showing and tending to show a lack of negligence in the handling of all of the turkeys during the continuance of the undertaking that the same lack of negligence attended the handling of the one turkey by which plaintiffs were

injured. Carsten v. Wilkes Supermarket of Gwinnett County, Inc., 181 Ga. App. 834, 353 S.E.2d 922 (1987) (decided under former O.C.G.A. § 24-2-2).

In a wrongful death action against a truck manufacturer based on product liability and negligence, evidence that no truck of the type and design involved had ever been recalled or had been the subject of a regulatory proceeding was relevant and admissible to show that defendant's design and manufacture was not negligent. Browning v. Paccar, Inc., 214 Ga. App. 496, 448 S.E.2d 260 (1994) (decided under former O.C.G.A. § 24-2-2).

Insurer's mishandling of related claim. — Trial court, in an employee's action against an employer for failure to pay no-fault insurance benefits, properly excluded evidence of the insurer's mishandling of a related workers' compensation claim on the issue of punitive damages. Williams v. Aetna Cas. & Sur. Co., 182 Ga. App. 684, 356 S.E.2d 690 (1987) (decided under former O.C.G.A. § 24-2-2).

Witness's testimony that defendant had a reputation for hurting people was admissible to explain the witness's reason for lying even though it incidentally put the defendant's character in issue. Smith v. State, 165 Ga. App. 669, 302 S.E.2d 414 (1983) (decided under former O.C.G.A. § 24-2-2).

Evidence of severance pay under similar circumstances. — In a suit to recover severance pay by employee remaining on job until sale of the company was consummated, the trial court did not err in allowing two former employees to testify that those employees had received severance pay upon their voluntary departure from the company after the sale of the corporation. Amax, Inc. v. Fletcher, 166 Ga. App. 789, 305 S.E.2d 601 (1983) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior claims against defendant. — In an action alleging that defendant jewelry store substituted a flawed diamond in a ring plaintiff brought in to be re-set, the trial court did not err in excluding evidence of prior disputes between defendant and other customers. Ament v. Bennett's Fine Jewelry, 249 Ga. App. 683, 549 S.E.2d 501 (2001) (decided under former O.C.G.A. § 24-2-2).

General partners' (GPs') motion for a new trial was properly denied as evidence of a GP's involvement in a prior suit was properly admitted. The prior suit was relevant to show a course of conduct because the prior suit also involved a breach of a partnership agreement, a breach of fiduciary duty, a nursing home, and accusations that the GP violated the plain language of the partnership agreement by failing to pay the limited partners their preferred returns. Kellett v. Kumar, 281 Ga. App. 120, 635 S.E.2d 310 (2006) (decided under former O.C.G.A. § 24-2-2).

Character evidence was admissible in the following cases. — See McNabb v. Lockhart & Thomas, 18 Ga. 495 (1855) (reputation of one charged with loss of money) (decided under former Code 1863, § 3680); DuBose v. DuBose, 75 Ga. 753 (1885) (character of spouse charged with cruelty) (decided under former Code 1882, § 3757); McClure v. State Banking Co., 6 Ga. App. 303, 65 S.E. 33 (1909) (character of one accused of forgery) (decided under former Civil Code 1895, § 5159); Georgia Southern & Florida Ry. v. Ransom, 5 Ga. App. 740, 63 S.E. 525 (1909), aff'd on other grounds, 10 Ga. App. 558, 73 S.E. 858 (1912) (character of employee against whom damages were sought for insulting conduct) (decided under former Civil Code 1895, § 5159); Conley v. Conley, 152 Ga. 184, 108 S.E. 777 (1921) (character of spouse charged with adultery) (decided under former Civil Code 1910, § 5745); Dalton v. Jackson, 66 Ga. App. 625, 18 S.E.2d 791 (1942) (character in civil action for rape) (decided under former Code 1933, § 38-202); Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1961) (character of spouse charged with cruelty) (decided under former Code 1933, § 38-202); Murray v. Clayton, 151 Ga. App. 720, 261 S.E.2d 455 (1979) (reputation of one for being married) (decided under former Code 1933, § 38-202); Shivers v. Webster, 224 Ga. App. 254, 480 S.E.2d 304 (1997) (action to enforce oral promise) (decided under former O.C.G.A. § 24-2-2).

Admission of character evidence in deprivation proceeding. — Evidence that a father had emotionally abused and neglected a child by repeatedly beating and threatening to kill the child's mother

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in the child's presence, along with evidence that the father also repeatedly beat the first wife, was relevant to whether the cause of the child's deprivation was likely to continue under O.C.G.A. § 15-11-94 and was admissible under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405). Davis v. Rathel, 273 Ga. App. 183, 614 S.E.2d 823 (2005) (decided under former O.C.G.A. § 24-2-2).

Evidence that parent missed medical appointments for child. — Evidence of the mother's missed health care appointments for her child did not relate to her conduct in other transactions, as contemplated by former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405), but was probative of causation, and thus, was admissible in the mother's medical malpractice action against the health care providers who reviewed the child's case before the child died. Fulton-DeKalb Hosp. Auth. v. Dawson, 270 Ga. 376, 509 S.E.2d 28 (1998) (decided under former O.C.G.A. § 24-2-2).

Evidence of parent's alleged suicide attempt in custody modification case. — In ruling on a parent's petition to modify custody, as the trial court made no finding of the existence of family violence under O.C.G.A. § 19-9-3(a)(4), whether the other parent had sought the help of a mental health professional or had attempted to commit suicide many years earlier was not probative of any material issue in the case. Therefore, such evidence was properly excluded. Moore v. Moore-McKinney, 297 Ga. App. 703, 678 S.E.2d 152 (2009) (decided under former O.C.G.A. § 24-2-2).

Character evidence was inadmissible in the following cases. — See Travelers Ins. Co. v. Sheppard, 85 Ga. 751, 12 S.E. 18 (1890) (beneficiary's character in insurance case) (decided under former Code 1882, § 3757); Stanley v. Willingham, 93 Ga. App. 421, 91 S.E.2d 791 (1956) (decided under former Code 1933, § 38-202); Dennis v. Dennis, 227 Ga. 164, 179 S.E.2d 238 (1971) (evidence from spouse's former divorce) (decided under former Code 1933, § 38-202); Ginsberg v. Termotto, 175 Ga. App. 265, 333 S.E.2d 120 (1985) (evidence of past good act irrelevant to issue of liability for utility expenses) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior consensual adulterous relationship not admitted. — Evidence of a dentist's prior consensual adulterous relationship was properly excluded from the evidence as the evidence was irrelevant to a former employee's claim against the dentist for assault and battery and would only have served to impugn the general character of the dentist. Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285 (2008) (decided under former O.C.G.A. § 24-2-2).

Character evidence is admissible in termination of parental rights cases. — Evidence of a parent's character is admissible in a termination of parental rights proceeding as the proceeding inherently involves character issues, specifically the parent's ability to provide proper parental care and control; while most civil cases require the factfinder to determine the truth only with regard to the discrete transactions in issue, termination cases require the factfinder to predict a parent's future conduct and ability to parent. Davis v. Rathel, 273 Ga. App. 183, 614 S.E.2d 823 (2005) (decided under former O.C.G.A. § 24-2-2).

Evidence admissible in negligent hiring and retention claim. — Evidence of a dentist's harassment of other employees and a patient was admissible under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) as to a former employee's claim of negligent hiring and retention because the evidence tended to show that the dental center that hired the dentist should have known that the dentist posed a risk of committing the same type of harassing behavior against the former employee. Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285 (2008) (decided under former O.C.G.A. § 24-2-2).

Pastor testifying to truthfulness of parties. — Trial court erred by admitting the testimony of a pastor regarding the reputation for truthfulness of a husband and a wife and that the pastor would believe the husband and the wife under

oath because the claims of the husband and wife did not involve the general character of the parties pursuant to former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405); the error was not harmless because the jury's verdict was based in large part upon the jury's determinations regarding the parties' credibility. Barnett v. Farmer, 308 Ga. App. 358, 707 S.E.2d 570 (2011) (decided under former O.C.G.A. § 24-2-2).

Criminal Cases

1. In General

Proper admission of similar transaction evidence requires the state to make three affirmative showings: (1) that the evidence is sought for a proper purpose; (2) that sufficient evidence exists to establish that the accused committed the similar transaction; and (3) that sufficient connection exists between the similar transaction and the crime charged so that proof of the former tends to prove the latter. Rice v. State, 217 Ga. App. 456, 458 S.E.2d 368 (1995) (decided under former O.C.G.A. § 24-2-2).

Test of admissibility of evidence of other criminal acts by the defendant is not the number of similarities between the two incidents, rather, such evidence may be admitted if the evidence is substantially relevant for some purpose other than to show a probability that the defendant committed the crime on trial because the defendant is a man of criminal character; similarity is an important factor in determining the admissibility of the extrinsic crime, however, it is not the only factor, nor is it necessarily the controlling factor. The ultimate issue for admissibility is whether the evidence of other crimes has relevance to the issues in the trial of the case at bar. Parnell v. State, 260 Ga. App. 213, 581 S.E.2d 263 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting similar transaction evidence because all of the crimes occurred in a relatively small area and reflected a similar modus operandi; the crimes were sufficiently similar to the crime against the victim. Alatise v. State, 291 Ga. 428, 728 S.E.2d 592 (2012) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting similar transaction testimony that 15 years before, the defendant had bitten the witness's parent. The evidence was offered to show intent and course of conduct; in both the previous incident and the one for which the defendant was being tried, the defendant bit the party with whom the defendant was fighting, drew blood and inflicted visible injuries, used the tools at hand, and involved multiple other parties; and the trial court did not err in finding that the evidence was more probative than prejudicial despite its age. Dunham v. State, 315 Ga. App. 901, 729 S.E.2d 45 (2012) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting similar transaction evidence because the state introduced the evidence for the purpose of showing defendant's state of mind and course of conduct. Lewis v. State, 317 Ga. App. 218, 735 S.E.2d 1 (2012) (decided under former O.C.G.A. § 24-2-2).

Degree of similarity that is required. — When similar transaction evidence is being introduced to prove motive, intent, or bent of mind, it requires a lesser degree of similarity to meet the test of admissibility than when such evidence is being introduced to prove identity; all that is required is that the incidents are sufficiently similar such that proof of the earlier event helps prove an element of the later crime. Cain v. State, 268 Ga. App. 39, 601 S.E.2d 415 (2004) (decided under former O.C.G.A. § 24-2-2).

Unlike similar transactions, prior difficulties between the defendant and the victim are not independent acts or occurrences, but are connected acts or occurrences arising from the relationship between the same people involved in the prosecution and are related and connected by such nexus; hence, evidence of motive, even though not an essential element of a crime, had such great probative value that it outweighed the inherent prejudice of such evidence, even if it incidentally placed the defendant's character in issue. LeBlanc v. State, 283 Ga. App. 434, 641 S.E.2d 646 (2007) (decided under former O.C.G.A. § 24-2-2).

Database match of DNA profile admissible. — Testimony concerning a

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1. In General (Cont'd)

CODIS database match of the defendant's DNA profile was relevant and admissible because the DNA evidence did not, in and of itself, constitute impermissible character evidence since no reference was made as to why the matching sample was collected or stored and no reference was made linking the defendant's DNA profile to other criminal activity. Scales v. State, 310 Ga. App. 48, 712 S.E.2d 555 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of other crime not generally admissible. — Testimony as to a crime other than that for which the defendant is being tried is not ordinarily admissible. Loughridge v. State, 181 Ga. 261, 182 S.E. 12 (1935) (decided under former Code 1933, § 38-202); Chambers v. State, 76 Ga. App. 269, 45 S.E.2d 724 (1947) (decided under former Code 1933, § 38-202); Wiggins v. State, 80 Ga. App. 258, 55 S.E.2d 842 (1949) (decided under former Code 1933, § 38-202); Mims v. State, 207 Ga. 118, 60 S.E.2d 373 (1950) (decided under former Code 1933, § 38-202); Kelley v. State, 98 Ga. App. 324, 105 S.E.2d 798 (1958) (decided under former Code 1933, § 38-202); Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185 (1968) (decided under former Code 1933, § 38-202); Dawson v. State, 120 Ga. App. 242, 170 S.E.2d 45 (1969) (decided under former Code 1933, § 38-202); Nooner v. State, 131 Ga. App. 563, 206 S.E.2d 660 (1974) (decided under former Code 1933, § 38-202); Perry v. State, 154 Ga. App. 559, 269 S.E.2d 63 (1980), overruled on other grounds, Joiner v. State, 231 Ga. App. 61, 497 S.E.2d 642 (1998) (decided under former Code 1933, § 38-202); State v. Johnson, 246 Ga. 654, 272 S.E.2d 321 (1980) (decided under former Code 1933, § 38-202).

Testimony that a defendant engaged in other criminal transactions is prejudicial to the defendant in the case for which the defendant is on trial, not because it has no probative value but because it has too much, as tending to indicate that defendant is of a criminal bent of mind and therefore more likely than the average citizen to have committed the act of which defendant is accused. Cardell v. State, 119 Ga. App. 848, 168 S.E.2d 889 (1969) (decided under former Code 1933, § 38-202).

General rule is that in a criminal trial evidence which in any manner shows or tends to show that the accused has committed other criminal acts is irrelevant and inadmissible as that evidence tends to place the accused's character into evidence. Perry v. State, 158 Ga. App. 349, 280 S.E.2d 390 (1981) (decided under former Code 1933, § 38-202); Bankston v. State, 159 Ga. App. 342, 283 S.E.2d 319 (1981), cert. denied, 454 U.S. 1154, 102 S. Ct. 1026, 71 L. Ed. 2d 311 (1982) (decided under former Code 1933, § 38-202).

Proof of other crimes is never admissible (except in cases when the defendant has personally put the defendant's character in issue) where its chief or only probative value consists in showing that the defendant is, by reason of the defendant's bad character, more likely to have committed the crime than the defendant otherwise would have been. To admit such evidence, it must have relevancy and probative value from some other point of view. Jones v. State, 159 Ga. App. 634, 284 S.E.2d 651 (1981) (decided under former Code 1933, § 38-202).

Trial court did not abuse the court's discretion in admitting evidence of prior and subsequent bad acts because the defendant's prior and subsequent physical abuse of the victim was relevant to showing the type of relationship that existed between them, as well as the defendant's motive, intent, and bent of mind in committing the charged offenses. Futch v. State, 316 Ga. App. 376, 730 S.E.2d 14 (2012) (decided under former O.C.G.A. § 24-2-2).

Exceptions to prohibition of evidence of other crimes. — When the extraneous crime forms part of the res gestae, or is one of a system of mutually dependent crimes, or is evidence of guilty knowledge, or may bear upon the question of the identity of the accused or articles connected with the offense, or is evidence of prior attempts by the accused to commit the same offense upon the victim as that for which the defendant stands charged, or when the proof of the extraneous crime tends to prove malice, intent, motive, or

the like, then its admission as evidence may be proper. Cawthon v. State, 119 Ga. 395, 46 S.E. 897 (1904) (decided under former Penal Code 1895, § 993); Wilson v. State, 173 Ga. 275, 160 S.E. 319 (1931) (decided under former Penal Code 1910, § 1019); Williams v. State, 51 Ga. App. 319, 180 S.E. 369 (1935) (decided under former Code 1933, § 38-202).

When evidence of other criminal transactions is a part of the res gestae or tends to show motive, or to show a course of conduct pointing toward and leading to the crime or to the concealment of the crime or the identity of the perpetrator thereof, such evidence is admissible as an exception to the general rule which makes evidence of other criminal transactions inadmissible under most circumstances. Richards v. State, 157 Ga. App. 601, 278 S.E.2d 63 (1981) (decided under former Code 1933, § 38-202).

Evidence of another crime is admissible when it is part of a course of criminal conduct if it is a part of the res gestae. Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627 (1981) (decided under former Code 1933, § 38-202).

Independent crimes are admissible to show motive, intent, plan, identity, bent of mind, or course of conduct. In order for these independent acts to be admissible it must be shown that the defendant was the perpetrator of the independent crime and that there is sufficient similarity of the former independent crime that it tends to prove the latter crime. Weathersby v. State, 262 Ga. 126, 414 S.E.2d 200 (1992) (decided under former O.C.G.A. § 24-2-2).

Explanation of why officer investigated defendant. — Because evidence of defendant's prior crimes was relevant to explain why a police officer investigated defendant, the trial court did not err in admitting the evidence. Smith v. State, 274 Ga. App. 852, 619 S.E.2d 358 (2005) (decided under former O.C.G.A. § 24-2-2).

Admission of sheriff's statements regarding run-ins with law. — Even if the mention by sheriff's deputies of the defendant's previous run-ins with the law had impermissibly placed the defendant's character at issue during the trial, any such error would have been harmless due to the overwhelming evidence of the defendant's guilt. Furthermore, none of the trial testimony at issue remotely suggested that the defendant had ever been convicted of a past crime. Moore v. State, 310 Ga. App. 106, 712 S.E.2d 126 (2011) (decided under former O.C.G.A. § 24-2-2).

Admission of evidence of defendant's prior misdemeanor convictions was harmless error. — Trial court did not commit reversible error when the court: (1) granted the state's motion in limine prohibiting admission of evidence that another person confessed to the crime; (2) permitted a police officer to explain the officer's conduct under former O.C.G.A. § 24-3-2; and (3) allowed the state to introduce evidence of defendant's prior misdemeanor convictions under former O.C.G.A.§§ 24-2-2 and 24-9-20(b) (see now O.C.G.A. §§ 24-4-404, 24-4-405, and 24-5-506); thus, defendant failed to show that counsel's trial strategies on these issues constituted ineffective assistance of counsel. Harris v. State, 279 Ga. 522, 615 S.E.2d 532 (2005) (decided under former O.C.G.A. § 24-2-2).

Testimony as to circumstances connected with the accused's arrest is admissible even though the testimony incidentally shows the commission of another crime. Humphries v. State, 154 Ga. App. 596, 269 S.E.2d 90 (1980) (decided under former Code 1933, § 38-202); Cleveland v. State, 155 Ga. App. 267, 270 S.E.2d 687 (1980) (decided under former Code 1933, § 38-202); Woodard v. State, 155 Ga. App. 533, 271 S.E.2d 671 (1980) (decided under former Code 1933, § 38-202).

When evidence is relevant for the purpose of showing the circumstances of the arrest, the evidence will not be excluded because the evidence incidentally shows the commission of another crime. Bryan v. State, 157 Ga. App. 635, 278 S.E.2d 177 (1981) (decided under former Code 1933, § 38-202).

Proof of other crime required. — In order to justify the admission of evidence relating to an independent crime committed by the accused, it is absolutely essential that there should be evidence establishing the fact that the independent crime was committed by the accused, and satisfactorily connecting that crime with

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1. In General (Cont'd)

the offense for which the accused is indicted. Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758 (1940) (decided under former Code 1933, § 38-202); Johnson v. State, 152 Ga. App. 624, 263 S.E.2d 509 (1979) (decided under former Code 1933, § 38-202); Albert v. State, 152 Ga. App. 708, 263 S.E.2d 685 (1979) (decided under former Code 1933, § 38-202); Sweeny v. State, 152 Ga. App. 765, 264 S.E.2d 260 (1979) (decided under former Code 1933, § 38-202); Rhodes v. State, 153 Ga. App. 306, 265 S.E.2d 110 (1980) (decided under former Code 1933, § 38-202); Smith v. State, 154 Ga. App. 497, 268 S.E.2d 714 (1980) (decided under former Code 1933, § 38-202); Haygood v. State, 154 Ga. App. 633, 269 S.E.2d 480 (1980) (decided under former Code 1933, § 38-202); Head v. State, 246 Ga. 360, 271 S.E.2d 452 (1980) (decided under former Code 1933, § 38-202); Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696 (1980) (decided under former Code 1933, § 38-202); State v. Johnson, 246 Ga. 654, 272 S.E.2d 321 (1980) (decided under former Code 1933, § 38-202).

Jury is to receive evidence of the commission of previous crimes only for the purposes specified, and not for the purpose of determining by this alone the guilt of the accused. Fitzgerald v. State, 52 Ga. App. 33, 182 S.E. 77 (1935) (decided under former Code 1933, § 38-202).

Evidence of the commission of independent crimes by the accused may be admitted even when the defendant is acquitted of the other offense. Albert v. State, 152 Ga. App. 708, 263 S.E.2d 685 (1979), conviction reversed, Albert v. Montgomery, 732 F.2d 865 (11th Cir. 1984) (holding that the principle of collateral estoppel prevents the introduction for any purpose of evidence of crime of which a defendant has been acquitted) (decided under former Code 1933, § 38-202).

Although the modification of a defendant's first offender status by the Georgia Crime Information Center was authorized by O.C.G.A. § 42-8-65, it was not a conviction because only the trial court that imposed first offender probation was authorized to revoke that status. Thus, as the defendant was not shown to have been adjudicated guilty of the prior crimes, the state improperly impeached the defendant with evidence of the defendant's first offender record. Lee v. State, 294 Ga. App. 796, 670 S.E.2d 488 (2008) (decided under former O.C.G.A. § 24-2-2).

Criminal confession is not rendered inadmissible because the language used therein indicates that the accused had committed another and separate offense. Dampier v. State, 245 Ga. 882, 268 S.E.2d 349, cert. denied, 449 U.S. 938, 101 S. Ct. 337, 66 L. Ed. 2d 161 (1980) (decided under former Code 1933, § 38-202).

Use of form to pose prohibited question. — It is error requiring the grant of a new trial for the state to put the plaintiff's character in issue by using a form completed by the plaintiff to ask a question which would otherwise be prohibited, and then introducing into the evidence the defendant's entire past criminal record to impeach the answer to that question. Mikle v. State, 236 Ga. 748, 225 S.E.2d 275 (1976) (decided under former Code 1933, § 38-202).

Res gestae. — Generally, on a prosecution for a particular crime, evidence of another and distinct crime wholly independent from that for which one is on trial is inadmissible; but there are exceptions to this rule: one is, if the separate crime was committed as a part of the same transaction as that for which the accused is being tried, and forms a part of the res gestae. Bailey v. State, 214 Ga. 409, 105 S.E.2d 320 (1958) (abandonment) (decided under former Code 1933, § 38-202); Williams v. State, 223 Ga. 773, 158 S.E.2d 373 (1967) (rape) (decided under former Code 1933, § 38-202); Blanton v. State, 150 Ga. App. 559, 258 S.E.2d 174 (1979) (prostitution) (decided under former Code 1933, § 38-202); Mosley v. State, 150 Ga. App. 802, 258 S.E.2d 608 (1979) (armed robbery) (decided under former Code 1933, § 38-202); Bradley v. State, 154 Ga. App. 333, 268 S.E.2d 388 (1980) (burglary) (decided under former Code 1933, § 38-202); Hayes v. State, 199 Ga. 251, 34 S.E.2d 97 (1945) (robbery) (decided under former Code 1933, § 38-202); Durham v. State, 243 Ga. 408, 254 S.E.2d 359 (1979)

(rape and murder) (decided under former Code 1933, § 38-202); Deshazier v. State, 155 Ga. App. 526, 271 S.E.2d 664 (1980) (vehicular homicide) (decided under former Code 1933, § 38-202).

When transactions involving other crimes and the alleged bad character of the defendant are so connected in time and event as to be part of the same transaction as that for which defendant is being tried, those transaction are admissible as a clear exception to the general rule of inadmissibility of other transactions. Kennedy v. State, 193 Ga. App. 784, 389 S.E.2d 350 (1989) (decided under former O.C.G.A. § 24-2-2).

Since the defendant produced a prison identification card voluntarily, and volunteered information about a prior conviction when a police officer asked if the defendant had a driver's license, the evidence was admissible as part of the res gestae despite its prejudicial nature. Bertholf v. State, 298 Ga. App. 612, 680 S.E.2d 652 (2009) (decided under former O.C.G.A. § 24-2-2).

Connection between crimes in mind of actor. — To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose the actor intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that the actor who committed the one must have done the other. Loughridge v. State, 181 Ga. 261, 182 S.E. 12 (1935) (decided under former Code 1933, § 38-202); Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955) (decided under former Code 1933, § 38-202); Kelley v. State, 98 Ga. App. 324, 105 S.E.2d 798 (1958) (decided under former Code 1933, § 38-202).

Logical connection between crimes. — When one is on trial charged with the commission of a crime, proof of a distinct and independent offense is never admissible, unless there is some logical connection between the two, from which it can be said that proof of the one tends to establish the other. Wilson v. State, 173 Ga. 275, 160 S.E. 319 (1931) (decided under former Penal Code 1910, § 1019); Scott v. State, 46 Ga. App. 213, 167 S.E. 210 (1932) (decided under former Penal Code 1910, § 1019); McMichen v. State, 62 Ga. App. 50, 7 S.E.2d 749 (1940) (decided under former Code 1933, § 38-202); Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758 (1940) (decided under former Code 1933, § 38-202); Chambers v. State, 76 Ga. App. 269, 45 S.E.2d 724 (1947) (decided under former Code 1933, § 38-202); Fowler v. State, 82 Ga. App. 197, 60 S.E.2d 473 (1950) (decided under former Code 1933, § 38-202); Gilstrap v. State, 90 Ga. App. 12, 81 S.E.2d 872 (1954) (decided under former Code 1933, § 38-202); Spinks v. State, 92 Ga. App. 878, 90 S.E.2d 590 (1955) (decided under former Code 1933, § 38-202); Bailey v. State, 214 Ga. 409, 105 S.E.2d 320 (1958) (decided under former Code 1933, § 38-202); Cardell v. State, 119 Ga. App. 848, 168 S.E.2d 889 (1969) (decided under former Code 1933, § 38-202); Nicholson v. State, 125 Ga. App. 24, 186 S.E.2d 287 (1971) (decided under former Code 1933, § 38-202); Wooten v. State, 125 Ga. App. 635, 188 S.E.2d 409 (1972) (decided under former Code 1933, § 38-202); Lee v. State, 154 Ga. App. 562, 269 S.E.2d 65 (1980) (decided under former Code 1933, § 38-202); Haygood v. State, 154 Ga. App. 633, 269 S.E.2d 480 (1980) (decided under former Code 1933, § 38-202); Carroll v. State, 155 Ga. App. 514, 271 S.E.2d 650 (1980) (decided under former Code 1933, § 38-202); Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696 (1980) (decided under former Code 1933, § 38-202); State v. Johnson, 246 Ga. 654, 272 S.E.2d 321 (1980) (decided under former Code 1933, § 38-202); Paxton v. State, 160 Ga. App. 19, 285 S.E.2d 741 (1981) (decided under former Code 1933, § 38-202).

Evidence of the commission of one crime is not admissible upon the trial of the defendant for another crime, when the sole purpose is to show that the defendant is guilty of such other crime. Honea v. State, 181 Ga. 40, 181 S.E. 416 (1935) (decided under former Code 1933, § 38-202); Loughridge v. State, 181 Ga. 261, 182 S.E. 12 (1935) (decided under former Code 1933, § 38-202); Cooper v.

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State, 182 Ga. 42, 184 S.E. 716 (1936) (decided under former Code 1933, § 38-202); Harrison v. State, 60 Ga. App. 610, 4 S.E.2d 602 (1939) (decided under former Code 1933, § 38-202).

If the evidence be so dubious that the judge does not clearly perceive the connection between the crime with which the defendant is charged and another offense, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt. Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758 (1940) (decided under former Code 1933, § 38-202).

Mere fact that the defendant has recently committed a crime of the same sort as that for which defendant is on trial establishes no probative connection between the two crimes. Cardell v. State, 119 Ga. App. 848, 168 S.E.2d 889 (1969) (decided under former Code 1933, § 38-202).

Only separate crimes which are admissible are those that are either similar or logically connected to the crime for which defendant is being tried, and crimes which are not similar or which are not logically connected to the crime for which defendant is being tried should be excluded from evidence; proof of crimes which are similar or are closely connected to the crime charged does tend to establish the crime charged. Bissell v. State, 157 Ga. App. 711, 278 S.E.2d 415 (1981) (decided under former Code 1933, § 38-202).

There are exceptions to the "other crimes" rule when there is sufficient logical connection between the independent crime and the offense charged so that it can be said that proof of the former tends to prove the latter. Perry v. State, 158 Ga. App. 349, 280 S.E.2d 390 (1981) (decided under former Code 1933, § 38-202); Kilgore v. State, 176 Ga. App. 121, 335 S.E.2d 465 (1985) (decided under former O.C.G.A. § 24-2-2).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — While it is the general rule that upon the trial of a person for a criminal offense, other and distinct criminal transactions cannot be given in evidence against the defendant, yet, according to the weight of authority, evidence of other transaction may be received as tending to show motive or intent, when the transactions are so connected in time and similar in their other relations that the same motive may reasonably be imputed to all. Bates v. State, 18 Ga. App. 718, 90 S.E. 481 (1916) (decided under former Penal Code 1910, § 1019); Hales v. State, 250 Ga. 112, 296 S.E.2d 577 (1982) (decided under former O.C.G.A. § 24-2-2).

Proof of another offense is admissible on the trial of a defendant charged with the commission of a crime even though such evidence incidentally places the defendant's character in issue, when evidence of such other crime tends to show identity, motive, malice, intent, plan, scheme, bent of mind, or course of conduct. Wilson v. State, 173 Ga. 275, 160 S.E. 319 (1931) (decided under former Penal Code 1910, § 1019); Scott v. State, 46 Ga. App. 213, 167 S.E. 210 (1932) (decided under former Penal Code 1910, § 1019); Phillips v. State, 51 Ga. App. 675, 181 S.E. 233 (1935) (decided under former Code 1933, § 38-202); Loughridge v. State, 181 Ga. 261, 182 S.E. 12 (1935) (decided under former Code 1933, § 38-202); Fitzgerald v. State, 52 Ga. App. 33, 182 S.E. 77 (1935) (decided under former Code 1933, § 38-202); Gray v. State, 52 Ga. App. 209, 182 S.E. 862 (1935) (decided under former Code 1933, § 38-202); Cooper v. State, 182 Ga. 42, 184 S.E. 716 (1936) (decided under former Code 1933, § 38-202); Bennings v. State, 53 Ga. App. 218, 185 S.E. 370 (1936) (decided under former Code 1933, § 38-202); Wright v. State, 184 Ga. 62, 190 S.E. 663 (1937) (decided under former Code 1933, § 38-202); Hunter v. State, 188 Ga. 215, 3 S.E.2d 729 (1939) (decided under former Code 1933, § 38-202); McMichen v. State, 62 Ga. App. 50, 7 S.E.2d 749 (1940) (decided under former Code 1933, § 38-202); Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758 (1940) (decided under former Code 1933, § 38-202); Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824 (1944) (decided under former Code 1933, § 38-202); Bell v. State,

71 Ga. App. 430, 31 S.E.2d 109 (1944) (decided under former Code 1933, § 38-202); Chambers v. State, 76 Ga. App. 269, 45 S.E.2d 724 (1947) (decided under former Code 1933, § 38-202); Anderson v. State, 206 Ga. 527, 57 S.E.2d 563 (1950) (decided under former Code 1933, § 38-202); Mims v. State, 207 Ga. 118, 60 S.E.2d 373 (1950) (decided under former Code 1933, § 38-202); Fowler v. State, 82 Ga. App. 197, 60 S.E.2d 473 (1950) (decided under former Code 1933, § 38-202); Crawford v. State, 211 Ga. 166, 84 S.E.2d 354 (1954) (decided under former Code 1933, § 38-202); Lyles v. State, 215 Ga. 229, 109 S.E.2d 785 (1959) (decided under former Code 1933, § 38-202); Hargett v. State, 121 Ga. App. 157, 173 S.E.2d 266 (1970) (decided under former Code 1933, § 38-202); Nicholson v. State, 125 Ga. App. 24, 186 S.E.2d 287 (1971) (decided under former Code 1933, § 38-202); McNeal v. State, 228 Ga. 633, 187 S.E.2d 271 (1972) (decided under former Code 1933, § 38-202); Overton v. State, 230 Ga. 830, 199 S.E.2d 205 (1973) (decided under former Code 1933, § 38-202); Bloodworth v. State, 233 Ga. 589, 212 S.E.2d 774 (1975) (decided under former Code 1933, § 38-202); Davis v. State, 233 Ga. 638, 212 S.E.2d 814 (1975) (decided under former Code 1933, § 38-202); Lofton v. State, 137 Ga. App. 323, 223 S.E.2d 727, aff'd, 237 Ga. 275, 227 S.E.2d 327 (1976) (decided under former Code 1933, § 38-202); Lloyd v. State, 139 Ga. App. 625, 229 S.E.2d 106 (1976) (decided under former Code 1933, § 38-202); Moss v. State, 144 Ga. App. 226, 240 S.E.2d 773 (1977) (decided under former Code 1933, § 38-202); Bunge v. State, 149 Ga. App. 712, 256 S.E.2d 23 (1979) (decided under former Code 1933, § 38-202); Simmons v. State, 152 Ga. App. 643, 263 S.E.2d 522 (1979) (decided under former Code 1933, § 38-202); McClesky v. State, 245 Ga. 108, 263 S.E.2d 146 (1980), cert. denied, 449 U.S. 891, 101 S. Ct. 253, 66 L. Ed. 2d 119 (1980) (decided under former Code 1933, § 38-202); Buffington v. State, 153 Ga. App. 54, 264 S.E.2d 543 (1980) (decided under former Code 1933, § 38-202); Laws v. State, 153 Ga. App. 166, 264 S.E.2d 700 (1980) (decided under former Code 1933, § 38-202); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565 (1980) (decided under former Code 1933, § 38-202); Pittman v. State, 245 Ga. 453, 265 S.E.2d 592 (1980) (decided under former Code 1933, § 38-202); Smith v. State, 154 Ga. App. 497, 268 S.E.2d 714 (1980) (decided under former Code 1933, § 38-202); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42 (1980) (decided under former Code 1933, § 38-202); Lee v. State, 154 Ga. App. 562, 269 S.E.2d 65 (1980) (decided under former Code 1933, § 38-202); Felts v. State, 154 Ga. App. 571, 269 S.E.2d 73 (1980) (decided under former Code 1933, § 38-202); Humphries v. State, 154 Ga. App. 596, 269 S.E.2d 90 (1980) (decided under former Code 1933, § 38-202); Cleveland v. State, 155 Ga. App. 267, 270 S.E.2d 687 (1980) (decided under former Code 1933, § 38-202); Plemons v. State, 155 Ga. App. 447, 270 S.E.2d 836 (1980) (decided under former Code 1933, § 38-202); Head v. State, 246 Ga. 360, 271 S.E.2d 452 (1980) (decided under former Code 1933, § 38-202); Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696 (1980) (decided under former Code 1933, § 38-202); State v. Johnson, 246 Ga. 654, 272 S.E.2d 321 (1980) (decided under former Code 1933, § 38-202); Wallace v. State, 246 Ga. 738, 273 S.E.2d 143 (1980) (decided under former Code 1933, § 38-202); Kendrick v. State, 156 Ga. App. 27, 274 S.E.2d 78 (1980) (decided under former Code 1933, § 38-202); Bissell v. State, 157 Ga. App. 711, 278 S.E.2d 415 (1981) (decided under former Code 1933, § 38-202); Ballweg v. State, 158 Ga. App. 576, 281 S.E.2d 319 (1981) (decided under former Code 1933, § 38-202); Neal v. State, 159 Ga. App. 450, 283 S.E.2d 671 (1981) (decided under former Code 1933, § 38-202); Hale v. State, 159 Ga. App. 563, 284 S.E.2d 68 (1981) (decided under former Code 1933, § 38-202).

Evidence of other crimes to prove malice, intent, and motive is admissible only when the act of which the accused stands charged would be legal in the absence of those elements. Thomas v. State, 239 Ga. 734, 238 S.E.2d 888 (1977) (decided under former Code 1933, § 38-202).

Evidence of independent crimes will not be admitted unless its relevance to the issues at trial outweighs its prejudicial

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impact. Tuzman v. State, 145 Ga. App. 761, 244 S.E.2d 882 (1978) (decided under former Code 1933, § 38-202).

Fact that defendant was not arrested and charged with the commission of the independent crimes does not render evidence of the commission of such crimes inadmissible for showing common motive, plan, or scheme. Woodard v. State, 155 Ga. App. 533, 271 S.E.2d 671 (1980) (decided under former Code 1933, § 38-202).

When evidence of other crimes is admitted for the limited purpose of showing identity, plan, motive, scheme, bent of mind, or course of conduct, the other crimes need not be listed in the indictment as defendant is not on trial for those crimes. State v. Johnson, 246 Ga. 654, 272 S.E.2d 321 (1980) (decided under former Code 1933, § 38-202).

When a prior victim testified as to the similarities between the prior victim's encounter with defendant and the victim's, the prior victim's evidence was properly admitted pursuant to Ga. Unif. Super. Ct. R. 31.3(B) to show defendant's bent of mind, intent, and course of conduct; any inconsistencies in the prior victim's testimony affected only the weight and credibility. Williams v. State, 264 Ga. App. 115, 589 S.E.2d 676 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in finding that similar transaction evidence was relevant and admissible because some of the offenses committed during the coconspirators' crime spree were very similar to the crimes for which the defendant was indicted and, therefore, were relevant and admissible to demonstrate the co-conspirators' modus operandi, identity, bent of mind, and motive; even if some of the separate offenses were insufficiently similar to the indicted offenses, the evidence showed that each of the offenses was an essential part of a continuing criminal enterprise in which the defendant and the coconspirators acted in concert and with a common purpose. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of the similar transaction involving an attack by the defendant on an inmate because the state introduced the evidence of the attack on the inmate for the purpose of showing the defendant's course of conduct and bent of mind, which was a legitimate and proper purpose. Johnson v. State, 292 Ga. 22, 733 S.E.2d 736 (2012) (decided under former O.C.G.A. § 24-2-2).

Introduction of certified copy of indictment proper. — In proving a prior offense for the purpose of proving identity, bent of mind, course of conduct, etc., it is proper to introduce a certified copy of the indictment and the plea or verdict of guilty. Scott v. State, 162 Ga. App. 541, 292 S.E.2d 125 (1982) (decided under former O.C.G.A. § 24-2-2).

Standard for admitting evidence of prior crimes is well-settled: the state must show that: (1) it is introducing evidence of an independent offense or act for an appropriate purpose; (2) there is sufficient evidence to establish that an accused committed the independent offense or act; and (3) there is sufficient connection or similarity between the independent offense or act and the crime charged so that proof of the former tends to prove the latter. Cain v. State, 268 Ga. App. 39, 601 S.E.2d 415 (2004) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence admissible. — Similar transaction evidence was properly admitted to show defendant's state of mind, knowledge, or intent because, in both crimes, defendant worked with an accomplice to force the victims to cooperate by threatening to shoot the victims, and both crimes were committed in a brazen manner during the daytime without any attempt to hide defendant's identity. Pace v. State, 272 Ga. App. 16, 611 S.E.2d 694 (2005) (decided under former O.C.G.A. § 24-2-2).

Scheme defined. — Plan, scheme, device, design, etc., means a peculiar or distinctive method of committing a crime which, if employed at another time by an accused, would tend to show the accused was the one who employed it this time. Nicholson v. State, 125 Ga. App. 24, 186 S.E.2d 287 (1971) (decided under former

Code 1933, § 38-202); Hammitt v. State, 183 Ga. App. 382, 359 S.E.2d 4, cert. denied, 183 Ga. App. 906, 359 S.E.2d 4 (1987) (decided under former O.C.G.A. § 24-2-2).

Impeachment of defendant's specific testimony by contradictory evidence. — District attorney's reference to an indictment was an inappropriate means of impeaching, by contradictory evidence, defendant's statement that defendant had never hurt anyone. Williams v. State, 257 Ga. 761, 363 S.E.2d 535 (1988) (decided under former O.C.G.A. § 24-2-2).

In order for evidence of independent crime to be admissible as a circumstance of an arrest, it must be relevant to the circumstances of the arrest, which circumstances must, in turn, be relevant to the crime for which the defendant is on trial. Bryan v. State, 157 Ga. App. 635, 278 S.E.2d 177 (1981) (decided under former Code 1933, § 38-202).

Conduct of defendant before, during the time of, and after commission of a crime may be considered by the jury in establishing defendant's intention and defendant's participation in order to determine whether or not such intention and conduct were sufficient corroboration of the testimony of an accomplice to sustain a conviction. This may be done by circumstantial as well as by direct evidence. Zuber v. State, 248 Ga. 314, 282 S.E.2d 900 (1981) (decided under former Code 1933, § 38-202).

Conduct by family members. — Trial court did not abuse the court's discretion in curtailing defendant's cross-examination of the victim as to the victim's spouse's criminal activities since defendant argued that the victim might have been a participant in the criminal conduct and that, therefore, the victim's credibility would have to be tested against the victim's criminal conduct. Bell v. State, 265 Ga. App. 407, 593 S.E.2d 935 (2004) (decided under former O.C.G.A. § 24-2-2).

Continuous course of conduct. — In a criminal prosecution, evidence of another crime is admissible when both crimes are part of a continuous course of conduct, closely connected in time, place, and manner of commission. Putman v. State, 251 Ga. 605, 308 S.E.2d 145 (1983), cert. denied, 466 U.S. 954, 104 S. Ct. 2161, 80 L. Ed. 2d 546 (1984) (decided under former O.C.G.A. § 24-2-2).

Two conditions imposed on admission of evidence of independent crimes. — Before evidence of independent crimes is admissible two conditions must be satisfied: first, there must be evidence that the defendant was in fact the perpetrator of the independent crime; second, there must be sufficient similarity or connection between the independent crime and the offense charged that proof of the former tends to prove the latter. Bissell v. State, 157 Ga. App. 711, 278 S.E.2d 415 (1981) (decided under former Code 1933, § 38-202); Paxton v. State, 160 Ga. App. 19, 285 S.E.2d 741 (1981) (decided under former Code 1933, § 38-202); Milner v. State, 180 Ga. App. 97, 348 S.E.2d 509 (1986) (decided under former O.C.G.A. § 24-2-2).

Length of time intervening between prior difficulty and present offense is only material as affecting the credibility and weight to be given such evidence. Barnes v. State, 157 Ga. App. 582, 277 S.E.2d 916 (1981) (decided under former Code 1933, § 38-202).

Objection to admission of similar transaction evidence must be at trial. — Trial court properly denied defendant's motion for a new trial as defendant waived defendant's contentions that one of the similar transactions offered to show bent of mind and course of conduct was too remote in time, and that the similar transaction evidence was unduly prejudicial, as defendant failed to object on these grounds at trial. Murphy v. State, 263 Ga. App. 62, 587 S.E.2d 223 (2003) (decided under former O.C.G.A. § 24-2-2).

Use of alias. — District attorney's opening statement to jury referring to defendant by defendant's alias "The Grass Man" was relevant since testimony of the witnesses established that defendant often used the alias. Campbell v. State, 160 Ga. App. 561, 287 S.E.2d 591 (1981) (decided under former Code 1933, § 38-202).

Prior peace warrant of victim against defendant. — Under former O.C.G.A. § 24-2-2 (see now O.C.G.A.

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§§ 24-4-404 and 24-4-405), evidence of prior difficulties between the accused and the victim is admissible to illustrate the accused's motive, intent, or bent of mind toward the victim; therefore, a peace warrant that victim had taken out against defendant nine months before the victim's death was clearly relevant to show defendant's motive and "bent of mind" towards the victim, and the admission of the warrant into evidence did not violate defendant's due process rights. Williams v. Kemp, 846 F.2d 1276 (11th Cir. 1988), cert. dismissed, 489 U.S. 1094, 109 S. Ct. 1579, 103 L. Ed. 2d 931 (1989), cert. denied, 494 U.S. 1090, 110 S. Ct. 1836, 108 L. Ed. 2d 965 (1990) (decided under former O.C.G.A. § 24-2-2).

Mistrial was not necessary to preserve defendant's right to a fair trial after trial court immediately ruled out improperly admitted evidence and instructed the jury to disregard the evidence and, thus, the trial court did not abuse the court's discretion in denying defendant's motion for a mistrial after defendant claimed that the state improperly placed defendant's character into evidence when the state attempted to introduce evidence of a third similar shoplifting incident in which defendant was involved but the state's evidence failed to establish the third similar incident. Bradford v. State, 261 Ga. App. 621, 583 S.E.2d 484 (2003) (decided under former O.C.G.A. § 24-2-2).

Similarity between former transactions and charged crime not found. — When, in presenting similar crimes evidence to the jury, the state merely introduced certified copies of the guilty pleas, that procedure was reversible error because the jury was not presented with any evidence to establish the similarity or connection between the former transactions and the charged crime. Little v. State, 202 Ga. App. 7, 413 S.E.2d 496 (1991) (decided under former O.C.G.A. § 24-2-2).

Evidence of incident occurring when defendant was a juvenile. — Trial court did not err when the court denied the defendant's motion for new trial on the basis that the state proffered similar transaction evidence of an incident that occurred when the defendant was a juvenile because the trial court did offer to give a curative instruction to the jury, but trial counsel refused the curative instruction citing "strategy" as counsel's reasons; the trial court admonished the witness not to make any references to the juvenile court proceeding. Kitchens v. State, 289 Ga. 242, 710 S.E.2d 551 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of other conduct or crimes was admissible in the following cases. — See Fitzgerald v. State, 51 Ga. App. 636, 181 S.E. 186 (1935) (possession of whiskey) (decided under former Code 1933, § 38-202); Honea v. State, 181 Ga. 40, 181 S.E. 416 (1935) (conspiracy to commit robbery) (decided under former Code 1933, § 38-202); Loughridge v. State, 181 Ga. 261, 182 S.E. 12 (1935) (conspiracy to commit robbery and murder) (decided under former Code 1933, § 38-202); Crow v. State, 52 Ga. App. 192, 182 S.E. 685 (1935) (transporting liquor) (decided under former Code 1933, § 38-202); Cooper v. State, 182 Ga. 42, 184 S.E. 716 (1936) (robbery) (decided under former Code 1933, § 38-202); Sisk v. State, 182 Ga. 448, 185 S.E. 777 (1936) (murder) (decided under former Code 1933, § 38-202); Ballenger v. State, 60 Ga. App. 344, 4 S.E.2d 58 (1939) (maintaining a disorderly house) (decided under former Code 1933, § 38-202); Heller v. State, 60 Ga. App. 552, 4 S.E.2d 413 (1939) (possession of burglary tools) (decided under former Code 1933, § 38-202); Springer v. State, 60 Ga. App. 641, 4 S.E.2d 679 (1939) (illegal sale of whiskey) (decided under former Code 1933, § 38-202); Guiffrida v. State, 61 Ga. App. 595, 7 S.E.2d 34 (1940) (abortion) (decided under former Code 1933, § 38-202); Hale v. State, 62 Ga. App. 315, 7 S.E.2d 787 (1940) (illegal sale of whiskey) (decided under former Code 1933, § 38-202); Williams v. State, 62 Ga. App. 679, 9 S.E.2d 697 (1940) (operating a lottery) (decided under former Code 1933, § 38-202); Thompson v. State, 191 Ga. 222, 11 S.E.2d 795 (1940) (homicide) (decided under former Code 1933, § 38-202); Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, cert.

denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (murder) (decided under former Code 1933, § 38-202); Simmons v. State, 196 Ga. 395, 26 S.E.2d 785 (1943) (robbery) (decided under former Code 1933, § 38-202); Fuller v. State, 197 Ga. 714, 30 S.E.2d 608 (1944) (murder) (decided under former Code 1933, § 38-202); Christian v. State, 71 Ga. App. 350, 30 S.E.2d 832 (1944) (violation of lottery laws) (decided under former Code 1933, § 38-202); Bell v. State, 71 Ga. App. 430, 31 S.E.2d 109 (1944) (homicide) (decided under former Code 1933, § 38-202); Loughridge v. State, 201 Ga. 513, 40 S.E.2d 544 (1946) (homicide) (decided under former Code 1933, § 38-202); Diggs v. State, 90 Ga. App. 853, 84 S.E.2d 611 (1954) (larceny) (decided under former Code 1933, § 38-202); Bowman v. State, 91 Ga. App. 52, 85 S.E.2d 66 (1954) (seduction and fornication) (decided under former Code 1933, § 38-202); Pierce v. State, 212 Ga. 88, 90 S.E.2d 417 (1955) (murder) (decided under former Code 1933, § 38-202); Lyles v. State, 215 Ga. 229, 109 S.E.2d 785 (1959) (homicide) (decided under former Code 1933, § 38-202); Huckaby v. State, 127 Ga. App. 439, 194 S.E.2d 119 (1972) (obscene telephone calls) (decided under former Code 1933, § 38-202); Garrett v. State, 147 Ga. App. 666, 250 S.E.2d 1 (1978) (theft by conversion) (decided under former Code 1933, § 38-202); Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980) (murder) (decided under former Code 1933, § 38-202); Cleveland v. State, 155 Ga. App. 267, 270 S.E.2d 687 (1980) (drug violation) (decided under former Code 1933, § 38-202); Head v. State, 246 Ga. 360, 271 S.E.2d 452 (1980) (vehicular homicide) (decided under former Code 1933, § 38-202); Carroll v. State, 155 Ga. App. 514, 271 S.E.2d 650 (1980) (bank robbery) (decided under former Code 1933, § 38-202); Wilson v. State, 155 Ga. App. 560, 271 S.E.2d 694 (1980) (theft by deception) (decided under former Code 1933, § 38-202); Rakestraw v. State, 155 Ga. App. 563, 271 S.E.2d 696 (1980) (burglary) (decided under former Code 1933, § 38-202); Kendrick v. State, 156 Ga. App. 27, 274 S.E.2d 78 (1980) (theft by receiving stolen property) (decided under former Code 1933, § 38-202); Walker v. State, 156 Ga. App. 842, 275 S.E.2d 755 (1980) (embezzlement) (decided under former Code 1933, § 38-202); Sherrod v. State, 157 Ga. App. 351, 277 S.E.2d 335 (1981) (battery) (decided under former Code 1933, § 38-202); Huckeba v. State, 157 Ga. App. 795, 278 S.E.2d 703 (1981) (indecent exposure) (decided under former Code 1933, § 38-202); Millwood v. State, 164 Ga. App. 699, 296 S.E.2d 239 (1982) (homicide with a knife over misconduct of a woman) (decided under former O.C.G.A. § 24-2-2); Rivers v. State, 250 Ga. 288, 298 S.E.2d 10 (1982) (multiple murders, kidnappings, armed robbery and burglary in three counties) (decided under former O.C.G.A. § 24-2-2); Hendrix v. State, 164 Ga. App. 831, 298 S.E.2d 317 (1982) (evidence of same facts already properly before jury) (decided under former O.C.G.A. § 24-2-2); Hunter v. State, 177 Ga. App. 326, 339 S.E.2d 381 (1985) (aggravated battery) (decided under former O.C.G.A. § 24-2-2); Nelson v. State, 181 Ga. App. 481, 352 S.E.2d 804 (1987) (theft of disadvantaged victim, eleven years earlier under similar circumstances) (decided under former O.C.G.A. § 24-2-2); Haywood v. State, 256 Ga. 694, 353 S.E.2d 184 (1987) (evidence showing propensity to use gun when intoxicated) (decided under former O.C.G.A. § 24-2-2); Bernyk v. State, 182 Ga. App. 329, 355 S.E.2d 753 (1987) (armed robbery) (decided under former O.C.G.A. § 24-2-2); Methvin v. State, 189 Ga. App. 906, 377 S.E.2d 735 (1989) (burglary) (decided under former O.C.G.A. § 24-2-2); Burney v. State, 201 Ga. App. 64, 410 S.E.2d 172 (1991) (burglary) (decided under former O.C.G.A. § 24-2-2); Farley v. State, 265 Ga. 622, 458 S.E.2d 643 (1995) (felony murder) (decided under former O.C.G.A. § 24-2-2); Herring v. State, 224 Ga. App. 809, 481 S.E.2d 842 (1997) (prior domestic violence) (decided under former O.C.G.A. § 24-2-2); Standfill v. State, 267 Ga. App. 612, 600 S.E.2d 695 (2004) (burglary and possession of tools) (decided under former O.C.G.A. § 24-2-2).

Evidence of other conduct or crimes was inadmissible in the following cases. — See Cawthon v. State, 119 Ga. 395, 46 S.E. 897 (1904) (adultery

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as background for murder) (decided under former Penal Code 1895, § 993); Alsobrook v. State, 126 Ga. 100, 54 S.E. 805 (1906) (adultery as background for murder) (decided under former Penal Code 1895, § 993); Moose v. State, 145 Ga. 361, 89 S.E. 335 (1916) (threats to another in assault case) (decided under former Penal Code 1910, § 1019); Young v. State, 149 Ga. 17, 98 S.E. 603 (1919) (adultery as background for murder) (decided under former Penal Code 1910, § 1019); Williams v. State, 51 Ga. App. 319, 180 S.E. 369 (1935) (killing a hog) (decided under former Code 1933, § 38-202); Hillery v. State, 51 Ga. App. 373, 180 S.E. 499 (1935) (possession of stolen goods in burglary case) (decided under former Code 1933, § 38-202); Ballenger v. State, 60 Ga. App. 344, 4 S.E.2d 58 (1939) (maintaining a disorderly house) (decided under former Code 1933, § 38-202); Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758 (1940) (murder) (decided under former Code 1933, § 38-202); Waters v. State, 80 Ga. App. 559, 56 S.E.2d 924 (1949) (murder by automobile) (decided under former Code 1933, § 38-202); Anderson v. State, 206 Ga. 527, 57 S.E.2d 563 (1950) (operating a disorderly house in a murder case) (decided under former Code 1933, § 38-202); Walker v. State, 86 Ga. App. 875, 72 S.E.2d 774 (1952) (theft) (decided under former Code 1933, § 38-202); Howard v. State, 211 Ga. 186, 84 S.E.2d 455 (1954) (embezzlement) (decided under former Code 1933, § 38-202); Kelley v. State, 98 Ga. App. 324, 105 S.E.2d 798 (1958) (assault in attempted murder case) (decided under former Code 1933, § 38-202); Abner v. State, 139 Ga. App. 600, 229 S.E.2d 83 (1976) (victim as homosexual in sodomy case) (decided under former Code 1933, § 38-202); Watkins v. State, 151 Ga. App. 510, 260 S.E.2d 547 (1979) (forgery) (decided under former Code 1933, § 38-202); Johnson v. State, 154 Ga. App. 793, 270 S.E.2d 214 (1980) (sale of contraband) (decided under former Code 1933, § 38-202).

2. Character

Good character may of itself generate a reasonable doubt in the minds of the jury as to the defendant's guilt, and for this reason the defendant is allowed when the defendant sees fit to offer defendant's good character in issue. Clarke v. State, 52 Ga. App. 254, 183 S.E. 92 (1935) (decided under former Code 1933, § 38-202).

In criminal trials, the state cannot introduce evidence of the character of the accused unless the accused has personally first put it in issue. Richardson v. State, 41 Ga. App. 226, 152 S.E. 599 (1930) (decided under former Penal Code 1910, § 1019); Clarke v. State, 52 Ga. App. 254, 183 S.E. 92 (1935) (decided under former Code 1933, § 38-202); Love v. State, 70 Ga. App. 529, 28 S.E.2d 781 (1944) (decided under former Code 1933, § 38-202); Bacon v. State, 209 Ga. 261, 71 S.E.2d 615 (1952) (decided under former Code 1933, § 38-202); Haire v. State, 209 Ga. 378, 72 S.E.2d 707 (1952) (decided under former Code 1933, § 38-202); Borders v. State, 114 Ga. App. 90, 150 S.E.2d 306 (1966) (decided under former Code 1933, § 38-202); Brown v. State, 118 Ga. App. 617, 165 S.E.2d 185 (1968) (decided under former Code 1933, § 38-202); Dawson v. State, 120 Ga. App. 242, 170 S.E.2d 45 (1969) (decided under former Code 1933, § 38-202); Bowen v. State, 123 Ga. App. 670, 182 S.E.2d 124 (1971) (decided under former Code 1933, § 38-202); Dudley v. State, 228 Ga. 551, 186 S.E.2d 875 (1972) (decided under former Code 1933, § 38-202); Wooten v. State, 125 Ga. App. 635, 188 S.E.2d 409 (1972) (decided under former Code 1933, § 38-202); Askew v. State, 135 Ga. App. 56, 217 S.E.2d 385 (1975) (decided under former Code 1933, § 38-202); Mikle v. State, 236 Ga. 748, 225 S.E.2d 275 (1976) (decided under former Code 1933, § 38-202); Brown v. State, 237 Ga. 467, 228 S.E.2d 853 (1976) (decided under former Code 1933, § 38-202); Posey v. State, 152 Ga. App. 216, 262 S.E.2d 541 (1979) (decided under former Code 1933, § 38-202); Perry v. State, 154 Ga. App. 559, 269 S.E.2d 63 (1980), overruled on other grounds, 231

Ga. App. 61, 497 S.E.2d 642 (1998) (decided under former Code 1933, § 38-202); Head v. State, 246 Ga. 360, 271 S.E.2d 452 (1980) (decided under former Code 1933, § 38-202).

General character of defendant and defendant's conduct in other transactions was irrelevant under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) unless the defendant chose to put defendant's character in issue. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698 (1981) (decided under former Code 1933, § 38-202).

Opportunity of state to disprove good character. — Whenever defendant puts defendant's good character in issue as fact state has privilege of disproving this fact, by cross-examination of the witness by whom the accused attempts to make the proof. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698 (1981) (decided under former Code 1933, § 38-202).

When nature of the case does not involve defendant's character, and the case does not render necessary and proper the investigation thereof, it is error to allow, over objection of the defendant, prejudicial and irrelevant matter to go before the jury in a trial which tends to place defendant's character and conduct before the jury. Hartley v. State, 159 Ga. App. 157, 282 S.E.2d 684 (1981) (decided under former Code 1933, § 38-202).

After testimony put defendant's character in issue, implying defendant's commission of the offense and such testimony was not necessary or relevant to the circumstances of defendant's arrest, that testimony should not be admitted. Bryan v. State, 157 Ga. App. 635, 278 S.E.2d 177 (1981) (decided under former Code 1933, § 38-202).

A passing reference to a defendant's record does not place defendant's character in evidence. Johnson v. State, 256 Ga. 604, 351 S.E.2d 623 (1987) (decided under former O.C.G.A. § 24-2-2).

In a trial for armed robbery, aggravated assault, kidnapping, and possession of a firearm during the commission of certain crimes, the trial court properly denied defendant's motion for a mistrial even though the state placed defendant's character in issue when a police officer testified that defendant was "picked up on charges" when police arrested defendant in Maryland pursuant to a fugitive warrant because the testimony was admissible and relevant to the circumstances surrounding defendant's arrest, even if it did incidentally show that defendant committed another crime. Blake v. State, 272 Ga. App. 181, 612 S.E.2d 33 (2005) (decided under former O.C.G.A. § 24-2-2).

When an officer testified that the officer had known the defendant for a long time and "could have charged" the defendant in a couple of cases, this passing reference to prior conduct did not suffice to put the defendant's character in evidence so as to violate former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405); furthermore, a curative instruction remedied any prejudicial impact from the statement. Height v. State, 281 Ga. 727, 642 S.E.2d 812 (2007) (decided under former O.C.G.A. § 24-2-2).

When an investigator, asked how the investigator knew defendant, replied, "I've made contact with [the defendant] in the streets before and I believe through past cases," this did not warrant a mistrial. A passing reference to a defendant's criminal record did not suffice to put the defendant's character in evidence so as to violate former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405). Thomas v. State, 291 Ga. App. 795, 662 S.E.2d 849 (2008) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in denying the defendant's motion for mistrial, which was based on the admission of a recorded telephone conversation between the defendant and the defendant's mother, who stated "because it's on your record," in response to why the defendant could not be disappointed if the defendant was denied bond; the comment was fleeting and was not a direct comment about the defendant's criminal history, and the mother did not comment on the content of the defendant's criminal record or even say, with certainty, that one did or did not exist. Hamrick v. State, 304 Ga. App. 378, 696 S.E.2d 403 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion by denying a motion for a mis-

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trial because, although a reference by a defense witness on cross-examination to the defendant's photograph having been pulled from the website of the Georgia State Board of Pardons and Paroles was improper, the curative instruction which the trial court gave was sufficient to remedy any prejudice arising from the answer. Moreover, the evidence of guilt in the case was overwhelming, such that the comment likely did not affect the outcome of the trial. Russell v. State, 308 Ga. App. 328, 707 S.E.2d 543 (2011) (decided under former O.C.G.A. § 24-2-2).

Defendant's character not "put in issue." — It is only when a defendant has "put his character in issue," as that term is defined in the context of former O.C.G.A. §§ 24-2-2 and 24-9-20(b), that the court is required to give a charge on good character and when, in a trial for aggravated battery, the defendant's statement that defendant never shot anybody was not responsive to the direct question relating to defendant's defenses of accident and self-defense, which the court did fully charge, the volunteered additional statement, merely repeated on redirect, was not legally sufficient to put defendant's character in issue. Williams v. State, 187 Ga. App. 355, 370 S.E.2d 210 (1988) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying defendant's motion in limine to exclude evidence that police, in searching defendant's apartment, found not only the murder weapon defendant used to shoot and kill defendant's girlfriend, but also two other handguns; the evidence of the two other handguns was relevant to the accuracy of a statement defendant gave to police that upon searching defendant's apartment, the police would find the two guns hidden in a shoe box and the fact that defendant owned the guns was not, in and of itself, evidence of bad character. Brinson v. State, 276 Ga. 671, 581 S.E.2d 548 (2003) (decided under former O.C.G.A. § 24-2-2).

State did not improperly place a defendant's character in evidence by informing the jury that defendant was charged with possession of a firearm by a convicted felon when defendant was charged with possession of a firearm by a convicted felon, not because defendant personally was a convicted felon, but because defendant aided and abetted defendant's cousin, a convicted felon, in receiving and possessing a firearm. Perry v. State, 276 Ga. 836, 585 S.E.2d 614, rev'd, 276 Ga. 839, 584 S.E.2d 253 (2003) (decided under former O.C.G.A. § 24-2-2).

Testimony by police officers did not improperly place the defendant's character at issue; statements regarding the charges against the defendant at the time of previous arrests were merely passing references and described the circumstances of the arrests; a statement about the defendant having an open warrant fell short of placing the defendant's character at issue. Williams v. State, 285 Ga. App. 190, 645 S.E.2d 676 (2007) (decided under former O.C.G.A. § 24-2-2).

Permitting an officer to testify that the officer had been looking for the defendant because the officer had a warrant for the defendant's arrest did not impermissibly put the defendant's character into issue; the testimony was admissible as relevant to the circumstances leading the police to the residence where the defendant was found. Smith v. State, 285 Ga. App. 399, 646 S.E.2d 499 (2007) (decided under former O.C.G.A. § 24-2-2).

Because a mere mention that the defendant had been in jail did not place the defendant's character in issue, and despite this fact the defendant waived any claim of error regarding the placement of character in issue, it did not amount to reversible error; moreover, the challenged testimony, given by the defendant's mother, amounted to a non-responsive answer, which the state did not directly solicit and it did not appear from the record that the state anticipated the response. Jennings v. State, 285 Ga. App. 774, 648 S.E.2d 105 (2007), cert. denied, No. S07C1576, 2007 Ga. LEXIS 667 (Ga. 2007) (decided under former O.C.G.A. § 24-2-2).

When a witness twice referred to a codefendant's incarceration, these nonresponsive answers did not improperly place the defendant's own character at issue.

Moreover, any error was harmless because the evidence of the defendant's guilt was overwhelming. Walker v. State, 282 Ga. 703, 653 S.E.2d 468 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence that police were at the defendant's residence to serve defendant with an arrest warrant, because that evidence did not improperly place the issue of character into evidence, but was necessary to explain why police were able to detain, handcuff, and search the defendant. Moreover, a limiting instruction was also issued advising the jurors that the jurors were not to consider the warrant for any purpose other than to explain the officers' presence at the defendant's home. Thrasher v. State, 289 Ga. App. 399, 657 S.E.2d 316 (2008) (decided under former O.C.G.A. § 24-2-2).

Appellant alleged that the trial court erred by denying appellant's motion for a mistrial because a witness, while testifying about the abduction and murder of the victim, improperly injected the appellant's character in issue by saying, in front of the jury, "these guys are killers." While the state agreed that the reference to "killers" in this comment should not have been made, any error was harmless as the statement did not place the appellants' character in issue because the statement did not concern other transactions. Overton v. State, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009) (decided under former O.C.G.A. § 24-2-2).

Testimony that an investigator ran a criminal history check on the defendant and prepared photographic lineups at two police stations did not put the defendant's character into issue under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405). The testimony did not indicate that the defendant had been convicted of any crime and did not otherwise specify the nature of the defendant's prior dealings with police; moreover, the other evidence against the defendant was substantial and damning, and the action taken by the trial court assured, without drawing attention to the improper evidence, that there would be no other references to the defendant's criminal history. Young v. State, 297 Ga. App. 248, 676 S.E.2d 854 (2009) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by denying the defendant's motion for mistrial with respect to a nonresponsive answer by an accomplice when the accomplice was asked on direct examination whether the accomplice had a conversation with defendant about a pistol in the defendant's possession on the day of the shooting because a nonresponsive answer that impacted negatively on the defendant's character did not improperly place the defendant's character in issue; moreover, the defendant declined the trial court's offer to give a curative instruction with regard to the statement. Lewis v. State, 287 Ga. 210, 695 S.E.2d 224 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by denying the defendant's motion for mistrial due to the prosecutor's questioning an accomplice as to whether the accomplice had spoken with the defendant on the previous day because the possibility that the defendant had spoken with the accomplice did not necessarily imply that the defendant too was in custody; even if it did, a passing reference to the defendant's incarceration did not place the defendant's character in evidence. Lewis v. State, 287 Ga. 210, 695 S.E.2d 224 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial counsel did not place the defendant's character in issue by conceding the defendant's guilt of aggravated assault because the concession related to the facts alleged and crimes charged in the case, not to other transactions reflective of the defendant's character; given that numerous witnesses testified that the defendant had a bat on the night in question and struck the victim in the head with the bat while only one witness testified that the defendant took the victim's wallet out of the victim's pocket, trial counsel's strategy of contesting only the armed robbery count was reasonable and not ineffective. Taylor v. State, 304 Ga. App. 395, 696 S.E.2d 686 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying the defendant's motion for a mistrial after an

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investigating officer testified on cross-examination that the defendant gave the officer a statement right after the defendant talked with the defendant's parole officer because the testimony followed defense counsel's question regarding the content, not the timing of the defendant's statement; a passing reference to a defendant's record does not place his or her character in evidence, and a nonresponsive answer that impacts negatively on a defendant's character does not improperly place his or her character in issue. Lanier v. State, 288 Ga. 109, 702 S.E.2d 141 (2010) (decided under former O.C.G.A. § 24-2-2).

Defendant failed to establish a claim of ineffective assistance of counsel due to counsel's failure to seek a mistrial after successfully objecting to a witness's testimony that the defendant told the witness that "he would have a shoot-out with police before he ever went back to jail" on the ground that the witness's response placed the defendant's character in evidence because even if counsel's failure to request a mistrial were deemed deficient, no mistrial would have been granted as a nonresponsive answer that impacted negatively on a defendant's character did not improperly place the defendant's character in issue. Billings v. State, 308 Ga. App. 248, 707 S.E.2d 177 (2011) (decided under former O.C.G.A. § 24-2-2).

Character not placed in issue by prison uniform. — In a prosecution for felony murder, armed robbery, and burglary, the fact that the jury was shown a videotape of the defendant's statement to police depicting the defendant wearing a prison uniform did not place the defendant's character in evidence. Jackson v. State, 284 Ga. 484, 668 S.E.2d 700 (2008) (decided under former O.C.G.A. § 24-2-2).

Use of booking photographs. — As the booking photograph in no way suggested that the defendant was guilty of any previous crimes, the trial court did not abuse the court's discretion in admitting the photographs. Clark v. State, 285 Ga. App. 182, 645 S.E.2d 671 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court erred by admitting the defendant's mug shot from a prior arrest because the mug shot used in the photo array could not have been related to the crime for which the defendant was being tried, but it would have to be related to a prior crime; however, the error was harmless based on the overwhelming evidence of the defendant's guilt. Sharpe v. State, 288 Ga. 565, 707 S.E.2d 338 (2011) (decided under former O.C.G.A. § 24-2-2).

Agent's reference to the defendant's mug shot from a previous arrest was harmless because there was overwhelming evidence of the defendant's guilt. Butler v. State, 290 Ga. 425, 721 S.E.2d 889 (2012) (decided under former O.C.G.A. § 24-2-2).

Photographic identification. — In a prosecution for forgery, defendant's photographic identification card issued by the Georgia Department of Corrections was admissible as relevant to issues of the identity of the perpetrator and the credibility of witnesses; the card did not refer to any charge or conviction nor indicate that defendant was a parolee. Biggins v. State, 229 Ga. App. 297, 494 S.E.2d 45 (1997) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying defendant's motion to exclude evidence and admitting the correctional facility identification card found on defendant's person at the time of arrest for stealing a car as the card was not used to show defendant's criminal character, but, instead, was used to prove that defendant gave a police officer investigating the crime a false name, which was a different crime. McNeil v. State, 257 Ga. App. 147, 570 S.E.2d 433 (2002) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting investigating officer's testimony that the investigating officer obtained from police in another county a prior photograph of defendant for use in a photographic lineup the investigating officer was creating as the investigating officer's testimony, without more, did not indicate that defendant was guilty of any prior crimes, and, thus, did not improperly place defendant's character in issue. Browne v. State, 261 Ga. App. 648, 583 S.E.2d 496 (2003) (decided under former O.C.G.A. § 24-2-2).

Defendant waived any error in the admission of a photograph of defendant with a gun as defendant did not argue at trial that the photo was improper character evidence; further, gun ownership did not impute bad character. Johnson v. State, 274 Ga. App. 641, 618 S.E.2d 716 (2005) (decided under former O.C.G.A. § 24-2-2).

Admission of fingerprint card. — Admission into evidence of the defendant's fingerprint card taken in connection with a previous crime does not place the defendant's character into evidence when any incriminating evidence was removed from the face of the card. Williams v. State, 184 Ga. App. 124, 361 S.E.2d 15 (1987) (decided under former O.C.G.A. § 24-2-2).

In a prosecution for possession of marijuana, it was reversible error to introduce a fingerprint card of defendant that showed the date of a prior arrest and listed charges against defendant. Jinks v. State, 229 Ga. App. 18, 493 S.E.2d 214 (1997) (decided under former O.C.G.A. § 24-2-2).

Evidence of prison identification card. — Defendant's claim that defendant's character was improperly placed into evidence when an officer testified that the officer found defendant's prison identification card in defendant's pocket was waived as defendant failed to make a further objection or renew defendant's motion for a mistrial after a curative instruction was given. McCullough v. State, 268 Ga. App. 445, 602 S.E.2d 181 (2004) (decided under former O.C.G.A. § 24-2-2).

Admission of videotape. — Trial court did not err in denying defendant's motion in limine that sought to bar introduction of defendant's videotaped statement to police, as well as defendant's later motion for mistrial after the videotape was played for the jury; although defendant claimed that the videotape was entirely exculpatory and was only introduced by the state to place defendant's character in evidence because defendant referenced in the videotape a murder, separate from the instant crimes, with which defendant had previously been charged, the videotape was not entirely exculpatory and defendant's references in the videotape were relevant to other issues besides defendant's character, such as motive, intent, and course of conduct, and, thus, was material and admissible. Cummings v. State, 261 Ga. App. 281, 582 S.E.2d 231 (2003), cert. denied, 543 U.S. 824, 125 S. Ct. 40, 160 L. Ed. 2d 35 (2004) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by admitting improper character evidence, consisting of video and photographs of the defendant stealing laptops, because the evidence showed the theft of the laptops the defendant was accused of receiving; the videotape was relevant to show that the laptops at issue were stolen. Fields v. State, 310 Ga. App. 455, 714 S.E.2d 45 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of motive. — Evidence that victim's taking of an arrest warrant would have immediately returned defendant to jail was relevant to prove that defendant had a motive to kill the victim and relevant evidence is not rendered inadmissible simply because it incidentally puts the defendant's character in issue. Terrell v. State, 271 Ga. 783, 523 S.E.2d 294 (1999) (decided under former O.C.G.A. § 24-2-2).

Evidence that defendant's motive for shooting the victim was the victim's friendship with a person who had apparently bought drugs from defendant, but had refused to pay the amount of money defendant demanded, was admissible, even if it injected defendant's character into evidence. Sharif v. State, 272 Ga. App. 660, 613 S.E.2d 176 (2005) (decided under former O.C.G.A. § 24-2-2).

Evidence that defendant was on probation at the time of the crimes was relevant to show defendant's motive for fleeing from the officer, even though the evidence might have reflected negatively on defendant's character. Mills v. State, 273 Ga. App. 699, 615 S.E.2d 824 (2005) (decided under former O.C.G.A. § 24-2-2).

Substantial evidence showed that defendant was using crack cocaine before the crimes and that defendant planned to take the victim's wallet to purchase more; proof of motive was not inadmissible simply because it incidentally put defendant's character into evidence. Young v. State, 280 Ga. 65, 623 S.E.2d 491 (2005) (decided under former O.C.G.A. § 24-2-2).

Defendant failed to establish that de-

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fendant received ineffective assistance of counsel because, even assuming that the transcript was accurate and that the involvement of drug money was placed before the jury, the question elicited testimony which constituted relevant evidence of defendant's motive, and thus defense counsel was not ineffective in failing to object, since any objection would have been fruitless. Jones v. State, 280 Ga. 205, 625 S.E.2d 1 (2005) (decided under former O.C.G.A. § 24-2-2).

Trial counsel did not "open the door" to bad character evidence by stating that the evidence would show that the victim previously stole the defendant's cash and marijuana because evidence concerning the victim's transaction with the defendant and the defendant's subsequent suspicion that the victim stole the defendant's marijuana and money was admissible as evidence of prior difficulties between the two and was relevant to show the defendant's motives. Taylor v. State, 304 Ga. App. 395, 696 S.E.2d 686 (2010) (decided under former O.C.G.A. § 24-2-2).

Evidence of drug use. — Because evidence of the defendant's prior drug use and history of crimes committed against family members fueled by that drug use were properly admitted as relevant to the crimes charged, despite incidentally placing the defendant's character in issue, convictions for both aggravated assault and simple assault were upheld on appeal. Jones v. State, 283 Ga. App. 812, 642 S.E.2d 887 (2007) (decided under former O.C.G.A. § 24-2-2).

Because evidence of the defendant's prior drug use was introduced to show evidence of motive, it did not violate former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405); therefore, counsel was not ineffective for failing to raise a meritless objection. Simons v. State, 311 Ga. App. 819, 717 S.E.2d 319 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in allowing the state to introduce evidence that the defendant used cocaine and marijuana before the robbery because an accomplice's testimony that the accomplice and the defendant used drugs on the day of the crime was relevant evidence of the defendant's state of mind and admissible as part of the res gestae; whether the effects due to the drugs' use may have worn off by the time of the crime was a question for the jury to decide. Hawkins v. State, 316 Ga. App. 415, 729 S.E.2d 549 (2012) (decided under former O.C.G.A. § 24-2-2).

Evidence of defendant's Klu Klux Klan affiliation was admissible since the evidence explained defendant's motive for murder and defendant's bent of mind. Mize v. State, 269 Ga. 646, 501 S.E.2d 219 (1998), cert. denied, 525 U.S. 1078, 119 S. Ct. 817, 142 L. Ed. 2d 676 (1999) (decided under former O.C.G.A. § 24-2-2).

Evidence of Gothic beliefs or Satanism. — Trial court erred in admitting photographs of the defendant with dyed black hair and dark make-up, a document bearing the words of a "curse" to be recited while burning the letter over a black candle, and seven different inscriptions bearing themes of anguish, enslavement, atheism, and violence because nothing in the challenged evidence explicitly referenced Satanism or "gothic" beliefs and there was no testimony linking the inscriptions or other evidence to any such ideology. The trial court abused the court's discretion in admitting the challenged evidence, which bore no specific connection to the crime and operated to impugn the defendant's character. Boring v. State, 289 Ga. 429, 711 S.E.2d 634 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence incidentally reflecting on character not barred. — Former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) did not bar evidence simply because the evidence might incidentally reflect on the defendant's character. Felker v. State, 252 Ga. 351, 314 S.E.2d 621, cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984) (decided under former O.C.G.A. § 24-2-2).

In allowing testimony relating to defendant's obtaining possession of a gun used in committing offenses, the trial court refused to allow characterization of defendant's conduct as criminal, denial of a motion to exclude the testimony was

proper since the limitation injected defendant's character only minimally. Baker v. State, 225 Ga. App. 848, 485 S.E.2d 548 (1997) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying defendant's motion for a mistrial based on admission of a police officer's testimony that defendant, on the night prior to being arrested for theft by receiving stolen property, fled every time the officer turned into a particular parking lot and that the stolen property, a rental car, was parked nearby; even though the evidence might have incidentally put defendant's character in issue, the evidence was relevant and probative on the issue of defendant's consciousness of guilt. Richardson v. State, 275 Ga. App. 320, 620 S.E.2d 522 (2005) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in allowing evidence of the previous conflict between defendant and the condominium association because the testimony was relevant to whether defendant made telephone calls with the intent of harassing the victim in violation of O.C.G.A. § 16-11-39.1(a) and only incidentally reflected on defendant's character. Bozzuto v. State, 276 Ga. App. 614, 624 S.E.2d 166 (2005) (decided under former O.C.G.A. § 24-2-2).

In a prosecution for armed robbery, the victim's testimony that the defendant looked at the victim with a "mean, just horrible cold-hearted face" was relevant to show the defendant's demeanor during the commission of the crime, even if the testimony incidentally placed the defendant's character in issue. Fuller v. State, 295 Ga. App. 439, 672 S.E.2d 438 (2009), cert. denied, No. S09C0749, 2009 Ga. LEXIS 220 (Ga. 2009) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying the defendant's motion for a mistrial based on an allegation that the defendant's character was impermissibly placed into evidence because the challenged testimony was no more than a fleeting comment, and, thus, the trial court was authorized to find that its effect was not prejudicial enough to warrant a mistrial; because defense counsel declined the trial court's offer to give curative instructions to the jury, the defendant would not be heard to complain. Bowen v. State, 304 Ga. App. 819, 697 S.E.2d 898 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in failing to grant a mistrial after a witness testified that the witness was afraid of the defendant and the defendant's friends because although the testimony put the defendant's character in evidence, the testimony was admissible since the testimony was relevant to the witness's credibility and was being used to show that the witness was testifying by reason of duress or fear; in light of the fact that four other witnesses independently testified that the witnesses also observed the defendant shoot the victim and picked the defendant out of a photographic lineup, even if the witness's testimony was improper, any error was harmless. Cannon v. State, 288 Ga. 225, 702 S.E.2d 845 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying the defendant's motion in limine to redact references in the defendant's statement to previous drug transactions because the statement was relevant to the issue of the defendant's intent; any potential error caused by the inclusion of the defendant's references to previous drug transactions amounted to harmless error in light of the overwhelming evidence against the defendant, including the defendant's own statement admitting to drug dealing. Nowell v. State, 312 Ga. App. 150, 717 S.E.2d 730 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of good character may not serve to create such doubt, even in the face of apparently conclusive evidence, as to lead jurors to believe the other evidence false or witnesses mistaken. Edwards v. State, 255 Ga. 149, 335 S.E.2d 869 (1985) (decided under former O.C.G.A. § 24-2-2).

Testimony as to defendant's residence. — Defendant's character not injected into evidence after a police officer testified that the officer knew where defendant resided. Chaney v. State, 169 Ga. App. 616, 314 S.E.2d 457 (1984) (decided under former O.C.G.A. § 24-2-2).

State's mention of defendant's aliases. — State does not impermissibly

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place the defendant's character in issue by referring, in a limited manner, to the defendant's uncontestedly correct aliases and nickname. Veal v. State, 167 Ga. App. 175, 306 S.E.2d 667 (1983) (decided under former O.C.G.A. § 24-2-2).

Good character is valid defense. — Courts of this state have consistently recognized the validity of a good character defense, and have held that good character should be considered by the court and jury. Riceman v. State, 166 Ga. App. 825, 305 S.E.2d 595 (1983) (decided under former O.C.G.A. § 24-2-2).

Specific acts to prove character. — Former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) limits proof of character to evidence of reputation. Proof of conduct in other transactions by evidence of specific instances of such conduct is not authorized but amounts to self-serving declarations of nonculpability to prove a trait of character. Baine v. State, 181 Ga. App. 856, 354 S.E.2d 177 (1987) (decided under former O.C.G.A. § 24-2-2); Barrett v. State, 192 Ga. App. 705, 385 S.E.2d 785 (1989) (decided under former O.C.G.A. § 24-2-2).

Character testimony need not be based exclusively on community relationships. — Appellate court could not conclude that the trial court erred in restricting the character testimony of one of the defendant's witnesses, which testimony was obtained through business relationships rather than through the community in which the defendant lived, and further, even if the trial court did commit error, the defendant showed no harm in the restriction as the trial court did not completely restrict the witness's testimony, and because of the cumulative testimony of the other character witnesses concerning the defendant's good character. Burchette v. State, 260 Ga. App. 739, 580 S.E.2d 609 (2003), aff'd, 278 Ga. 1, 596 S.E.2d 162 (2004) (decided under former O.C.G.A. § 24-2-2).

Inadvertant reference did not warrant mistrial. — Given the trial court's prompt and pointed curative instruction after an inadvertent placement of the defendant's character into evidence, the trial court did not abuse the court's discretion in denying the defendant a mistrial. Hunter v. State, 281 Ga. 526, 640 S.E.2d 271 (2007) (decided under former O.C.G.A. § 24-2-2).

When a stalking victim was asked if the defendant had ever pulled a gun on the victim, the victim's reply that the victim had seen the defendant pull a gun on someone else was stricken as nonresponsive, and the trial court advised the jury to disregard that response. Even assuming this testimony improperly injected evidence of the defendant's bad character, the defendant was not entitled to a mistrial, particularly in light of the defendant's testimony that admitted each act listed in the indictment. Seibert v. State, 294 Ga. App. 202, 670 S.E.2d 109 (2008) (decided under former O.C.G.A. § 24-2-2).

When the nature of the presentence hearing involves the "general character" of the defendant, and when the state has notified the defendant that such evidence will be admitted, evidence of general bad character may be admitted. Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311 (1973) (decided under former Code 1933, § 38-202); Cochran v. State, 144 Ga. App. 820, 242 S.E.2d 735 (1978) (decided under former Code 1933, § 38-202).

Statements as to defendant's drinking habits. — Testimony that a defendant drank alcohol did not place defendant's character in issue under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405); further, testimony that the defendant had been drinking on the night of the crimes of child molestation of the defendant's daughter concerned the res gestae of the incident, which the state was entitled to present even if the defendant's character was incidentally placed in issue. Hernandez v. State, 304 Ga. App. 435, 696 S.E.2d 155 (2010) (decided under former O.C.G.A. § 24-2-2).

Evidence of victim's alcoholism not relevant. — Defendant's convictions of aggravated battery and simple battery were affirmed as the trial court properly refused to admit evidence of the victim's alcoholism prior to the victim's involve-

ment with defendant since defendant failed to show any nexus between the victim's alcoholism and the conclusion that the victim had falsely accused defendant of battery. Harris v. State, 263 Ga. App. 329, 587 S.E.2d 819 (2003) (decided under former O.C.G.A. § 24-2-2).

Voluntary intoxication charge was not "red flag" as to character. — Defendant's claim that the state used a voluntary intoxication charge as a "red flag" to the jury that defendant was drunk and therefore was "an unsavory character," that the victim's parents now might question their decision "to invite this intoxicated man into their home," and that defendant had "major psychological problems" was rejected; there was evidence from which an inference or deduction might be made that defendant was drunk on the afternoon in question. Byers v. State, 276 Ga. App. 295, 623 S.E.2d 157 (2005) (decided under former O.C.G.A. § 24-2-2).

Bent of mind evidence. — In a joint trial of two defendants, the trial court did not err in showing the jury portions of a movie which depicted a method of disposing of a murdered victim's body as: (1) such was relevant to show a bent of mind, despite the fact that it could have placed the first defendant's character in issue; and (2) the jury could have made the permissible inference that the first defendant was encouraged by the movie to order the manner of disposing of the victim's body; moreover, because the second defendant failed to request a cautionary instruction to adequately protect from this inference, the second defendant could not complain of the inference on appeal. Oree v. State, 280 Ga. 588, 630 S.E.2d 390 (2006) (decided under former O.C.G.A. § 24-2-2).

Character evidence admissible. — On the trial of a case arising under a municipal ordinance prohibiting street walking, evidence of the general character of the woman arrested was admissible. Braddy v. City of Milledgeville, 74 Ga. 516, 58 Am. R. 443 (1885) (decided under former Code 1882, § 3757).

On the trial of one for murder when the testimony tended to show that the homicide was committed in consequence of an effort to have some sort of sexual relation with the victim, and the defendant introduced a witness to establish the defendant's good character, it was competent, on cross-examination, to ask such witness if the witness had not heard of certain lascivious acts of the defendant with other females. Frank v. State, 141 Ga. 243, 80 S.E. 1016, aff'd on other grounds, 142 Ga. 741, 83 S.E. 645 (1914); 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 582 (1915) (decided under former Penal Code 1910, § 1019).

When defendant put defendant's character in issue by attempting to explain defendant's actions as resulting from devotion to defendant's church, admission of evidence of prior convictions was proper. Language v. State, 169 Ga. App. 649, 314 S.E.2d 484 (1984) (decided under former O.C.G.A. § 24-2-2).

Testimony about the characteristics of spousal abuse and a statement that defendant fit the profile of a spouse abuser was properly admitted in defendant's trial for felony murder and aggravated assault of defendant's spouse after defendant claimed the defense of an accident, thereby putting defendant's character into evidence; the court found such testimony was relevant to rebut defendant's claimed defense. Jones v. State, 276 Ga. 253, 577 S.E.2d 560 (2003) (decided under former O.C.G.A. § 24-2-2).

Although the general character of a party and the party's conduct in other transactions were usually irrelevant, the trial court did not err in concluding that defendant's counsel rendered effective assistance and was not ineffective for not objecting to the codefendant's testimony that defendant was not employed and sold drugs for a living, as such testimony, although incidentally involving defendant's character, went to the very central issue in the case of whether defendant was dealing drugs, and, thus, defendant's counsel could not be faulted for not making an objection that would have been meritless because such testimony was admissible. Pitts v. State, 260 Ga. App. 553, 580 S.E.2d 618 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by allowing the state to cross-examine the defendant's biological daughter about having previously

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2. Character (Cont'd)

worked as a stripper and having abused drugs because the evidence was offered by the state in rebuttal to the daughter's testimony after the defendant intentionally elicited the testimony as to the defendant's and the daughter's own good character; since the only conceivable purpose of the questions defense counsel asked the daughter was to elicit testimony concerning the character of the defendant and the daughter, the trial court did not err when the court held that the state could introduce rebuttal evidence on the same subject. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010) (decided under former O.C.G.A. § 24-2-2).

State's introduction of evidence of the defendant's two prior arrests was not improper since the only conceivable purpose of defense counsel's questions to a case agent was to elicit testimony concerning the defendant's character, defense counsel opened the door to the state's rebuttal character evidence on the same specific subject. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348 (2009) (decided under former O.C.G.A. § 24-2-2).

Admission of defendant's videotaped statement in which defendant implicated oneself in the commission of other crimes did not improperly place defendant's character in issue. Griffin v. State, 243 Ga. App. 282, 531 S.E.2d 175 (2000) (decided under former O.C.G.A. § 24-2-2).

Evidence properly admitted as res gestae and did not amount to bad character evidence. — Introduction of evidence regarding crimes for which the defendant was not charged, specifically two checkbooks that were recovered from the defendant's residence at the time of the arrest, and testimony of the defendant's involvement in two uncharged robberies, did not amount to bad character evidence, but was part of the res gestae; moreover, pretermitting whether the trial court properly admitted the aforementioned evidence, any error arising from that admission was harmless. Cartledge v. State, 285 Ga. App. 145, 645 S.E.2d 633 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion when the court allowed a passenger in the defendant's car to testify that the defendant "always ran red lights," as such was not used for improper character evidence under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405), but rather, as part of the res gestae of the moments described by the passenger, whereupon a police officer had to swerve away from the defendant's vehicle and the officer eventually died from injuries sustained in a subsequent crash; further, any error in the admission thereof was harmless due to the overwhelming amount of evidence of the defendant's guilt. Potts v. State, 296 Ga. App. 242, 674 S.E.2d 109 (2009) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by ruling that the state was not required to redact from a recording allegedly irrelevant and prejudicial statements the defendant made during the course of the offense; evidence of statements made by the defendant during the commission of the offense are admissible as part of the res gestae of the crime even if the evidence puts the defendant's character in evidence. Ware v. State, 308 Ga. App. 24, 707 S.E.2d 111 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial counsel was not deficient for failing to object to the victim's testimony regarding the defendant's excessive alcohol consumption, mental health problems, and possession of a handgun because the evidence was part of the res gestae of the numerous incidents of prior difficulties between the victim and the defendant; the evidence was relevant and admissible, even if the evidence incidentally placed the defendant's character in issue. Billington v. State, 313 Ga. App. 674, 722 S.E.2d 395 (2012) (decided under former O.C.G.A. § 24-2-2).

Evidence properly admitted to establish defendant's identity and appearance, and did not amount to bad character evidence. — Trial court did not err in denying a motion in limine to exclude the testimony of a state witness that allegedly placed the defendant's character in issue because the testimony was relevant to establish the defendant's iden-

tity and appearance on that date of the charged crime, and was not rendered inadmissible merely because the testimony incidentally placed the defendant's character in issue. Moreover, the defendant's trial counsel conceded that the witness's testimony regarding the description was admissible. Buice v. State, 289 Ga. App. 415, 657 S.E.2d 326 (2008) (decided under former O.C.G.A. § 24-2-2).

Bad character evidence improperly admitted. — Trial court erred in permitting a witness to testify that the witness saw the defendant with a pistol because the witness testified that the young defendant pulled out the gun while in a group of people at a shopping mall, and such testimony imputed bad character to the defendant. The trial court admitted the bad character evidence after defense counsel inquired into how the police had procured the witness's statement, but that inquiry had no bearing on the defendant's character and thus did not open the door to permit the introduction of character evidence. Lee v. State, 308 Ga. App. 711, 708 S.E.2d 633 (2011) (decided under former O.C.G.A. § 24-2-2).

Limiting instruction proper. — Limiting instruction on similar transaction evidence was properly given as the instruction was substantially the same as an approved pattern and did not direct the jury that the jury could consider similar transaction evidence to show any element of the offense charged in the indictment. Miller v. State, 281 Ga. App. 354, 636 S.E.2d 60 (2006), cert. denied, No. S07C0087, 2007 Ga. LEXIS 106 (Ga. 2007) (decided under former O.C.G.A. § 24-2-2).

Claim waived. — Appeals court rejected the defendant's contention that the trial court erroneously admitted character evidence consisting of the defendant's statement made to a special agent regarding past cocaine use and distribution, when at trial, counsel raised a delayed objection arguing that such was inculpatory, and the objection was not only untimely but also failed to state the specific grounds raised on appeal; moreover, because the defendant later admitted to making the statement, any error in admitting the special agent's testimony was harmless. Henley v. State, 281 Ga. App. 242, 635 S.E.2d 856 (2006) (decided under former O.C.G.A. § 24-2-2).

Despite the defendant's claim that the trial court erred by denying a mistrial based on an improper character reference in violation of former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405), because counsel failed to do anything more than move for a mistrial following the challenged statement and specifically request a curative instruction, no error resulted from the denial of the motion. Johnson v. State, 285 Ga. App. 590, 646 S.E.2d 760 (2007) (decided under former O.C.G.A. § 24-2-2).

Because the defendant did not contend at trial that testimony was improper character evidence or violated the defendant's Sixth Amendment right of confrontation, those bases for objections were not preserved for review on appeal. Sanders v. State, 290 Ga. 445, 721 S.E.2d 834 (2012) (decided under former O.C.G.A. § 24-2-2).

Counsel was not ineffective in failing to object to statements that might have impugned defendant's character, and hence the defendant was properly denied a new trial on those grounds. Page v. State, 287 Ga. App. 182, 651 S.E.2d 131 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial counsel was not ineffective for failing to move for a mistrial when a state's witness interjected bad character evidence because the witness's improper remarks were fleeting, unsolicited, and nonresponsive to the prosecutor's examination questions, and since the defendant did not show that the defendant was otherwise entitled to a mistrial based upon the circumstances, trial counsel's failure to pursue a meritless motion does not constitute ineffective assistance of counsel; the trial court sustained the objections to the improper testimony and instructed the prosecutor and witness to restrict the examination and responses, the witness and prosecutor complied with the trial court's instructions, and there was no further mention of the bad character evidence. Boatright v. State, 308 Ga. App. 266, 707 S.E.2d 158 (2011) (decided under former O.C.G.A. § 24-2-2).

Defendant failed to establish that there

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was a reasonable probability that, but for the alleged deficiencies of trial counsel, the outcome of the trial would have been different because even assuming that trial counsel performed deficiently by failing to object to character evidence, the defendant failed to show a reasonable probability that the outcome of the trial would have been different; the evidence of the crime charged was overwhelming. Lowe v. State, 310 Ga. App. 242, 712 S.E.2d 633 (2011) (decided under former O.C.G.A. § 24-2-2).

Defendant failed to demonstrate that trial counsel rendered ineffective assistance by failing to challenge the admission of bad character evidence against a codefendant because the defendant failed to call trial counsel as a witness during the motion for new trial hearing, and the record supported the trial court's finding that counsel made a conscious, strategic decision not to oppose the admission of evidence of the codefendant's cocaine conviction. Smith v. State, 316 Ga. App. 175, 728 S.E.2d 808 (2012) (decided under former O.C.G.A. § 24-2-2).

Evidence admissible to impeach witness. — Trial court did not abuse the court's discretion in admitting bad character evidence because the testimony of the defendant's witness called into question the truthfulness of the state's witnesses; therefore, evidence of an incident where the defendant allegedly possessed a knife in the witness's presence was admissible for purposes of impeaching the witness. Pate v. State, 315 Ga. App. 205, 726 S.E.2d 691 (2012), cert. denied, No. S12C1308, 2012 Ga. LEXIS 1027 (Ga. 2012) (decided under former O.C.G.A. § 24-2-2).

3. Specific Crimes

a. Assault, Battery, and Homicide Crimes

Proper admission of similar transaction evidence. — In a prosecution for aggravated assault, under O.C.G.A. § 16-5-21, and possession of a knife during the commission of a crime, under O.C.G.A. § 16-11-106(b)(1), evidence that defendant stabbed another in an incident eight years previously was admissible to show whether defendant intended to threaten or harm the victim when defendant brandished a knife, and the evidence was not more prejudicial than probative, given the prior incident's relevance to a necessary element of the current crimes. Ledford v. State, 275 Ga. App. 107, 620 S.E.2d 187 (2005) (decided under former O.C.G.A. § 24-2-2).

During the defendant's trial for malice murder and drug-related offenses, the trial court did not abuse the court's discretion in admitting as similar transaction evidence testimony regarding the defendant's previous arrest on a charge of possession of cocaine with intent to distribute and a prior shooting incident because a drug sting was similar to the cocaine trafficking in that both involved relatively recent arrangements for appellant to sell cocaine, and the shooting incident was probative of defendant's inclination towards unprovoked gun violence; the similar transactions were offered to prove, inter alia, intent and state of mind, the trial court admitted the evidence for those limited purposes only, and the trial court instructed the jury accordingly. Moore v. State, 288 Ga. 187, 702 S.E.2d 176 (2010) (decided under former O.C.G.A. § 24-2-2).

Admission of similar transaction proper. — Because the state adequately showed the connection between the murder of one victim, and the murder charged in the instant proceeding, specifically embedded in the defendant's proffered motive that the killing of the victim in the instant proceeding was committed to prevent evidence from being introduced against the defendant in the first killing, the similar transaction evidence was properly allowed; hence, the similar transaction did not amount to improper character evidence. Young v. State, 281 Ga. 750, 642 S.E.2d 806 (2007) (decided under former O.C.G.A. § 24-2-2).

In a trial for felony murder, aggravated assault, and possession of a firearm during the commission of a felony, the trial court properly allowed the state to introduce as similar transaction evidence an aggravated assault the defendant committed four years earlier; both the old assault

charge and crimes for which the defendant was on trial involved violent assaults committed by the defendant with the help of young, unarmed accomplices, involved the defendant's use of a firearm and demand for valuables, and targeted business people within the same five-mile area during morning work hours. Edwards v. State, 282 Ga. 259, 646 S.E.2d 663 (2007) (decided under former O.C.G.A. § 24-2-2).

Admission of family fight over insurance. — Trial court did not abuse the court's discretion in denying the defendant's motion for a mistrial after the prosecutor elicited the defendant's prior admissions that the defendant had the defendant's spouse killed in order to show that the defendant's children were involved in litigation over an insurance policy based on a legitimate desire to insure that the defendant was not rewarded for taking their mother from them because the defendant introduced the family fight over insurance proceeds, which were payable on the death of the defendant's spouse, in an effort to undercut the credibility of the defendant's children, who testified that the defendant admitted killing the victim. Cantera v. State, 304 Ga. App. 289, 696 S.E.2d 354 (2010) (decided under former O.C.G.A. § 24-2-2).

During the defendant's trial for felony murder, malice murder, aggravated assault, and possession of a firearm by a convicted felon, the trial court did not abuse the court's discretion in allowing the state to introduce evidence of the defendant's involvement in a prior shooting as a similar transaction based on the similarities that the defendant used a handgun, committed the offenses with little or no provocation, fled the scene, and attempted to cause serious injury or death in the same immediate location; the crimes need not be exactly alike for the crimes to be sufficiently similar. Evans v. State, 288 Ga. 571, 707 S.E.2d 353 (2011) (decided under former O.C.G.A. § 24-2-2).

Similar transaction notice was sufficient. — Similar transaction evidence was properly admitted because: (1) defendant's claim that the similar transaction notice was insufficient because the notice did not include a copy of the prior indictment was waived; (2) while the notice did not state the county involved and did not include the indictment, the failure of the state to attach copies of the indictment and to fully comply with Ga. Unif. Super. Ct. R. 31.3(B) did not require automatic reversal or exclusion of the similar transaction evidence, but was subject to testing for harm; and (3) the state served the indictment, verdict, and police report from the earlier attack on trial counsel more than a year before the trial took place. Moreover, any error in failing to attach the indictment to the notice was harmless because the indictment was otherwise provided in discovery long before trial. Ellis v. State, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, No. S07C0324, 2007 Ga. LEXIS 66 (2007) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior difficulties between victim and defendant ought to be received carefully, and if there is no probative connection between the two, or the prejudice arising from the evidence far outweighs what probative value the evidence may have, the evidence ought not be admitted; but if there is any relevance, or in cases of doubt, the jury ought to hear the evidence and determine for itself the weight and credibility the evidence will be given. Barnes v. State, 157 Ga. App. 582, 277 S.E.2d 916 (1981) (decided under former Code 1933, § 38-202).

Trial court did not err in admitting the testimony of a long-time friend of the deceased wife about prior difficulties the deceased wife and defendant had, as evidence of defendant's prior acts toward the victim, the deceased wife, was admissible. Rowe v. State, 276 Ga. 800, 582 S.E.2d 119 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in permitting a witness to testify about the decedent victim's statement concerning defendant's prior acts of abuse as testimony about prior difficulties between the defendant and a victim was admissible at trial to show the nature of their relationship and to demonstrate motive, intent, or bent of mind of the defendant in committing the act. Banegas v. State, 283 Ga. App. 346, 641 S.E.2d 593 (2007) (decided under former O.C.G.A. § 24-2-2).

Evidence plainly was sufficient to au-

Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
a. Assault, Battery, and Homicide Crimes (Cont'd)

thorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault with a deadly weapon in violation of O.C.G.A. § 16-5-21(a)(2) and battery in violation of O.C.G.A. § 16-5-23.1(a) because the state presented more than ample evidence that the defendant's use of force was not justified under O.C.G.A. § 16-3-21(a); the prior and subsequent difficulties evidence and the similar transaction evidence the state presented supported the jury's decision to give little credence to the defendant's self-defense claim. Whitley v. State, 307 Ga. App. 553, 707 S.E.2d 375 (2011) (decided under former O.C.G.A. § 24-2-2).

There was no reversible error, much less any "plain error" pursuant to O.C.G.A. § 17-8-58(b), in the trial court's decision to give a prior difficulties charge to the jury because evidence was presented regarding prior difficulties between the defendant and the victim, and thus, the inclusion of a prior difficulties charge did not constitute an impermissible comment on the evidence; the defendant testified that the defendant and the victim "had problems" on more than one occasion, that the victim had called the police because of those problems "a few times," and that the defendant's mother had helped the defendant move out of the victim's house once before, telling the victim not to let the defendant move back in. Jones v. State, 289 Ga. 145, 710 S.E.2d 127 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of drug use. — Trial court did not err in admitting into evidence defendant's unredacted taped statement to police in a case in which defendant was ultimately convicted of malice murder; even though the statement contained evidence that defendant was under the influence of drugs at the time the crime was committed, such evidence was deemed part of the res gestae and was admissible as such even though the statement incidentally placed defendant's character in evidence. Cunningham v. State, 279 Ga. 694, 620 S.E.2d 374 (2005) (decided under former O.C.G.A. § 24-2-2).

Prior use of a firearm. — Trial court did not err in admitting evidence of defendant's conviction several years earlier for voluntary manslaughter as evidence of the prior conviction was admissible as substantive evidence of defendant's guilt on the current charge against defendant of possession of a firearm by a convicted felon. Laster v. State, 276 Ga. 645, 581 S.E.2d 522 (2003) (decided under former O.C.G.A. § 24-2-2).

Prior threat to kill another. — Witnesses testimony that defendant had recently come to the witnesses' residences in an intoxicated state and threatened the witnesses by pointing a loaded, cocked shotgun at the witnesses was admissible to show a common course of conduct and state of mind of the defendant in a time frame substantially close to the date on which the murder occurred. Hooks v. State, 253 Ga. 141, 317 S.E.2d 531 (1984) (decided under former O.C.G.A. § 24-2-2).

Trial court properly admitted similar transaction evidence to show a defendant's course of conduct and intent. — With regard to a defendant's conviction for the malice murder of the defendant's husband, the trial court did not err in admitting evidence of a similar transaction as to the defendant poisoning a boyfriend with antifreeze via being fed green Jell-O because the defendant was intimate with both victims; both men went to the hospital complaining of flu-like symptoms soon before each man died; both men died from the unique cause of antifreeze poisoning; the defendant was the last person to see either man alive; both men died soon after the defendant served them Jell-O; and the defendant, who had financial problems before the deaths of both men, collected substantial money in connection with each man's death. Turner v. State, 281 Ga. 647, 641 S.E.2d 527 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting a prior shooting as similar transaction evidence because the trial court admitted the evidence for the limited, proper purpose of establishing the defendant's bent of mind and course of conduct and instructed the

jury on several occasions to consider it for this purpose alone; both the prior shooting and the crime for which the defendant was convicted involved nighttime shootings occurring less than two weeks apart, wherein a man emerged from a gold car in the parking lot of an apartment complex and opened fire with little apparent provocation. Johnson v. State, 289 Ga. 22, 709 S.E.2d 217 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence was sufficient to support defendant's conviction for malice murder because the defendant hit the victim with a baseball bat during the course of an argument over a drug transaction, and an incident that occurred when the defendant was a juvenile was properly admitted to show course of conduct and bent of mind. Jackson v. State, 291 Ga. 54, 727 S.E.2d 454 (2012) (decided under former O.C.G.A. § 24-2-2).

Guilty plea to earlier offense properly admitted. — In the malice murder and armed robbery case, the trial court did not err under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) in admitting into evidence the defendant's guilty plea to an earlier robbery; the crimes were close in time, two years apart, each involved the morning robbery of a lone male at a convenience store, and in both robberies, the robbery was accomplished with a weapon other than a firearm, a borrowed vehicle was used, money was taken from the register, and the employee was forcibly moved around the store. Daniels v. State, 281 Ga. 226, 637 S.E.2d 403 (2006) (decided under former O.C.G.A. § 24-2-2).

Trial court properly admitted similar transaction evidence: in both incidents, which occurred seven months apart, the defendant had a verbal disagreement with young unarmed males, demanded that they leave the premises, and when they refused to comply, retrieved a particular make of weapon and fired it at or near the victims, then calmly walked inside. Johnson v. State, 289 Ga. App. 435, 657 S.E.2d 333 (2008) (decided under former O.C.G.A. § 24-2-2).

In a prosecution for felony murder, armed robbery, and burglary, it was not error to admit evidence of an armed robbery that the defendant and the codefendant committed two weeks before the charged crimes as the trial court's conclusion that the two crimes were sufficiently similar was not clearly erroneous. Jackson v. State, 284 Ga. 484, 668 S.E.2d 700 (2008) (decided under former O.C.G.A. § 24-2-2).

In a malice murder prosecution when the victim was violently stabbed and severely beaten, evidence that an officer saw the defendant violently attack an acquaintance as the result of a minor disagreement was properly submitted as a similar transaction to show the defendant's bent of mind and course of conduct. Dixon v. State, 285 Ga. 312, 677 S.E.2d 76 (2009), overruled on other grounds, 287 Ga. 242, 695 S.E.2d 255 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court acted within the court's discretion in finding that a sufficient similarity existed between a prior transaction and family violence battery, O.C.G.A. § 16-5-23.1(f), so that proof of the former tended to prove the latter because in both instances the defendant became enraged and reacted impulsively and aggressively in response to a perceived challenge from a woman, and the prior transaction tended to disprove the defendant's claim of self-defense. Jones v. State, 316 Ga. App. 442, 729 S.E.2d 578 (2012) (decided under former O.C.G.A. § 24-2-2).

Admission of unrelated criminal incidents involving the defendant's former girlfriend was not erroneous because there was unquestionably similarity between the incidents, including that the incidents all involved the defendant reacting violently with a weapon and inflicting physical injury when the defendant believed the defendant's authority was challenged by a female with whom the defendant once had a romantic relationship. Faniel v. State, 291 Ga. 559, 731 S.E.2d 750 (2012) (decided under former O.C.G.A. § 24-4-6).

Incident occurring eight years ago admitted. — Trial court properly allowed similar transaction evidence in the defendant's trial for malice murder, O.C.G.A. § 16-5-1(b), to show course of conduct; the defendant, who was working as a security officer at a government building was

Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
a. Assault, Battery, and Homicide Crimes (Cont'd)

charged with attacking a coworker without provocation. The state was permitted to present evidence of a similar transaction from eight years earlier in which the defendant, wearing the uniform of a security guard, ran down the stairs of a train station to the platform, grabbed a man awaiting the arrival of a train, beat and kicked the victim, threw the victim on the train tracks, and when the victim climbed back on the platform, the defendant resumed beating and kicking the victim until transit police arrived. Hicks v. State, 285 Ga. 386, 677 S.E.2d 111 (2009) (decided under former O.C.G.A. § 24-2-2).

Testimony as to circumstances connected with the accused's arrest admissible. — Because the police found weapons in defendant's car, after obtaining consent to search, when the police arrested defendant for stalking, the evidence was properly admitted in defendant's subsequent trial for burglary and aggravated assault to show the circumstances connected with the stalking arrest. Blackwell v. State, 274 Ga. App. 579, 618 S.E.2d 190 (2005) (decided under former O.C.G.A. § 24-2-2).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — Admission of evidence that defendant committed a prior crime was proper pursuant to former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) when the defendant was on trial for having pursued defendant's former girlfriend in defendant's car, threatening to kill her because they broke up, and shooting at her, and there was evidence from a prior crime that the defendant had taken the same type of action against another former girlfriend; the court found that such evidence was properly admitted in order to prove identity, course of conduct, intent, and motive because there was obvious similarity between the crimes and the methods in which the crimes were carried out. Morris v. State, 263 Ga. App. 115, 587 S.E.2d 272 (2003) (decided under former O.C.G.A. § 24-2-2).

When the defendant was accused of the malice murder of the mother of defendant's child, the trial court did not err in admitting testimony about an earlier statement where the defendant said that the defendant would have shot the victim and the victim's male companion had the defendant's gun not jammed; such evidence was proper to show motive, intent, and bent of mind. Lowery v. State, 282 Ga. 68, 646 S.E.2d 67, cert. denied, 552 U.S. 999, 128 S. Ct. 508, 169 L. Ed. 2d 355 (2007) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence admissible. — When the defendant pointed a gun at the victim twice after the victim flicked a cigarette that landed on the defendant's car seat, the trial court properly admitted similar transaction evidence that two days before the incident, the defendant pointed a gun at the chest of a teenager who was wearing a T-shirt with a message that the defendant did not like. Moore v. State, 286 Ga. App. 313, 649 S.E.2d 337 (2007) (decided under former O.C.G.A. § 24-2-2).

In a trial for arson, burglary, and malice murder, the trial court properly admitted similar transaction evidence of a fire at the defendant's former home to show motive and course of conduct; before each incident, the defendant acted in a suspicious manner with regard to the fire, both fires occurred at homes to which the defendant had access, and the defendant had incurred substantial debt before each fire and reaped a financial benefit as a result of each fire. Bryant v. State, 282 Ga. 631, 651 S.E.2d 718 (2007) (decided under former O.C.G.A. § 24-2-2).

In a malice murder case, a voluntary manslaughter conviction was properly admitted as similar transaction evidence since in both cases defendant knew the victim and obtained the weapon from the victim, both incidents arose from arguments with the victim and resulted in the victim being struck or shot in the head, neither victim was able to defend against the attack, and in both cases the defendant attempted to conceal evidence. Harvey v. State, 284 Ga. 8, 660 S.E.2d 528 (2008) (decided under former O.C.G.A. § 24-2-2).

In a murder and aggravated assault prosecution, the trial court properly admitted similar transaction evidence for the limited purposes of showing motive, state of mind, bent of mind, course of conduct, and plan or scheme, as the similar transaction and the crimes for which the defendant was on trial occurred in very close proximity, in time and location, and each involved the defendant using a handgun to shoot an unsuspecting victim without provocation. Abdullah v. State, 284 Ga. 399, 667 S.E.2d 584 (2008) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting similar transaction evidence from the defendant's ex-wife and ex-girlfriends because the evidence was sufficient to establish the required similarity between the charged crime and the assaults the defendant inflicted on the ex-wife and ex-girlfriends; both the prior transactions and the murder at issue involved violent assaults by the defendant against women with whom the defendant was intimately involved, and the evidence established the defendant's pattern of choking the defendant's lovers, beating the lovers, and threatening the lovers with a knife. Wheeler v. State, 290 Ga. 817, 725 S.E.2d 580 (2012) (decided under former O.C.G.A. § 24-2-2).

Evidence of similar or connected sexual offenses against children. — Trial counsel was not ineffective for failing to object to testimony that the defendant could have molested the victim's brother because the evidence included more than just the allegations made in the initial outcry; thus, the defendant failed to show a reasonable probability that the outcome of the trial would have been more favorable to the defendant had the testimony been excluded. Henry v. State, 316 Ga. App. 132, 729 S.E.2d 429 (2012) (decided under former O.C.G.A. § 24-2-2).

Evidence of a subsequent successful conspiracy by defendant to murder her husband had a logical connection to the crime for which she was being tried, a separate conspiracy to murder him. Such evidence tends to show intent and state of mind, and certainly tends to establish conspiracy to murder the same victim. Buffington v. State, 171 Ga. App. 919, 321 S.E.2d 418 (1984) (decided under former O.C.G.A. § 24-2-2).

Impeachment of defendant's specific testimony by contradictory evidence. — While the impeachment of a defendant's general credibility by proof of general bad character and of prior convictions is prohibited, impeachment of the specific testimony of a criminal defendant (e.g., "I never hurt nobody") may be accomplished by testimony that defendant did, in fact, hurt another, or by a certified copy of a conviction for a crime of physical violence. Williams v. State, 257 Ga. 761, 363 S.E.2d 535 (1988) (decided under former O.C.G.A. § 24-2-2).

Defense counsel's failure to object to evidence that a burglar alarm went off at the house where defendant was arrested shortly before the defendant was arrested was not ineffective assistance of counsel because even if this evidence improperly placed defendant's character into evidence, contrary to former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405), there was no reasonable probability that defendant would have been acquitted, given the strength of other evidence against the defendant. Patterson v. State, 274 Ga. App. 341, 618 S.E.2d 81 (2005) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior obstruction of police officers admissible. — After defendant struck and pushed an officer, and fought with another officer who attempted to arrest defendant the trial court did not abuse the court's discretion in admitting evidence of a similar transaction because, in both incidents, defendant refused to comply with law enforcement officers' instructions, cursed at the officers, and physically resisted by struggling with the officers; the similar transaction evidence showed a course of conduct in resisting law enforcement officers in the performance of their duties and was relevant to rebut defendant's claim of justification. Harris v. State, 276 Ga. App. 234, 622 S.E.2d 905 (2005) (decided under former O.C.G.A. § 24-2-2).

Evidence admissible on assault and battery claim. — With regard to a former employee's assault and battery claim, a trial court erred in excluding evidence of

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3. Specific Crimes (Cont'd)
a. Assault, Battery, and Homicide Crimes (Cont'd)

a dentist's prior threats to kill the dentist's spouse and children and of the dentist pushing a 13-year-old patient after the patient had allegedly been rude to the dentist; the evidence was admissible given that the dentist was alleged to have assaulted the employee and threatened to kill the employee. Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285 (2008) (decided under former O.C.G.A. § 24-2-2).

Evidence of defendant's prior assault on victim. — In a prosecution against a defendant for aggravated assault upon defendant's spouse, evidence that defendant had earlier committed an assault upon the spouse was admissible to demonstrate defendant's intent or bent of mind. Roberson v. State, 180 Ga. App. 406, 349 S.E.2d 39 (1986) (decided under former O.C.G.A. § 24-2-2).

In a prosecution against a defendant for aggravated assault on defendant's girlfriend, evidence that the defendant had previously attacked her with a machete was admissible. Smith v. State, 232 Ga. App. 290, 501 S.E.2d 523 (1998) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying defendant's motion to suppress certain testimony about prior difficulties that had occurred between defendant and the murder victim as such evidence was relevant to the relationship between the victim and defendant, and was admissible to show defendant's motive, intent, and bent of mind in murdering the victim. Moody v. State, 277 Ga. 676, 594 S.E.2d 350 (2004) (decided under former O.C.G.A. § 24-2-2).

Evidence not related to issues excluded. — In a voluntary manslaughter case, a photograph portraying the victim's use of obscene hand gestures, a photograph portraying the victim's display of what appeared to be two partially consumed bottles of beer, and photographs portraying the victim's obscene consumption of a cake baked in the likeness of a nude woman were properly excluded because the photographs were not relevant to the issues being tried and not relevant to defendant's claim of self-defense. Guy v. State, 204 Ga. App. 228, 418 S.E.2d 778, cert. denied, 204 Ga. App. 921, 418 S.E.2d 778 (1992) (decided under former O.C.G.A. § 24-2-2).

Evidence of a prior violent act. — Trial court did not err in admitting evidence of defendant's conviction for manslaughter since the plaintiff contended that the defendant made a violent, malicious, and unwarranted attack on the plaintiff, as it went to the issue of defendant's bent of mind, habit, and course of conduct. Dimarco's, Inc. v. Neidlinger, 207 Ga. App. 526, 428 S.E.2d 431 (1993) (decided under former O.C.G.A. § 24-2-2).

In a prosecution for battery, evidence of the victim's prior acts of violence and convictions for battery was properly excluded as the defendant failed to make a prima facie showing of justification. There was no evidence that the victim attacked the defendant, and the testimony of the victim's former romantic companion indicated that the defendant could not have seen the victim's alleged attack on the companion. Frasier v. State, 295 Ga. App. 596, 672 S.E.2d 668 (2009) (decided under former O.C.G.A. § 24-2-2).

Trial court's determination that the state met the requirements for admission of similar transaction evidence was not an abuse of discretion because evidence that the defendant used violence against an adult with whom the defendant had a close, loving relationship was admissible to show the defendant's bent of mind in using violence against a member of the defendant's family, even though the family member was a mere infant, and even though the family member suffered internal, rather than external, injuries. Brinson v. State, 289 Ga. 150, 709 S.E.2d 789 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err by admitting evidence of the defendant's prior difficulty in which the defendant squeezed and threw the defendant's baby because the prior difficulty evidence was properly admitted to show the defendant's bent of mind towards and course of conduct with the baby; even if similarity were an issue, both the prior difficulty and the crimes for which the defendant was being tried in-

volved inappropriate squeezing of the baby. Stokes v. State, 289 Ga. 702, 715 S.E.2d 81 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of other conduct or crimes was admissible. — Defendant's aggravated assault conviction was upheld on appeal, as the victim's identification of the defendant as the perpetrator was sufficient evidence to uphold the conviction, and evidence of a subsequent altercation between the two, like evidence of a prior difficulty, was probative evidence that the victim immediately identified the defendant to police on the day of the incident. Bond v. State, 283 Ga. App. 620, 642 S.E.2d 223 (2007) (decided under former O.C.G.A. § 24-2-2).

In an aggravated assault case, since there was evidence that the victim's injuries were consistent with the use of a sharp instrument, similar transaction evidence of attacks with a box cutter and with a knife during altercations was not admitted for an improper purpose. The evidence was admissible to show the defendant's bent of mind and course of conduct. Miller v. State, 292 Ga. App. 641, 666 S.E.2d 35 (2008), cert. denied, 2008 Ga. LEXIS 903 (Ga. 2008) (decided under former O.C.G.A. § 24-2-2).

In a malice murder prosecution, the trial court did not abuse the court's discretion in admitting testimony concerning the violent relationship between the defendant and the victim (the defendant's paramour), and the marks and scratches witnesses saw on the victim's body as the testimony qualified as prior difficulties or similar transaction evidence. Smith v. State, 284 Ga. 304, 667 S.E.2d 65 (2008) (decided under former O.C.G.A. § 24-2-2).

Defendant was convicted of voluntary manslaughter for fatally stabbing the defendant's spouse. A witness's testimony at a Ga. Unif. Super. Ct. R. 31.3(B) hearing that the defendant had threatened the witness with a knife was sufficient to establish the commission of the prior act, and as the prior act was sufficiently connected to the charged crime, the testimony was properly admitted at trial. McKenzie v. State, 294 Ga. App. 376, 670 S.E.2d 158 (2008) (decided under former O.C.G.A. § 24-2-2).

Evidence of other conduct or crimes of a witness was inadmissable. — Trial court did not err in excluding evidence that a witness and a friend had been involved in a separate crime because absent any competent evidence showing that a witness and a friend had actually committed a prior crime, the defendant failed to meet the burden of showing that evidence of the prior crime was admissible. Redinburg v. State, 315 Ga. App. 413, 727 S.E.2d 201 (2012) (decided under former O.C.G.A. § 24-2-2).

Error in admitting similar transaction evidence required reversal. — While state presented sufficient evidence of the victim's age to support assault charge under O.C.G.A. § 16-5-21(a)(1), because the trial court clearly erred in admitting evidence of two burglaries defendant committed in 1998 as similar transactions to help prove the issue of identity, defendant's aggravated assault, burglary, robbery, theft, and battery convictions were reversed. Usher v. State, 290 Ga. App. 710, 659 S.E.2d 920 (2008) (decided under former O.C.G.A. § 24-2-2).

b. Robbery, Burglary, and Theft Crimes

Admission of similar transaction evidence proper. — In a prosecution involving a murder and robbery at a convenience store, the trial court properly admitted similar transaction evidence of an attempted robbery of a fast-food restaurant. In each case, the defendant recruited another person from the same house for assistance, wore a mask, carried a .9mm pistol, and committed the crimes early in the morning. Judkins v. State, 282 Ga. 580, 652 S.E.2d 537 (2007) (decided under former O.C.G.A. § 24-2-2).

In an armed robbery case, the trial court properly admitted evidence of a prior armed robbery. The similar transaction was offered to prove course of conduct, state of mind, and the defendant's intent; a certified copy of the defendant's conviction was offered; and the prior robbery took place the day before the robbery at issue and like the present robbery involved a victim being robbed of money at gunpoint while at work. Deloatch v. State,

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3. Specific Crimes (Cont'd)
b. Robbery, Burglary, and Theft Crimes (Cont'd)

296 Ga. App. 65, 673 S.E.2d 576 (2009) (decided under former O.C.G.A. § 24-2-2).

Defendant was charged of robbing a store clerk at knife-point. Evidence presented at a Ga. Unif. Super. Ct. R. 31.3(B) hearing that, on the day after this robbery, the defendant robbed a second clerk at knife-point, was properly admitted as similar transaction evidence; the fact that the trial on the second robbery was pending afforded no basis to exclude the evidence. Hill v. State, 298 Ga. App. 677, 680 S.E.2d 702 (2009) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting similar transaction evidence because the prior armed robbery victim's identification of the defendant as one of the robbers was based on an investigating officer's personal knowledge; a second police officer's testimony that the officer had arrested a man with the same name as the defendant with a date of birth of February 23, 1984, was sufficient circumstantial evidence that the defendant committed a motor vehicle theft in 1998. Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010), overruled on other grounds, Reed v. State, 291 Ga. 10, 727 S.E.2d 112 (2012) (decided under former O.C.G.A. § 24-2-2).

Given the similarities between the theft of a car and the theft of a second vehicle only hours after the car was stolen, evidence of either theft would be admissible as a similar transaction of the other to show bent of mind, intent, and course of conduct; both crimes occurred in the same city and on the same date, both involved the theft of foreign-made, mid-size sedans, and the state presented evidence from which the jury could infer that, like the car, the keys had been left in the second vehicle at the time the car was stolen, and the keys from both cars were missing when the cars were recovered. Ferguson v. State, 307 Ga. App. 232, 704 S.E.2d 470 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in permitting testimony and argument about a prior robbery at a video store because evidence relating to the first crime was not wholly unrelated to the charged crimes, nor was the evidence so remote in time as to make the evidence inadmissible; an officer's business card containing information relating to the earlier robbery of the video store was admissible because the evidence was relevant to the identity of the accused and was an article connected with the charged offense and recovered during the search of the codefendant's apartment, and although it was improper to permit testimony and argument that went beyond identifying the business card as an article taken in the prior robbery, the error did not require reversal since there was overwhelming evidence of the codefendant's guilt. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion by permitting witnesses to mention in their testimony, and the prosecutor to mention during the prosecutor's opening statement and closing argument, a prior robbery of a video store because the evidence and statements did not constitute evidence of or statements concerning similar transactions which the state sought to use against the defendant; the state did not suggest, nor could it be reasonably inferred from the evidence, that the defendant was implicated in any way in the prior robbery, and adherence to Ga. Unif. Super. Ct. R. 31.1 and 31.3 was not required because that evidence and those statements did not place the defendant's character in issue. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of two prior burglaries as similar transactions under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) during the defendant's trial for burglary, O.C.G.A. § 16-7-1, because the trial court's finding that the offenses satisfied the similarity requirement was not clearly erroneous; there was evidence that the defendant was in a house on the day before the burglary was discovered and was found wearing stolen sunglasses two days later, in each instance the defendant became acquainted with male college

students by asking for money or odd jobs and later, when the victims' house appeared to be vacant, entered without authority to appropriate the victims' goods, and the burgled houses were within one mile of each other. Long v. State, 307 Ga. App. 669, 705 S.E.2d 889 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court's decision to admit evidence of the defendant's prior handgun theft was not an abuse of the court's discretion because in both the earlier theft and the murder for which the defendant was convicted, the defendant stole 9 millimeter handguns from individuals with whom the defendant had a close relationship and access, and then the defendant lied to police in order to avoid arrest and prosecution. Hunt v. State, 288 Ga. 794, 708 S.E.2d 357 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of two prior burglaries as similar transactions under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) during the defendant's trial for burglary, O.C.G.A. § 16-7-1, because the trial court's finding that the offenses satisfied the similarity requirement was not clearly erroneous; there was evidence that the defendant was in a house on the day before the burglary was discovered and was found wearing stolen sunglasses two days later, in each instance the defendant became acquainted with male college students by asking for money or odd jobs and later, when the victims' house appeared to be vacant, entered without authority to appropriate the victims' goods, and the burgled houses were within one mile of each other. Long v. State, 307 Ga. App. 669, 705 S.E.2d 889 (2011) (decided under former O.C.G.A. § 24-2-2).

Testimony of 12 former child victims was properly admitted because the similar past transactions were sufficiently similar and showed the defendant's unique bent of mind; the similar transaction evidence included testimony about the defendant's sexual experiences with other underage victims, which were the same as those involved in the charged offenses. Ewell v. State, 318 Ga. App. 812, 734 S.E.2d 792 (2012) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence was properly admitted under former O.C.G.A. § 24-2-2 to show that the defendant had committed a prior armed robbery of a retail establishment when the defendant was unable to support oneself and needed money. Johnson v. State, 277 Ga. App. 41, 625 S.E.2d 411 (2005) (decided under former O.C.G.A. § 24-2-2).

When defendant was accused of robbing an auto parts store, similar transaction evidence was properly admitted; the evidence showed defendant's participation in nine other armed robberies of retail establishments in the same metropolitan area over a seven-month period, including six robberies at five other auto parts stores. Wyche v. State, 291 Ga. App. 165, 661 S.E.2d 226 (2008), cert. denied, No. S08C1413, 2008 Ga. LEXIS 914 (Ga. 2008) (decided under former O.C.G.A. § 24-2-2).

Incident occurring eight years ago admitted. — Similar transaction evidence of an eight-year-old incident in which the defendant robbed two victims at gunpoint was not too remote in time or dissimilar to the armed robbery and aggravated assault charges the defendant was on trial for, and was thus properly admitted to show course of conduct, bent of mind, motive, and identity. Wallace v. State, 295 Ga. App. 452, 671 S.E.2d 911 (2009) (decided under former O.C.G.A. § 24-2-2).

Prior crimes properly admitted. — Prior crimes committed by defendant, including the murder of a store owner and an armed robbery, were properly admitted, not as similar transactions, but as evidence to show the motive, course of conduct, and bent of mind; moreover, evidence of the robbery was sufficiently similar to the current armed robbery charges. Grimes v. State, 280 Ga. 363, 628 S.E.2d 580 (2006) (decided under former O.C.G.A. § 24-2-2).

When extreme prejudice results. — Statement volunteered by police officer, witness for the state, on cross-examination, that the defendant was apprehended after being shot while attempting to break into another house, was so prejudicial that the mere statement by the court that the jury was not to

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3. Specific Crimes (Cont'd)
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consider it did not cure the error, and a reversal was demanded on this ground. Felton v. State, 93 Ga. App. 48, 90 S.E.2d 607 (1955) (decided under former Code 1933, § 38-202).

Res gestae. — Three robberies of drive-through restaurants located within a short distance of each other occurred in less than a 24-hour period and the suspect walked up to the drive-through window wearing a green army jacket and using a blue car, were sufficiently similar and constituted part of the res gestae; therefore, the trial court did not err in admitting the evidence. Houston v. State, 270 Ga. App. 456, 606 S.E.2d 883 (2004) (decided under former O.C.G.A. § 24-2-2).

Logical connection between crimes. — When there is no question that the modus operandi of a past burglary for which defendant had been convicted is similar to that of the burglary for which the defendant is on trial, a logical connection exists between the two offenses sufficient to render the prior offense relevant and admissible for the purpose of establishing the defendant's criminal intent in the case for which defendant is on trial. Scott v. State, 162 Ga. App. 541, 292 S.E.2d 125 (1982) (decided under former O.C.G.A. § 24-2-2).

Admission of evidence of a defendant's theft of another vehicle as similar transaction evidence to show course of conduct, intent, and identity was not an abuse of discretion since, as in the present case, the defendant stole the other car from a salesperson during a test drive with the use of a weapon and then forced the salesperson from the car next to a freeway exit ramp. Mullins v. State, 280 Ga. App. 689, 634 S.E.2d 850 (2006) (decided under former O.C.G.A. § 24-2-2).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — Trial court did not err in admitting evidence of other crimes defendant committed on the same day defendant robbed a convenience store as both of the similar crimes involved robberies of a female victim working alone at a convenience store on the same day, just as occurred with the indicted offense, and the clerks' descriptions of defendant's clothing and physical appearance in the similar crimes resembled those of defendant in the indicted offense; accordingly, sufficient circumstantial evidence connected defendant to the offenses and allowed for admission of the evidence of similar crimes. Ferguson v. State, 262 Ga. App. 28, 584 S.E.2d 618 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting similar transaction evidence of a first car-jacking to show bent of mind, course of conduct, and identity since: (1) both incidents constituted car-jackings committed with a gun pointed at the victim; (2) the incidents occurred within six days of each other; (3) the first car-jacking involved a car of the same make and color as one used in the car-jacking that was being tried; (4) the victim of the first car-jacking positively identified defendant as the perpetrator of the first car-jacking; and (5) the testimony of the victim of the first car-jacking was sufficient to meet the elements of O.C.G.A. § 16-5-44.1(b). Mullins v. State, 267 Ga. App. 393, 599 S.E.2d 340 (2004) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of three similar transaction offenses in defendant's trial for robbery, hijacking a motor vehicle, and possession of a firearm by a convicted felon since the earlier incidents were sufficiently similar to show that defendant had a course of conduct and bent of mind to steal cars, particularly in a certain area, because: (1) on two prior occasions defendant was discovered driving stolen cars and was convicted of theft by receiving; and (2) as to the third similar transaction, a witness testified that a man showed the witness a gun and demanded that the witness give him the keys to a car, defendant was subsequently arrested and identified by the witness, and defendant was indicted for armed robbery and entered a guilty plea to the offense of robbery. Cain v. State, 268 Ga. App. 39, 601 S.E.2d 415 (2004) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting evidence of independent crimes to show identity, bent of mind, and course of conduct because the independent crimes and the charged crimes showed that defendant committed the burglaries with accomplices, that the defendant committed the burglaries during daylight hours, that defendant and the accomplices would choose a home to burglarize by driving around semi-rural areas until they found a home that looked empty and that "sat back" some distance from the street on which it was located, and that defendant used the brother's white van to commit the charged crimes and one of the independent crimes. Denny v. State, 280 Ga. 81, 623 S.E.2d 483 (2005) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence admissible. — Evidence of defendant's three prior convictions was properly admitted in defendant's entering an automobile trial as: (1) certified copies of the convictions were introduced and defendant was placed at the scene of the prior crimes; (2) the prior offenses and the charged offenses all involved acts of entering an automobile during the early morning hours in downtown Savannah; (3) the crimes could be admitted to show bent of mind and course of conduct; and (4) the prejudicial impact of the similar transaction evidence did not outweigh the probative value. Williams v. State, 273 Ga. App. 213, 614 S.E.2d 834 (2005) (decided under former O.C.G.A. § 24-2-2).

Evidence that defendant was on parole at the time of the crime was not inadmissible since the evidence showed defendant's motive for committing robbery and was material. Cook v. State, 221 Ga. App. 831, 472 S.E.2d 686 (1996) (decided under former O.C.G.A. § 24-2-2).

Defendant's denial of alleged admission of other acts. — Testimony in rebuttal to testimony by defendant that defendant had never told anyone that defendant had robbed and raped some people and thrown guns out of a car window is admissible to impeach defendant's testimony in defendant's own behalf. Baker v. State, 161 Ga. App. 670, 288 S.E.2d 280 (1982) (decided under former O.C.G.A. § 24-2-2).

Defendant's prior burglary conviction was properly admitted in defendant's burglary trial as: (1) defendant waived any claim that a prior conviction was insufficiently similar to the burglary as defendant did not raise the claim at the pretrial hearing and at trial; (2) defendant failed to preserve any objection to the introduction of the Alabama "Case Action Summary" based on a best evidence theory; and (3) defendant failed to show that the prior conviction was more prejudicial than probative. Brooks v. State, 273 Ga. App. 691, 615 S.E.2d 829 (2005), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in finding that similar transaction evidence was relevant and admissible because the evidence showed that the defendant was involved in the planning and/or execution of each of the similar transactions pursuant to O.C.G.A. § 16-2-20, even if the defendant was not the actual perpetrator of the crime; given that the defendant was identified as an active participant in individual crimes that were part of this continuing criminal enterprise, and that the defendant's possession of a ring stolen from a car salesperson further demonstrated the involvement in the crime spree, the jury was authorized to find that the defendant committed the independent offenses or acts as either an actual perpetrator or as a party to the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of previous arrest for burglary admissible. — In a trial for burglary, the trial court properly admitted evidence of a prior burglary as evidence of intent and state of mind, even though the trial court failed to expressly balance the probative value of the evidence against the prejudicial impact; the evidence was not overly prejudicial as detailed limiting instructions were given when the evidence was admitted and at the close of the case. Clark v. State, 272 Ga. App. 89, 611 S.E.2d 741 (2005) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err when the court declined to exclude a witness's testimony

Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
b. Robbery, Burglary, and Theft Crimes (Cont'd)

that the defendant told the witness that the defendant wanted to go to a "shot house" so that the defendant could rob the house based on the defendant's objection that the statement was rendered inadmissible by the state's failure to follow the procedural rules appropriate to similar transaction evidence, Ga. Unif. Super. Ct. R. 31.3, because the defendant's statement was neither a crime in and of itself nor a relevant expression of prior difficulties between the defendant and any of the victims of the crimes; an accused's statements were not independent offenses or acts unless those statements in and of themselves constituted a crime, but rather, statements such as the challenged words the witness repeated fell within the definition of character evidence, former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405), which was irrelevant and had to be excluded unless admissible for some other legal purpose. Newsome v. State, 288 Ga. 647, 706 S.E.2d 436 (2011) (decided under former O.C.G.A. § 24-2-2).

c. Controlled Substances

Proper admission of similar transaction evidence. — When, as part of trial strategy, the first defendant elected to introduce evidence of the first defendant's non-involvement in a prior drug sale and attempted to elicit testimony from a codefendant that the first defendant did not participate in the prior drug deal, but when the codefendant testified that the first defendant and the second defendant were the suppliers of the ounce of cocaine sold in that prior transaction, the trial court did not err in admitting evidence of the prior drug deal as a similar transaction because the first defendant could not complain on appeal about the deleterious results stemming from that defendant's own trial strategy. Lopez v. State, 267 Ga. App. 532, 601 S.E.2d 116 (2004) (decided under former O.C.G.A. § 24-2-2).

Admission of similar transaction evidence proper. See Ryan v. State, 277 Ga. App. 490, 627 S.E.2d 128 (2006) (drugs) (decided under former O.C.G.A. § 24-2-2).

When the defendant was charged with possessing methamphetamine, the trial court properly admitted as a similar transaction a prior conviction for possessing methamphetamine because both involved the defendant's possession of methamphetamine while involved in disorderly conduct. The defendant claimed that the scales on which the drug was found were in a car when the defendant bought it, and evidence of the similar transaction, when officers responding to a disorderly person call found methamphetamine in the defendant's pocket, was relevant to the defendant's intent and bent of mind to possess methamphetamine. Martin v. State, 291 Ga. App. 363, 662 S.E.2d 185 (2008) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting similar transaction evidence during the defendant's trial for possession of methamphetamine and possession of drug related objects because the subsequent incident involved possession of methamphetamine and possession of a glass pipe used to smoke methamphetamine. McGhee v. State, 303 Ga. App. 297, 692 S.E.2d 864 (2010) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting evidence of the defendant's prior drug sales as similar transactions for the purpose of showing the defendant's bent of mind and course of conduct because at trial the defendant denied having any knowledge of the cocaine found in the defendant's vehicle or about the sale of cocaine to an informant; therefore, based on the similarity of the prior crimes with the offense at issue, including the similar hand-to-hand nature of the sale of the same drug, for the same price, at a similar time of day, in the same general area, there was no abuse of the trial court's discretion in admitting the evidence of prior drug sales as similar transactions for the purpose of showing the defendant's bent of mind and course of conduct. Robertson v. State, 306 Ga. App. 721, 703 S.E.2d 343 (2010) (decided under former O.C.G.A. § 24-2-2).

During defendant's trial for possession of methamphetamine and possession of marijuana, the trial court did not abuse the court's discretion in admitting evidence of the defendant's prior conviction on an obstruction charge because the trial court admitted the evidence for the purpose of showing the defendant's course of conduct only after conducting a hearing pursuant to Ga. Unif. Super. Ct. R. 31.3(B), which it was required to do, and the state satisfied the criteria delineated in Rule 31.3 for the admission of similar-transaction evidence; even assuming that the similar-transaction evidence should have been excluded, any error in the evidence's admission was harmless because there was videotaped evidence that the defendant was driving an obviously stolen vehicle, that the defendant fled from officers who attempted to conduct a traffic stop, that the defendant continued to lead the officers on a chase even after the defendant's tires had been flattened, that the defendant ultimately exited the vehicle and ran on foot, and that methamphetamine and marijuana not belonging to the owner were found inside the vehicle in which the defendant was the sole occupant. Mangum v. State, 308 Ga. App. 84, 706 S.E.2d 612 (2011) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting similar transaction evidence because both the prior incident and the incident for which the defendant was convicted involved the possession of cocaine since the prior possession was for the purpose of distribution, inasmuch as the evidence showed that the defendant did, in fact, distribute cocaine on that occasion, and the possession for which the defendant was convicted was for an unknown purpose and not clearly for personal use; one incident involved possession and sale of less than one gram of cocaine, the other involved possession of less than two grams of cocaine, and both incidents occurred in the county within a span of two weeks. Gaudlock v. State, 310 Ga. App. 149, 713 S.E.2d 399 (2011) (decided under former O.C.G.A. § 24-2-2).

Similar transaction notice was sufficient. — Trial court committed no error in allowing the introduction of similar transaction evidence because the trial court was authorized to conclude that the defendant received adequate notice of the similar transactions prior to trial and was not prejudiced by the state's failure to attach the accusation and guilty plea to the state's notice pursuant to Ga. Unif. Super. Ct. R. 31.3; the prosecutor informed the trial court that since the defendant's counsel entered the case, the prosecutor had a number of discussions with counsel about the defendant's prior drug conviction as part of plea negotiations, and the similar transaction notice the state filed included information identifying the similar transaction, including the date of occurrence, the county in which the crime occurred, the case number, and the date of the guilty plea, as well as a list of potential witnesses who had been involved in the case and their contact information. Taylor v. State, 305 Ga. App. 748, 700 S.E.2d 841 (2010) (decided under former O.C.G.A. § 24-2-2).

Evidence of defendant's drug use. — Evidence that defendant's urine sample taken after killing had tested positive for marijuana was relevant and admissible as part of res gestae to show the influence of drugs on defendant's state of mind at the time of the killing. Giddens v. State, 206 Ga. App. 409, 425 S.E.2d 299 (1992) (decided under former O.C.G.A. § 24-2-2).

Witnesses' brief testimony that the defendant would sell cocaine to the witnesses because of a prior relationship, was necessary to explain why the witnesses were approached to make the purchase, and why neither an undercover officer nor a confidential informant could accompany one of the witnesses to the defendant's residence, and the trial court did not abuse the court's discretion in admitting the testimony. Smith v. State, 278 Ga. App. 315, 628 S.E.2d 722 (2006) (decided under former O.C.G.A. § 24-2-2).

In a drug case when cocaine, marijuana, and a scale were found in the car the defendant was driving, and the defendant gave police a false name, the trial court did not err in admitting evidence of similar transactions; in all of the transactions, the defendant either possessed cocaine or was in direct proximity to cocaine, the

Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
c. Controlled Substances (Cont'd)

defendant possessed scales in two of the other offenses, and in all but one of the offenses the defendant gave the police a false name. Jackson v. State, 284 Ga. App. 619, 644 S.E.2d 491 (2007), cert. denied, No. S07C1169, 2007 Ga. LEXIS 521 (Ga. 2007) (decided under former O.C.G.A. § 24-2-2).

In a prosecution for two counts of possession of less than one ounce of marijuana, evidence of the defendant's three prior convictions for the same offense was properly admitted. Given that the defendant denied possessing marijuana in two of the prior cases and in the case at bar, the prior transactions were probative of the defendant's bent of mind and course of conduct. Neal v. State, 297 Ga. App. 223, 676 S.E.2d 864 (2009) (decided under former O.C.G.A. § 24-2-2).

Admission of similar transaction evidence in a case charging the defendant with possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), and obstructing or hindering law enforcement officers, O.C.G.A. § 16-10-24, was proper because, in both the similar transaction and the incident leading to the charges being tried, the defendant was arrested in possession of cocaine and "sale-sized" baggies after seeking to avoid police; the trial court also gave an instruction that the similar transaction evidence was limited to the purpose of showing the defendant's bent of mind in committing the charged offenses. Cotton v. State, 297 Ga. App. 664, 678 S.E.2d 128 (2009) (decided under former O.C.G.A. § 24-2-2).

Although the evidence was sufficient to support the defendant's convictions for vehicular homicide under O.C.G.A. § 40-6-391(b), the court's admission of similar-transaction evidence, consisting of a prior methamphetamine conviction, was erroneous as irrelevant character evidence under former O.C.G.A. § 24-2-2 (see now O.C.G.A. § 24-4-404), and the conviction was reversed. McMullen v. State, 316 Ga. App. 684, 730 S.E.2d 151 (2012) (decided under former O.C.G.A. § 24-2-2).

Trial court properly admitted similar transaction evidence to show a defendant's course of conduct and intent. — In a marijuana possession case involving a stop of a car in which the defendant was a passenger, the trial court did not err under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) in permitting evidence that the defendant was previously stopped for speeding and a significant amount of marijuana was found in the car; since the defendant's constructive possession was at issue, the state was permitted to use the prior offense to show the defendant's intent, bent of mind, and course of conduct, the incidents occurred approximately a year apart and involved similar conduct, and the probative value of the evidence was not outweighed by any unfair prejudice that resulted. Curtis v. State, 282 Ga. App. 322, 638 S.E.2d 773 (2006), cert. denied, No. S07C0427, 2007 Ga. LEXIS 203 (Ga. 2007) (decided under former O.C.G.A. § 24-2-2).

Testimony as to circumstances connected with the accused's arrest is admissible. — Testimony that an officer had gone to defendant's home to execute an arrest warrant for a probation violation explained the officer's presence at defendant's home and the officer's observation of defendant's use of marijuana; the testimony did not put defendant's character in issue and was, therefore, admissible. Jones v. State, 268 Ga. App. 246, 601 S.E.2d 763 (2004) (decided under former O.C.G.A. § 24-2-2).

Trial counsel was not ineffective for failing to object to a witnesses reference to marijuana because any challenge to the testimony would have failed; even if the testimony incidentally placed the defendant's character in issue, all circumstances with an accused's arrest were admissible if the circumstances were shown to be relevant, and that was so even if the evidence incidentally put the accused's character in issue. Odom v. State, 304 Ga. App. 615, 697 S.E.2d 289, cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. 2010) (decided under former O.C.G.A. § 24-2-2).

Mere accusation or indictment insufficient. — Mere introduction of an

accusation with pleas of guilty thereon, embracing the same crime for which defendant is on trial, without proof of details as to the manner in which previous acts were committed, does not constitute similarity of transactions so connected as to reveal knowledge, plan, or system, and therefore the court erred in admitting, over objections, the former accusation and plea of guilty of defendant, charged with possession of non-taxpaid whiskey, to a previous charge of the same offense. Chambers v. State, 76 Ga. App. 269, 45 S.E.2d 724 (1947) (decided under former Code 1933, § 38-202); Waters v. State, 82 Ga. App. 608, 61 S.E.2d 794 (1950) (decided under former Code 1933, § 38-202).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — Trial court did not err when the court admitted evidence of defendant's prior conviction for possession of cocaine with intent to distribute in defendant's current case in which defendant was charged with, inter alia, trafficking in cocaine as the evidence was admitted for the permissible purpose of showing defendant's bent of mind and course of conduct. Kates v. State, 271 Ga. App. 326, 609 S.E.2d 710 (2005) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence admissible. — There was a sufficient connection between an earlier drug crime and the one at issue to support the admission of similar transaction evidence. In both instances defendant's vehicle was stopped on or near a certain interstate highway for driving in an unlawful manner, and upon each stop defendant consented to a search of defendant's vehicle and the search yielded cocaine; there was no doubt that defendant committed the prior act, as defendant confessed to it. Buckholts v. State, 283 Ga. App. 254, 641 S.E.2d 246 (2007) (decided under former O.C.G.A. § 24-2-2).

Evidence that defendant had previously transported marijuana. — Evidence that marijuana was found in the trunk of defendant's automobile supported the inference that the defendant had previously transported marijuana and was relevant to prove that defendant was predisposed to commit the crime for which the defendant was indicted and to which the defendant raised the defense of entrapment, so that the evidence was sufficient to withstand a relevancy objection. Fancher v. State, 190 Ga. App. 438, 378 S.E.2d 923 (1989) (decided under former O.C.G.A. § 24-2-2).

Conduct by family members. — Trial court erred in allowing the state's attorney to cross-examine the defendant, who was accused of possession of marijuana, as to whether other members of defendant's family had "been in trouble for marijuana." Hill v. State, 176 Ga. App. 509, 336 S.E.2d 276 (1985) (decided under former O.C.G.A. § 24-2-2).

Nonconvicted prior drug transactions admissible. — Evidence of prior drug transactions for which defendant was not arrested but in which defendant used a beeper to contact the arrestee and defendant's car to transport the arrestee was relevant to show defendant's participation for distribution of cocaine. Howard v. State, 206 Ga. App. 610, 426 S.E.2d 181 (1992) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in admitting the evidence as the state offered the evidence to show defendant's bent of mind or course of conduct, specifically, to show defendant's conduct in possessing small amounts of cocaine and when caught, denying that the cocaine belonged to defendant; the facts in the two instances were sufficiently similar to allow the introduction of the prior conviction into evidence and that the probative value of the evidence outweighed any prejudicial value. Kidd v. State, 277 Ga. App. 29, 625 S.E.2d 440 (2005) (decided under former O.C.G.A. § 24-2-2).

Presence of marijuana and gun not sufficient enough to be admissible. — Trial court erred in admitting evidence surrounding the defendant's prior arrest and subsequent guilty plea to possession of marijuana and carrying a concealed weapon because the only similarity in each transaction was that the defendant was in a vehicle in which marijuana and a gun were present. In addition, there was insufficient similarity between the independent offense and the crime charged so that proof of the former tended to prove the latter. Talifero v. State, 319 Ga. App.

Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
c. Controlled Substances (Cont'd)

65, 734 S.E.2d 61 (2012) (decided under former O.C.G.A. § 24-2-2).

d. Miscellaneous Crimes

Admission of similar transaction evidence proper. — In a forgery case, the trial court properly admitted similar transaction evidence of a prior forgery conviction. The trial court admitted the similar transaction evidence to show the defendant's identity and course of conduct, which were proper purposes; furthermore, in both cases, the defendant cashed or tried to cash bogus checks issued to the defendant and endorsed by the defendant at a check-cashing location other than at the bank where the checks were purportedly drawn. Beck v. State, 291 Ga. App. 702, 662 S.E.2d 798 (2008) (decided under former O.C.G.A. § 24-2-2).

Incident involving same victim was not a similar transaction. — During defendant's trial for aggravated stalking, the state was permitted to introduce evidence showing that the defendant violated a bond condition by accosting the victim at a department store. The encounter at the store was not a similar transaction just because the encounter involved the same victim; the state gave the defendant notice of the state's intent to submit the evidence, and gave a limiting instruction before the evidence was introduced. Reed v. State, 309 Ga. App. 183, 709 S.E.2d 847 (2011) (decided under former O.C.G.A. § 24-2-2).

State of feeling between defendant and victim. — On a trial of an indictment for arson, it is not error to admit evidence showing that feelings of anger or dislike existed on the part of the defendant toward the owner of the property. Wright v. State, 113 Ga. App. 436, 148 S.E.2d 333 (1966) (decided under former Code 1933, § 38-202).

Prior use of a firearm. — Defendant's prior offense of the unprovoked use of a firearm to threaten a driver who disagreed with defendant's taking of a parking space was admissible because the offense showed defendant's propensity to settle disagreements with a gun, to act violently and impulsively to disappointment or misunderstanding, and to resort to the use of a gun with little provocation. Davis v. State, 244 Ga. App. 708, 536 S.E.2d 596 (2000) (decided under former O.C.G.A. § 24-2-2).

Trial court properly admitted similar transaction evidence to show a defendant's course of conduct and intent. — When a defendant was charged with violating O.C.G.A. § 16-8-60(b), the admission of similar crimes evidence did not violate due process; evidence that following the defendant's arrest on the Georgia charge, the defendant had been arrested in Florida for possession of illegally reproduced recordings was appropriate for showing scheme and course of conduct, and the Florida act was sufficiently similar to the Georgia charges. Hayward-El v. State, 284 Ga. App. 125, 643 S.E.2d 242 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial for escape. — General rule which prohibits reference to other crimes by the accused is not fully applicable to a trial for escape, which by its nature alludes to a prior act resulting in incarceration or conviction; evidence of the escapee's original crime is often an unavoidable aspect of the state's proof with regard to the lawfulness of confinement. Johnson v. State, 188 Ga. 771, 4 S.E.2d 639 (1939) (decided under former Code 1933, § 38-202); Carter v. State, 155 Ga. App. 840, 273 S.E.2d 417 (1980) (decided under former Code 1933, § 38-202).

In trial for escape and other offenses, it was not error to introduce record of prior conviction to show lawfulness of confinement without a limiting instruction. Greene v. State, 155 Ga. App. 222, 270 S.E.2d 386 (1980) (decided under former Code 1933, § 38-202).

Conviction relied upon must have occurred prior to the escape. — When a conviction does not occur prior to the escape and thus is not relied upon to establish the felony grade of offense, reference to the conviction is unnecessary and is error. Carter v. State, 155 Ga. App. 840, 273 S.E.2d 417 (1980) (decided under former Code 1933, § 38-202).

Logical connection between crimes. — In defendant's trial for forgery

and racketeering for selling fake badges for a golf tournament to a ticket agency, the trial court did not abuse the court's discretion in admitting similar transaction evidence because all of the similar transactions were used, not to show identity, but to show bent of mind and course of conduct as: (1) four of the five transactions involved forgeries through which defendant appropriated the checks of other people and attempted to profit from those checks and at issue was whether defendant attempted to profit from badges that were constructed to resemble those created by a golf course; and (2) the final transaction even involved a scheme wherein defendant represented to potential buyers that defendant had golf tournament badges to sell to them, which defendant never delivered. With respect to the similarity requirement for admitting evidence of prior crimes, there can be substantial variation of circumstances when there exists a logical connection between crimes which are essentially dissimilar, and the issue is whether the extrinsic transactions are relevant to the issues in the trial of the case. When similar transaction evidence is being introduced to prove motive, intent, or bent of mind, it requires a lesser degree of similarity to meet the test of admissibility than when such evidence is being introduced to prove identity. Davis v. State, 264 Ga. App. 128, 589 S.E.2d 700 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in ruling that similar transaction evidence was admissible because the ex-wife's testimony closely paralleled that of the victim, defendant's ex-girlfriend; in both cases defendant violated a restraining order, called the victim names, picked on bodily faults, and threatened both the victim and the victim's children. Maskivish v. State, 276 Ga. App. 701, 624 S.E.2d 160 (2005) (decided under former O.C.G.A. § 24-2-2).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — Prejudicial impact of prior crimes evidence did not outweigh the probative value in defendant's fleeing or attempting to elude a police officer trial as the prior crimes evidence showed a pattern of running from police and of resisting arrest and was properly admitted to show course of conduct, bent of mind, and intent. Mills v. State, 273 Ga. App. 699, 615 S.E.2d 824 (2005) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence admissible. — In a trial for driving with a suspended license, the trial court did not improperly admit evidence of seven similar transactions; the similar transactions occurred in the same area and most at about the same time of day as the charged crime, two involved the same car, and all showed the defendant's bent of mind to drive with a suspended license. Williams v. State, 285 Ga. App. 190, 645 S.E.2d 676 (2007) (decided under former O.C.G.A. § 24-2-2).

Testimony of victim describing the telephone calls the victim received from defendant over a period of time and defendant's aborted visit the same month as the crime on trial was evidence of defendant's bent of mind and tended to show that as well as motive, intent, plan, identity, and/or course of conduct. Watson v. State, 180 Ga. App. 82, 348 S.E.2d 557 (1986) (decided under former O.C.G.A. § 24-2-2).

No mistrial when defendant declines cautionary instructions. — Acts of cruelty to children by the defendant have no relevance whatsoever to the issues in a trial for arson. However, when the defendant expressly declined the trial court's offer to give cautionary instructions to the jury and stated that defendant would stand on defendant's motion for mistrial, it cannot be said that, as a matter of law, the giving of cautionary instructions would have been inadequate so that a mistrial was demanded. Kuchenmeister v. State, 199 Ga. App. 64, 403 S.E.2d 847, cert. denied, 199 Ga. App. 906, 403 S.E.2d 847 (1991) (decided under former O.C.G.A. § 24-2-2).

Evidence of other conduct or crimes was admissible. — Evidence of other transactions was admissible when, as in the charged crime, in the other transactions defendant misrepresented to homeowners how quickly defendant could begin work and how many laborers defendant would commit to the project, in each transaction, defendant barely started

Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
c. Controlled Substances (Cont'd)

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Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
d. Miscellaneous Crimes (Cont'd)

work before abandoning the project, and in each case, defendant avoided customers' inquiries and failed to refund the unearned down payments. Smith v. State, 265 Ga. App. 57, 592 S.E.2d 871 (2004) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in sentencing the defendant to a $1,000 fine for speeding in violation of O.C.G.A. § 40-6-181(b)(2) because the defendant did not object to the state's failure to admit certified copies of the defendant's prior convictions, nor did the defendant dispute that the defendant had multiple convictions for traffic violations; when the trial court asked the defendant whether any of the defendant's previous violations occurred while the defendant was operating a motorcycle, the defendant implicitly admitted at least one prior conviction for speeding. Jones v. State, 308 Ga. App. 99, 706 S.E.2d 593 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior conviction of bribery. — Admission of an owner's conviction for bribery was harmless error because, although the conviction was irrelevant to claims against a contractor, there was no prejudice demonstrated. Greene v. Bryant, 277 Ga. App. 201, 626 S.E.2d 185 (2006) (decided under former O.C.G.A. § 24-2-2).

4. Victim's Character

In a trial for homicide, general bad character of the deceased for violence cannot be established by proof of specific acts. Ivey v. State, 42 Ga. App. 357, 156 S.E. 290 (1930) (decided under former Penal Code 1910, § 1019); Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945) (decided under former Code 1933, § 38-202); Wilcher v. State, 87 Ga. App. 93, 73 S.E.2d 57 (1952) (decided under former Code 1933, § 38-202); Henderson v. State, 234 Ga. 827, 218 S.E.2d 612 (1975) (decided under former Code 1933, § 38-202); Barrett v. State, 140 Ga. App. 309, 231 S.E.2d 116 (1976) (decided under former Code 1933, § 38-202); Guevara v. State, 151 Ga. App. 444, 260 S.E.2d 491 (1979) (decided under former Code 1933, § 38-202); P.D. v. State, 151 Ga. App. 662, 261 S.E.2d 413 (1979) (decided under former Code 1933, § 38-202); Wilson v. State, 153 Ga. App. 215, 265 S.E.2d 79 (1980) (decided under former Code 1933, § 38-202); Horne v. State, 155 Ga. App. 851, 273 S.E.2d 193 (1980) (decided under former Code 1933, § 38-202); Smith v. State, 247 Ga. 453, 276 S.E.2d 633 (1981) (decided under former Code 1933, § 38-202).

Evidence of victim's violent character may be admitted when defendant acted in self-defense. — Charge that proof of the violent and turbulent character of the deceased is admissible only when it is shown prima facie that the deceased was the assailant, and that the accused had been assaulted and was honestly seeking to defend oneself, was not error. Tatum v. State, 57 Ga. App. 849, 197 S.E. 51 (1938) (decided under former Code 1933, § 38-202); Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945) (decided under former Code 1933, § 38-202); Beam v. State, 208 Ga. 497, 67 S.E.2d 573 (1951) (decided under former Code 1933, § 38-202); Henderson v. State, 234 Ga. 827, 218 S.E.2d 612 (1975) (decided under former Code 1933, § 38-202); Maynor v. State, 241 Ga. 315, 245 S.E.2d 268 (1978) (decided under former Code 1933, § 38-202); Smith v. State, 247 Ga. 453, 276 S.E.2d 633 (1981) (decided under former Code 1933, § 38-202); Hanlon v. State, 162 Ga. App. 46, 290 S.E.2d 285 (1982) (decided under former O.C.G.A. § 24-2-2).

Proof of a victim's violent character becomes admissible when it is shown prima facie that the deceased was the assailant, that the accused had been assailed, and that the accused was honestly seeking to defend oneself. Williams v. State, 249 Ga. 6, 287 S.E.2d 31 (1982) (decided under former O.C.G.A. § 24-2-2); Cooper v. State, 249 Ga. 58, 287 S.E.2d 212 (1982) (decided under former O.C.G.A. § 24-2-2).

Victim's violent character and general reputation for violence were admissible when the codefendant arguably made a showing that defendant was honestly seeking to defend oneself rather than to act as the aggressor. Smith v. State, 267

Ga. 372, 477 S.E.2d 827 (1996), overruled on other grounds, 287 Ga. 646, 697 S.E.2d 757 (2010) (decided under former O.C.G.A. § 24-2-2).

Because a murder defendant did not assert a justification defense, there was no basis for defendant to seek to introduce evidence of victims' characters. Lance v. State, 275 Ga. 11, 560 S.E.2d 663 (2002), cert. denied, 537 U.S. 1050, 123 S. Ct. 620, 154 L. Ed. 2d 525 (2002) (decided under former O.C.G.A. § 24-2-2).

Victim's general character for violence cannot be established by proof of prior specific acts of violence, but a defendant should be allowed to offer evidence that the victim had a reputation for a particular type of violence. Williams v. State, 249 Ga. 6, 287 S.E.2d 31 (1982) (decided under former O.C.G.A. § 24-2-2).

Court of appeals erred in reversing the trial court's order refusing to allow the defendant to testify about a previous incident of violence the victim allegedly committed against third parties in support of a justification defense under O.C.G.A. § 16-3-21(a) because the defendant sought to introduce alleged evidence in the form of unsupported assertions by the defendant as to what was in the defendant's mind at the time the defendant killed the victim. State v. Hodges, 291 Ga. 413, 728 S.E.2d 582 (2012) (decided under former O.C.G.A. § 24-2-2).

Evidence of victim's drug use. — Trial court did not err by refusing to allow the defendant to show that crack cocaine was found inside the ambulance that transported the victim to the hospital as a police officer testified that crack cocaine was found in the ambulance; moreover, defendant was permitted to impeach the victim with certified copies of the victim's prior felony convictions, including two for drug possession. Haggins v. State, 277 Ga. App. 742, 627 S.E.2d 448 (2006) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in granting the state's motion in limine to exclude evidence of the victim's cocaine use under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) because the evidence as to effects of the cocaine in the victim's body was merely speculative since there was no evidence about the quantity of cocaine in the victim's system or when the cocaine was ingested; evidence of drug use is inadmissible when the evidence is intended only to impugn a victim's character and has no relevance to any disputed issues in the case. Askew v. State, 310 Ga. App. 746, 713 S.E.2d 925 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of victim's relationships. — In a murder prosecution in which the victim's body was never found, evidence of the victim's relationships at the time of the victim's disappearance was relevant because it rendered the inference that the victim did not run away but was killed more probable than it would be without the evidence. Hinton v. State, 280 Ga. 811, 631 S.E.2d 365 (2006) (decided under former O.C.G.A. § 24-2-2).

Whether or not the victim was a prostitute was not relevant to the determination of who killed the victim. Bryant v. State, 249 Ga. 242, 290 S.E.2d 75 (1982) (decided under former O.C.G.A. § 24-2-2).

School disciplinary record of victim inadmissible. — Trial court did not err in granting the state's motion in limine, which sought to prevent the defendant from introducing the victim's school records in an attempt to show that the victim had disciplinary problems, since such evidence was absolutely irrelevant to any issue in the prosecution for child molestation. Lively v. State, 157 Ga. App. 419, 278 S.E.2d 67 (1981) (decided under former Code 1933, § 38-202).

Victim's bomb threat irrelevant. — Because making a bomb threat did not unambiguously reflect on a child victim's credibility, honesty, or imagination, was not related to the victim's testimony, and was not material to the issues on trial, the trial court did not abuse the court's discretion in refusing to allow the defense to introduce the evidence under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405). Bentley v. State, 277 Ga. App. 483, 627 S.E.2d 61 (2006) (decided under former O.C.G.A. § 24-2-2).

Evidence of assault victim's character not relevant. — In a prosecution for aggravated assault, to the extent that the

Criminal Cases (Cont'd)
4. Victim's Character (Cont'd)

defendant sought to attack the victim's character through testimony about the victim's use of alcohol during pregnancy, whether the victim hid the defendant from the police, and the victim's alleged jealousy over the defendant's new relationship, the trial court did not abuse the court's discretion in limiting the scope of cross-examination to the issues directly related to the incidents. Massey v. State, 278 Ga. App. 303, 628 S.E.2d 706 (2006) (decided under former O.C.G.A. § 24-2-2).

Testimony as to the general reputation of the deceased, when admissible in a murder case, may come from two sources: the accused or a witness. Henderson v. State, 234 Ga. 827, 218 S.E.2d 612 (1975) (decided under former Code 1933, § 38-202).

Evidence of victim's violent acts. — Defendant was not improperly prohibited from introducing evidence of a victim's violent acts against third persons during the state's case, despite evidence that: (1) the victim pinned defendant against a wall; (2) defendant ran into defendant's house screaming that the defendant had been robbed and reported the robbery to the police; (3) defendant had fresh cuts or bruises on defendant's neck; and (4) defendant reported to police that defendant had shot at someone as defendant tried to fend off a robber; it did not necessarily follow that defendant honestly sought to defend oneself when defendant fired a gun at the victim, given evidence that the victim turned away or ran from defendant before the shooting and that the victim was shot in the back from at least two and one-half feet away. Nelloms v. State, 273 Ga. App. 448, 615 S.E.2d 153 (2005) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err when the court denied the defendant's ineffective assistance of counsel claim because counsel testified that counsel attempted to produce evidence of specific acts of violence by the victim against third persons but because of lack of time was not able to do so; counsel further testified that counsel did not strenuously pursue a continuance for more time to gather such evidence because of the age of the case and because counsel believed such motion for continuance would be unsuccessful. Rafi v. State, 289 Ga. 716, 715 S.E.2d 113 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of victim's prior child molestation against defendant not admitted. — In a defendant's trial for aggravated battery against a victim more than 65 years of age in violation of O.C.G.A. § 16-5-24(a) and (d), evidence that the victim had fondled the defendant's genitals when the defendant was 15 was not admissible under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) to support the defendant's claim of justification under O.C.G.A. § 16-3-21. Strozier v. State, 300 Ga. App. 199, 685 S.E.2d 743 (2009) (decided under former O.C.G.A. § 24-2-2).

Evidence that victim used cocaine. — Whether the victim of an aggravated assault and false imprisonment was addicted to cocaine was irrelevant to the issue of whether defendant assaulted the victim and held the victim against the victim's will, and the trial court did not err in ruling that defendant could not present evidence of the victim's prior cocaine use other than certified copies of convictions. Harris v. State, 196 Ga. App. 304, 396 S.E.2d 288 (1990) (decided under former O.C.G.A. § 24-2-2).

In a prosecution for murder, the victim's prior conviction for possession of cocaine did not tend to prove a reputation for violence nor the reasonableness of defendant's belief that deadly force was necessary, and the court properly refused to admit such evidence. Russell v. State, 264 Ga. 121, 441 S.E.2d 750 (1994) (decided under former O.C.G.A. § 24-2-2).

Toxicology report showing the presence of cocaine metabolites in a homicide victim's blood was properly excluded because the evidence was too attenuated to warrant speculation about the effects of cocaine on the victim at the time of the shooting. Bell v. State, 280 Ga. 562, 629 S.E.2d 213 (2006) (decided under former O.C.G.A. § 24-2-2).

Exchanging sex for drugs. — Although the victim's past cocaine use was irrelevant, the defendant was allowed to discuss any arrangement that the victim

had made with the defendant in exchange for sex and question the victim as to the victim's use of drugs on the night in question. Goodwin v. State, 208 Ga. App. 707, 431 S.E.2d 473 (1993) (decided under former O.C.G.A. § 24-2-2).

In a prosecution of defendant for possession of methamphetamine in defendant's body, evidence of prior convictions for the sale of that drug were not admissible. King v. State, 230 Ga. App. 301, 496 S.E.2d 312 (1998) (decided under former O.C.G.A. § 24-2-2).

Reckless behavior of victim. — In a prosecution for involuntary manslaughter, the trial court did not abuse the court's discretion in disallowing evidence of the victim's past reckless conduct, which consisted of the testimony of a police officer that the victim had, on several occasions in the past, been found in the early morning hours intoxicated and sitting in the victim's wheelchair in the road, creating a dangerous condition. Casillas v. State, 233 Ga. App. 752, 505 S.E.2d 251 (1998) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying defendant's motion for mistrial after a witness testified to other drug transactions defendant was involved in even though defendant's general character and especially defendant's conduct in other drug transactions were irrelevant matter as such statements were unsolicited, the trial court immediately instructed the jury to disregard the testimony, and the witness did not tell the jury anything the jury did not already know about defendant. McCollum v. State, 258 Ga. App. 574, 574 S.E.2d 561 (2002) (decided under former O.C.G.A. § 24-2-2).

Trial court's refusal to allow defendant to introduce a certified copy of the victim's prior conviction for simple assault, even though the testimony of the investigating officer was also offered, was harmless error in light of the fact that the trial court permitted the defense to present testimony from five witnesses concerning other incidents. Jones v. State, 265 Ga. App. 97, 592 S.E.2d 888 (2004) (decided under former O.C.G.A. § 24-2-2).

In the defendant's trial for homicide by vehicle in the first degree, serious injury by vehicle, driving under the influence of alcohol, and reckless driving, the trial court did not abuse its discretion in excluding as irrelevant evidence of a victim's two prior traffic citations because a trooper testified unequivocally that the impact occurred in the lane in which the victim and the victim's family were traveling, and there was no evidence introduced to the contrary; moreover, there was no evidence that the victim was speeding at the time of the fatal collision. Potter v. State, 301 Ga. App. 411, 687 S.E.2d 653 (2009) (decided under former O.C.G.A. § 24-2-2).

Evidence of victim's criminal activity. — Evidence that the victim was driving an allegedly stolen vehicle at the time the victim was shot by defendant was not relevant to the defense of justification. Wilson v. State, 262 Ga. 588, 422 S.E.2d 536 (1992), overruled on other grounds by Sanders v. State, 281 Ga. 36, 635 S.E.2d 772 (2006) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in denying the defendant's motion to admit evidence of the victim's robbery conviction because the defendant failed to meet the requirements for admission of evidence of violent acts by the victim against third parties by relying on the language of the indictment associated with the victim's conviction and offering no witnesses or other evidence to establish the facts underlying the crime; the trial transcript did include defense counsel's unchallenged recitation of the allegation set forth in the indictment, and although that language set forth certain elements of the crime of robbery, O.C.G.A. § 16-8-40(a)(1) and (2), it did not provide a factual basis for determining whether an act of violence was involved in the robbery at issue. Arnold v. State, 286 Ga. 418, 687 S.E.2d 836 (2010) (decided under former O.C.G.A. § 24-2-2).

Evidence of violent acts committed by the victim against either the defendant or against third parties may be introduced by a criminal defendant claiming justification and that is so because the key showing must be that the victim was the aggressor in the fatal encounter. State v. Hodges, 291 Ga. 413, 728 S.E.2d 582 (2012) (decided under former O.C.G.A. § 24-2-2).

Criminal Cases (Cont'd)

5. Jury Instructions

Jury charge as to good character. — Good character affords no license for committing a crime, and it is entirely proper to charge the jury that the jury would be authorized to convict, notwithstanding proof of good character, if upon consideration of all the evidence the jury believes the defendant guilty beyond a reasonable doubt. Mote v. State, 184 Ga. App. 333, 361 S.E.2d 523 (1987) (decided under former O.C.G.A. § 24-2-2).

Instruction on defense of good character must generally be requested. — Except in "exceptional cases," such as one in which the good character defense is the sole defense against the uncorroborated allegations of the prosecuting witness and the state's case, apart from those allegations, is based solely on highly tenuous circumstances and is extremely weak, the court's failure to give an instruction on good character, absent a timely request, does not warrant a new trial. Riceman v. State, 166 Ga. App. 825, 305 S.E.2d 595 (1983) (decided under former O.C.G.A. § 24-2-2).

Mistrial not warranted when curative instruction given. — After a witness stated in an answer not responsive to the question asked of the witness that the defendant and the victim had smoked crack cocaine together, the trial court properly denied the defendant's motion for a mistrial on the ground that the defendant's character had been improperly put in issue; a curative instruction was sufficiently prompt and clear. Rhines v. State, 288 Ga. App. 128, 653 S.E.2d 500 (2007) (decided under former O.C.G.A. § 24-2-2).

Trial court properly denied a mistrial based on allegedly improper character evidence after an officer did not specifically indicate that defendant had a criminal record when asked if the officer knew defendant, and after the trial court gave an adequate curative instruction, the officer clarified that the officer knew defendant to be a nice person and outstanding football player; moreover, even if there was error, it was harmless in light of the overwhelming evidence of guilt. Gartrell v. State, 291 Ga. App. 21, 660 S.E.2d 886 (2008) (decided under former O.C.G.A. § 24-2-2).

As the trial court instructed the jury to disregard the information contained in a witness's non-responsive answer to a question from the prosecutor, which impugned the defendant's character, the defendant was not entitled to a mistrial. Patterson v. State, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010) (decided under former O.C.G.A. § 24-2-2).

New trial denied when defendant failed to object to curative instruction given. — Defendant's motion for a new trial was properly denied because the state presented sufficient identification and circumstantial evidence linking the defendant to a burglary, including similar transaction evidence of a prior burglary, and in response to trial counsel's objection to the state's comment that the defendant was under the influence of drugs or alcohol at the time of the offense, the defendant did not object to the curative instruction given. Bryant v. State, 285 Ga. App. 508, 646 S.E.2d 717 (2007) (decided under former O.C.G.A. § 24-2-2).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 368 et seq.

C.J.S. — 32 C.J.S., Evidence, §§ 568 et seq., 776 et seq.

ALR. — Propriety of instructions as to the significance of evidence concerning the defendant's good character as an element bearing upon the question of reasonable doubt, 10 ALR 8; 68 ALR 1068.

Habit, custom, or reputation of one injured or killed as evidence of his own negligence or freedom from negligence, 15 ALR 125; 18 ALR 1109.

Admissibility of evidence of good reputation for truth and veracity of witness who has not been impeached, 15 ALR 1065; 33 ALR 1220.

Admissibility of evidence of other of-

fenses in criminal prosecution to prove identity of defendant, 22 ALR 1016; 27 ALR 357; 63 ALR 602.

Evidence of other forgeries or alterations on issue as to forgery or alteration in civil cases, 33 ALR 427.

Admissibility of evidence as to other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide, 64 ALR 1029; 1 ALR3d 571.

Admissibility on question of justification for dismissal or discharge of officer or employee for incompetency, of evidence as to his experience in other similar office or employment, 65 ALR 1096.

Admissibility on question as to quality, condition, or capacity of articles, machines, or apparatus, of evidence in regard to similar things manufactured or sold by the same person, 66 ALR 81.

Admissibility of parol evidence as to proceedings at meetings of stockholders or directors of private corporations or associations, 66 ALR 1328; 48 ALR2d 1259.

Negative proof of good character or reputation of defendant in criminal case, 67 ALR 1210.

Admissions of partner as to past transactions or events as evidence against firm or other partner, 73 ALR 447.

Admissibility of evidence of good character of party for truth and honesty on issue of fraud in civil action, 78 ALR 643.

Admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempts on other occasions, 80 ALR 1306; 78 ALR2d 1359.

Admissibility of evidence of other accidents on issue of negligence in respect of maintenance of electric wires, rails, etc., 81 ALR 685.

Admissibility, in prosecution for violation of intoxicating liquor law, of general reputation of person with whom defendant had dealings, as tending to show such violation, 83 ALR 1401.

Admissibility, in prosecution for receiving stolen property, of evidence of transactions other than, but similar to, that upon which the prosecution is based, for purpose of showing guilty knowledge or intent, 105 ALR 1288.

Admissibility of evidence of reputation on issue of mental condition, or testamentary or contractual incapacity or capacity, 105 ALR 1443.

Admissibility of evidence in a bastardy proceeding of defendant's reputation or character as to chastity and morality, 110 ALR 335.

Admissibility on issue of self-defense (or defense of another), on prosecution for homicide or assault, of evidence of specific acts of violence by deceased, or person assaulted, against others than defendant, 121 ALR 380.

Admissibility in criminal prosecution of evidence of notice of one other than defendant to commit the crime, 121 ALR 1362.

Admissibility against defendant in criminal case of evidence, otherwise competent, as to other offense as affected by fact that a charge for such offense is pending against him, 125 ALR 1036.

Admissibility, in action against manufacturer, packer, or bottler for personal injury due to defective or injurious condition of article, of evidence that like products were free from, or were subject to, defective or injurious conditions, 127 ALR 1194.

Admissibility, on cross-examination or otherwise, of evidence that witness in a civil action had been under arrest, indictment, or other criminal accusation on a charge growing out of the accident, transaction, or occurrence involved in the civil action, 149 ALR 935.

Admissibility of evidence of character or reputation of party in civil action for assault (other than for purpose of impeaching him as a witness), 154 ALR 121.

Motive in bringing action or choosing the forum or venue as proper matter for cross-examination, 157 ALR 604.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses, 167 ALR 565; 77 ALR2d 841; 2 ALR4th 330.

Admissibility and probative force, on issue of competency to execute an instrument, of evidence of incompetency at other times, 168 ALR 969.

Admissibility in criminal case of evidence relevant to the crime charged, as affected by incidental disclosure of another crime by defendant, 170 ALR 306.

Admissibility, in negligence action against bank by depositor, of evidence as to custom of banks in locality in handling and dealing with checks and other items involved, 8 ALR2d 446.

Admissibility of evidence as to financial condition of debtor on issue as to payment of debt, 9 ALR2d 205.

Admissibility and effect of evidence or comment on party's military service or lack thereof, 9 ALR2d 606; 24 ALR6th 747.

Admissibility, in prosecution based on abortion, of evidence of commission of similar crimes by accused, 15 ALR2d 1080.

Admissibility of evidence that defendant in negligence action has paid third persons on claims arising from the same transaction or incident as plaintiff's claim, 20 ALR2d 304.

Admissibility, in civil motor vehicle accident case, of evidence that driver was or was not involved in previous accidents, 20 ALR2d 1210.

Cross-examination of automobile driver in civil action with respect to arrest or conviction for previous traffic offenses, 20 ALR2d 1217; 88 ALR3d 74.

Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution, 20 ALR2d 1421.

Admissibility of evidence of unperformed compromise agreement, 26 ALR2d 858.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary, 28 ALR2d 857.

Prejudicial effect of admission of evidence as to Communist or other subversive affiliation or association of accused, 30 ALR2d 589.

Pardon as affecting impeachment by proof of conviction of crime, 30 ALR2d 893.

Admissibility, in forgery prosecution, of other acts of forgery, 34 ALR2d 777.

Admissibility, in prosecution for illegal sale of intoxicating liquor, of other sales, 40 ALR2d 817.

Admissibility, in robbery prosecution, of evidence of other robberies, 42 ALR2d 854.

Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent, 42 ALR2d 1055.

Admissibility, in action involving motor vehicle accident, of evidence as to manner in which participant was driving before reaching scene of accident, 46 ALR2d 9.

Admissibility of evidence showing plaintiff's antecedent intemperate habits, in personal injury motor vehicle accident action, 46 ALR2d 103.

Admissibility of evidence of precautions taken, or safety measures used, on earlier occasions at place of accident or injury, 59 ALR2d 1379.

Admissibility, in prosecution for gambling or gaming offense, of evidence of other acts of gambling, 64 ALR2d 823.

Admissibility, in civil assault and battery action, of similar acts or assaults against other persons, 66 ALR2d 806.

Admissibility, in prosecution for maintaining liquor nuisance, or evidence of general reputation of premises, 68 ALR2d 1300.

Admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires, 87 ALR2d 891.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 ALR2d 926.

Admissibility of evidence of accused's good reputation as affected by remoteness of time to which it relates, 87 ALR2d 968.

Admissibility on behalf of accused of evidence of similar acts or transactions tending to rebut fraudulent intent, 90 ALR2d 903.

Admissibility, in prosecution for illegal sale of narcotics, of evidence of other sales, 93 ALR2d 1097.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide, 98 ALR2d 6.

Effect of prosecuting attorney asking defense witness other than accused as to prior convictions where he is not prepared to offer documentary proof in event of denial, 3 ALR3d 965.

Impeachment of witness with respect to intoxication, 8 ALR3d 749.

Propriety and prejudicial effect of trial

court's limiting number of character or reputation witnesses, 17 ALR3d 327.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Admissibility of evidence of habit, customary behavior, or reputation as to care of motor vehicle driver or occupant, on question of his care at time of occurrence giving rise to his injury or death, 29 ALR3d 791.

Malpractice: admissibility of evidence that defendant physician has previously performed unnecessary operations, 33 ALR3d 1056.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

Prejudicial effect of prosecutor's reference in argument to homosexual acts or tendencies of accused which are not material to his commission of offense charged, 54 ALR3d 897.

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity, 59 ALR3d 659.

Admissibility, in action against notary public, of evidence as to usual business practice of notary public of identifying person seeking certificate of acknowledgment, 59 ALR3d 1327.

Admissibility of evidence of other offenses in rebuttal of defense of entrapment, 61 ALR3d 293.

Admissibility of evidence of subsequent repairs or other remedial measures in products liability cases, 74 ALR3d 1001; 38 ALR4th 583.

Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely, 79 ALR3d 1156.

Admissibility of testimony as to general reputation at place of employment, 82 ALR3d 525.

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case, 86 ALR3d 1170.

Admissibility of evidence of, or propriety of comment as to, plaintiff spouse's remarriage, or possibility thereof, in action for damages for death of other spouse, 88 ALR3d 926.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 ALR3d 718.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 ALR3d 925.

Use of unrelated misdemeanor conviction (other than for traffic offense) to impeach general credibility of witness in state civil case, 97 ALR3d 1150.

Admissibility of evidence of character or reputation of party in civil action for sexual assault on issues other than impeachment, 100 ALR3d 569.

Admissibility of evidence of accused's drug addiction or use to show motive for theft of property other than drugs, 2 ALR4th 1298.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 ALR4th 829.

Admissibility of evidence of accused's membership in gang, 39 ALR4th 775.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 ALR4th 1203.

Products liability: admissibility of evidence of absence of other accidents, 51 ALR4th 1186.

Habit or routine practice evidence under Uniform Evidence Rule 406, 64 ALR4th 567.

Admissibility of evidence in homicide case that victim was threatened by other than defendant, 11 ALR5th 831.

Ineffective assistance of counsel: battered spouse syndrome as defense to homicide or other criminal offense, 11 ALR5th 871.

Admissibility and prejudicial effect of evidence, in criminal prosecution, of defendant's involvement with witchcraft, satanism, or the like, 18 ALR5th 804.

Admissibility of evidence of commission of similar crime by one other than accused, 22 ALR5th 1.

Admissibility of evidence relating to accused's attempt to commit suicide, 73 ALR5th 615.

24-4-405. Methods of proving character.

(a) In all proceedings in which evidence of character or a trait of character of a person is admissible, proof shall be made by testimony as to reputation or by testimony in the form of an opinion.

(b) In proceedings in which character or a trait of character of a person is an essential element of a charge, claim, or defense or when an accused testifies to his or her own character, proof may also be made of specific instances of that person's conduct. The character of the accused, including specific instances of the accused's conduct, shall also be admissible in a presentencing hearing subject to the provisions of Code Section 17-10-2.

(c) On cross-examination, inquiry shall be allowable into relevant specific instances of conduct. (Code 1981, § 24-4-405, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Methods of proving character, Fed. R. Evid. 405.

Editor's notes. — In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-4-404, for cases discussing character and specific instances of previous conduct; Code Section 24-4-412, for cases discussing the complainant's character in sexual assault cases; Code Section 24-4-413, for cases discussing sexual assault; Code Section 24-4-414, for cases discussing child molestation; and Code Section 24-4-417, for cases discussing driving under the influence.

RESEARCH REFERENCES

ALR. — Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense, 58 ALR5th 749.

24-4-406. Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with such habit or routine practice. (Code 1981, § 24-4-406, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Habit; routine practice, Fed. R. Evid. 406.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-2-2 are included in the annotations for this Code section.

Habit and customs. — Witness may

testify as to the witness's fixed and uniform habit but not as to the habit and customs of another, when the actor is available to testify personally. Feinberg v. Durga, 189 Ga. App. 733, 377 S.E.2d 33 (1988) (decided under former O.C.G.A. § 24-2-2).

24-4-407. Subsequent remedial measures.

In civil proceedings, when, after an injury or harm, remedial measures are taken to make such injury or harm less likely to recur, evidence of the remedial measures shall not be admissible to prove negligence or culpable conduct but may be admissible to prove product liability under subsection (b) or (c) of Code Section 51-1-11. The provisions of this Code section shall not require the exclusion of evidence of remedial measures when offered for impeachment or for another purpose, including, but not limited to, proving ownership, control, or feasibility of precautionary measures, if controverted. (Code 1981, § 24-4-407, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Subsequent remedial measures, Fed. R. Evid. 407.

Editor's notes. — In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-4-404, which may also be applicable to this Code section.

24-4-408. Compromises and offers to compromise.

(a) Except as provided in Code Section 9-11-68, evidence of:

(1) Furnishing, offering, or promising to furnish; or

(2) Accepting, offering, or promising to accept

a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount shall not be admissible to prove liability for or invalidity of any claim or its amount.

(b) Evidence of conduct or statements made in compromise negotiations or mediation shall not be admissible.

(c) This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation. This Code section shall not require exclusion of evidence offered for another purpose, including, but not limited to, proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution. (Code 1981, § 24-4-408, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Compromise offers and negotiations, Fed. R. Evid. 408.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION AND ILLUSTRATIONS

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3712, former Code 1868, § 3736, former Code 1873, § 3789, former Code 1882, § 3789, former Civil Code 1895, § 5194, former Civil Code 1910, § 5781, former Code 1933, § 38-408, and former O.C.G.A. § 24-3-37 are included in the annotations for this Code section.

Former statute enlarged the common-law rule, which did not exclude the admission of distinct facts. McElrath v. Haley, 48 Ga. 641 (1873) (decided under former Code 1868, § 3736).

Distinction between compromise and settlement. — There is a distinction between an offer or proposition to compromise a doubtful or disputed claim, and an offer to settle upon certain terms a claim that is unquestioned. An admission made in an offer of the latter character will be admissible when one made in an offer of the former character will not. See as bearing somewhat on the point, Hatcher v. Bowen, 74 Ga. 840 (1885) (decided under former Code 1882, § 3789); Cooper v. Jones, 79 Ga. 379, 4 S.E. 916 (1887) (decided under former Code 1882, § 3789); Akers v. Kirke, 91 Ga. 590, 18 S.E. 366 (1893) (decided under former Code 1882, § 3789); Teasley v. Bradley, 110 Ga. 497, 35 S.E. 782, 78 Am. St. R. 113 (1900) (decided under former Civil Code 1895, § 5194); Austin v. Long, 5 Ga. App. 551, 63 S.E. 640 (1909) (decided under former Civil Code 1895, § 5194); Wilson v. Wilder, 23 Ga. App. 30, 97 S.E. 447 (1918) (decided under former Civil Code 1910, § 5781). See also Lewis v. Joyner, 29 Ga. App. 92, 113 S.E. 829 (1922); Broyles v. Haas, 48 Ga. App. 321, 172 S.E. 742 (1934) (decided under former Civil Code 1910, § 5781); Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765 (1952) (decided under former Code 1933, § 38-408).

Admission made in an offer to settle will be admissible while one made in an offer to compromise will not be admissible. Charter Mtg. Co. v. Ahouse, 165 Ga. App. 497, 300 S.E.2d 328 (1983) (decided under former O.C.G.A. § 24-3-37).

Trial court erred in denying a homeowner the opportunity to cross-examine the chair of a homeowners' association's architectural control committee regarding independent facts that demonstrated the association's violation of the restrictive covenants in the subdivision as those statements were not part of admissions towards settlement negotiations that should have been excluded under former O.C.G.A. § 24-3-37; the homeowner was being sued for not having sought prior approval of the committee prior to commencing construction, and the homeowner's attempt to show that the association had violated the covenants when the homeowner submitted the proper paperwork for the construction, after the lawsuit was filed, and the association did not respond in a timely manner was relevant to the issues being litigated. Bounds v. Coventry Green Homeowners' Ass'n, 268 Ga. App. 69, 601 S.E.2d 440 (2004) (decided under former O.C.G.A. § 24-3-37).

Benevolent gestures encouraged. — Evidence of activity constituting a voluntary offer of assistance made on the impulse of benevolence or sympathy should be encouraged and should not be considered as an admission of liability. Deese v. Carroll City County Hosp., 203 Ga. App. 148, 416 S.E.2d 127 (1992) (decided under former O.C.G.A. § 24-3-37).

Basis for rule. — Rule against allowing evidence of compromise was founded upon recognition of the fact that such testimony was inherently harmful for the jury would draw conclusions therefrom, in spite of anything said by the parties at the time of discussing the compromise, and in spite of anything which may be said by the judge in instructing the jury as to the weight to be given such evidence. Newton

Bros. v. Shank, 240 Ga. 471, 241 S.E.2d 231 (1978) (decided under former Code 1933, § 38-408); Central Nat'l Ins. Co. v. Dixon, 188 Ga. App. 680, 373 S.E.2d 849 (1988) (decided under former O.C.G.A. § 24-3-37).

Former statute was created in order to encourage settlements by letting a party which made an admission or proposition with a view toward compromise rest assured that the party's good-faith settlement attempt would not later be used against the party in court. Benn v. McBride, 140 Ga. App. 698, 231 S.E.2d 438 (1976) (decided under former Code 1933, § 38-408).

Purpose of former O.C.G.A. § 24-3-37 was to encourage settlements and protect parties who freely engage in negotiations directed toward resolution of lawsuits. Computer Communications Specialists, Inc. v. Hall, 188 Ga. App. 545, 373 S.E.2d 630 (1988) (decided under former O.C.G.A. § 24-3-37).

Former statute was very broad and excluded the introduction in evidence of propositions with a view to compromise and also admissions made with a view to compromise. Atlantic Coast Line R.R. v. Wells, 78 Ga. App. 859, 52 S.E.2d 496 (1949) (decided under former Code 1933, § 38-408).

Proscription of propositions made with view to compromise refers to civil, not criminal, cases. Reed v. State, 163 Ga. App. 364, 295 S.E.2d 108 (1982) (decided under former Code 1933, § 38-408).

Exclusion of extrinsic evidence. — When parol evidence regarding a refund and repair was contained in an offer of compromise, such evidence was properly excluded. Topeka Mach. Exch., Inc. v. Stoler Indus., Inc., 220 Ga. App. 799, 470 S.E.2d 250 (1996) (decided under former O.C.G.A. § 24-3-37).

Defendant challenging witness's testimony based on Fifth Amendment. — Defendant in a civil action lacks standing to challenge the admission of testimony given in a previous criminal action on the ground that such action violated the witness's Fifth Amendment rights or the immunity agreement between the witness and the state. The privilege against self-incrimination is that of the person under examination as a witness and is intended for that person's protection only. Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217 (1983) (decided under former O.C.G.A. § 24-3-37).

Application and Illustrations

Former statute applied to civil cases and not to criminal cases. Moore v. State, 230 Ga. 839, 199 S.E.2d 243 (1973) (decided under former Code 1933, § 38-408); Jones v. State, 137 Ga. App. 612, 224 S.E.2d 473 (1976) (decided under former Code 1933, § 38-408); Williams v. State, 178 Ga. App. 216, 342 S.E.2d 703 (1986) (decided under former O.C.G.A. § 24-3-7).

Former O.C.G.A. § 24-3-37 applied to preclude the introduction into evidence of offers of compromise, although the evidence of such offers was propounded by the offeror. Davidson v. American Fitness Ctrs., Inc., 171 Ga. App. 691, 320 S.E.2d 824 (1984) (decided under former O.C.G.A. § 24-3-7).

Question made to explore compromise offer excluded. — Exclusion of the defendant's question, "What is it going to take to make you folks happy?," was appropriate. The statement was an effort to explore an offer to compromise a claim still being disputed. Houston v. Kinder-Care Learning Ctrs., Inc., 208 Ga. App. 235, 430 S.E.2d 24 (1993) (decided under former O.C.G.A. § 24-3-7).

Separate judicial proceeding. — Unsigned memoranda of proposals made within the confines of probate court administration proceedings were properly admissible in a later action to recover property of an estate. Myers v. Myers, 195 Ga. App. 529, 394 S.E.2d 374 (1990) (decided under former O.C.G.A. § 24-3-7).

Rebuttal of admitted testimony. — When there was sufficient offer of proof by appellant on the issue, the trial court erred by excluding settlement negotiation evidence, which was admissible for the limited but permissible purpose of rebutting appellee's testimony about an unconditional offer. Holbrook Contracting, Inc. v. Tyner, 181 Ga. App. 838, 354 S.E.2d 22 (1987) (decided under former O.C.G.A. § 24-3-7).

Application and Illustrations (Cont'd)

When statement not made with view to compromise. — Former O.C.G.A. § 24-3-37 did not apply to a statement that the appellant owned decedent's interest in land and had a deed to prove ownership because this admission was not offered with a view to a compromise or settlement proposition, and no evidence existed to show that the statement was made with a view to a compromise. Graves v. Graves, 252 Ga. 27, 310 S.E.2d 901 (1984) (decided under former O.C.G.A. § 24-3-7).

Although civil engineer's testimony may have been construable as referring to an offer to compromise a claim, the engineer's brief reference to a discussion regarding reimbursement of defendant-homeowner for corrective measures against soil erosion produced by developer-plaintiff did not require grant of a mistrial. Ross v. Hagler, 209 Ga. App. 201, 433 S.E.2d 124 (1993) (decided under former O.C.G.A. § 24-3-7).

Defendant's unsolicited offer to settle for the entire amount claimed by plaintiff was an offer to settle and not a proposition to compromise and was admissible at trial. Charter Mtg. Co. v. Ahouse, 165 Ga. App. 497, 300 S.E.2d 328 (1983) (decided under former O.C.G.A. § 24-3-7).

Admission adduced at a criminal trial pursuant to a grant of immunity from prosecution was not an admission "obtained by constraint" within the meaning of former O.C.G.A. § 24-3-37. Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217 (1983) (decided under former O.C.G.A. § 24-3-7).

Guilty plea to a reduced criminal charge was proper evidence as an admission in a subsequent civil action, despite the fact that the admission was the result of a compromise in the criminal case. Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217 (1983) (decided under former O.C.G.A. § 24-3-7).

Admission when no effort made to compromise. — Admission of liability contained in an offer to settle, brought about by a simple demand for settlement, was not inadmissible on the ground that such admission was "made with a view to a compromise," when there was nothing whatever to indicate that there had been any effort to compromise, and when it cannot be inferred from the circumstances under which the offer was made that there had been such an effort. Williams v. Smith, 71 Ga. App. 632, 31 S.E.2d 873 (1944) (decided under former Code 1933, § 38-408); Campbell v. Mutual Serv. Corp., 152 Ga. App. 493, 263 S.E.2d 202 (1979) (decided under former Code 1933, § 38-408).

In a condemnation proceeding, the trial court did not err in denying the lessees' motion in limine to exclude evidence of an alleged pre-condemnation offer of compromise contained in a letter because the letter, which was sent to an appraiser and not to the Georgia Department of Transportation, was not an inadmissible offer of compromise under former O.C.G.A. § 24-3-37; no condemnation proceeding was pending when the letter was sent, the terms of the letter sought to persuade against the condemnation of the property, or, alternatively, to ensure that the lessees would receive the full amount that the lessees believed would be the lessees' just and adequate compensation if condemnation occurred, and the letter did not propose a compromise of that amount. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862 (2010) (decided under former O.C.G.A. § 24-3-37).

No specific terms of compromise suggested. — Even if a general proposition of settlement has been made by one party, the admissions of the opposite party may be admissible if no specific terms of compromise have been suggested, and the admissions of a party who may desire a settlement are not to be excluded when, so far as appears from the evidence, the opposite party did nothing to induce the statement, and did not contemplate a compromise or abatement of the party's demand. Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765 (1952) (decided under former Code 1933, § 38-408).

Evidence of a settlement agreement is admissible when the parties have successfully reached a posture of agreement settling the issues between the parties.

Building Assocs. v. Crider, 141 Ga. App. 825, 234 S.E.2d 666 (1977) (decided under former Code 1933, § 38-408).

Settlement negotiations were not admissible in evidence, and dd not constitute a "waiver" of either party's claim or defense. Citadel Corp. v. Sun Chem. Corp., 212 Ga. App. 875, 443 S.E.2d 489 (1994) (decided under former O.C.G.A. § 24-3-37).

General partners' motion for a new trial was properly denied as evidence of the limited partners' attempts to liquidate their interests in the partnership was properly excluded as evidence of settlement negotiations. Kellett v. Kumar, 281 Ga. App. 120, 635 S.E.2d 310 (2006) (decided under former O.C.G.A. § 24-3-37).

Since a telephone conversation transcript between plaintiff and defendant showed that defendant made an offer as an effort to compromise a claim which was still being disputed, the trial court did not err in excluding this evidence. Stover v. Candle Corp. of Am., 238 Ga. App. 657, 520 S.E.2d 7 (1999) (decided under former O.C.G.A. § 24-3-37).

Application to pleadings. — Offer to compromise a disputed claim was no more allowable in pleadings than in evidence. Malcolm v. Dobbs, 127 Ga. 487, 56 S.E. 622 (1907) (decided under former Civil Code 1895, § 5194).

Independent statements of fact. — Admissions which were to be rejected because "made with a view to a compromise," within the terms of the former statute, were those admissions which were made as a concession to bring about a compromise or settlement; but independent statements of fact by a party, even though made while the parties were trying to settle, are not necessarily inadmissible. Scales v. Shackleford, 61 Ga. 170 (1879) (decided under former Code 1873, § 3789); Austin v. Long, 5 Ga. App. 551, 63 S.E. 640 (1909) (decided under former Civil Code 1895, § 5194).

While offers of compromise, with the view to settle or prevent litigation, were inadmissible, yet an independent acknowledgement of a fact may be received, although made pending a treaty for the amicable adjustment of a controversy. Blakely Hardwood Lumber Co. v. Reynolds Bros. Lumber Co., 173 Ga. 602, 160 S.E. 775 (1931) (decided under former Civil Code 1910, § 5781).

Evidence material to other issues. — Terms of a proposition to compromise made to a party, and the party's reply thereto, were admissible in evidence against the party when the reply was material on certain issues. Lucas v. Parsons, 27 Ga. 593 (1859) (decided under former law).

Conversation between an attorney for the beneficiary and a proper official of the company is admissible for the purpose of illustrating, if it does, good or bad faith of the company in refusing to pay the amount claimed when the evidence negatives an effort to compromise. Progressive Life Ins. Co. v. Smith, 71 Ga. App. 157, 30 S.E.2d 411 (1944) (decided under former Code 1933, § 38-408).

In a suit alleging fraud and other claims, the trial court erred by granting the motion to dismiss for lack of personal jurisdiction of two property companies for not being served with the summons and complaint because the trial court erred in rejecting the plaintiff's evidence of a settlement proposal between the plaintiff and the two property companies since the settlement proposal was not prohibited by former O.C.G.A. § 24-3-37 as the proposal was being offered to show an agency relationship between the two property companies and a defending business person. Cox v. Mayan Lagoon Estates Ltd., 319 Ga. App. 101, 734 S.E.2d 883 (2012) (decided under former O.C.G.A. § 24-3-37).

Evidence of value of property as per compromise. — When there was no testimony from which an inference would arise that the offer of the defendant insurance company to pay $1000.00 as the cash value of a barn destroyed by fire was offered in a spirit of compromise, liability to pay the amount of loss being undisputed, it was not error to allow such testimony as tending to show the value placed upon the property by the defendant, since one of the major issues of the case was whether or not the amount of the award was so grossly inadequate as to constitute a badge of fraud. Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765 (1952) (decided under former Code 1933, § 38-408).

Application and Illustrations (Cont'd)

While evidence as to settlement negotiations ordinarily was inadmissible at a trial to determine the issue of liability, after a divorce and alimony case had been settled by agreement (except as to attorney fees), the effort needed by counsel to reach such settlement was a matter which could be considered in determining the amount of attorney fees to be awarded. Fenters v. Fenters, 238 Ga. 131, 231 S.E.2d 741 (1977) (decided under former Code 1933, § 38-408).

Evidence material to claim for attorney's fees. — In a breach of contract action with regard to the installation of a landscape irrigation system, the trial court did not err by allowing the irrigation company to rely upon two pre-litigation letters from the customer during the customer's cross-examination as the question was not intended to solicit evidence to prove the validity of the irrigation company's claim or the amount at issue. Rather, the letters were offered to support the company's claim for attorney fees. Christie v. Rainmaster Irrigation, Inc., 299 Ga. App. 383, 682 S.E.2d 687 (2009) (decided under former O.C.G.A. § 24-3-37).

Introduction into evidence of an agreement to delay trial or ancillary proceedings was not prohibited because neither the agreement nor any testimony showed that the agreement was executed with a view to compromise. Kaiser v. Simmons, 52 Ga. App. 355, 183 S.E. 343 (1936) (decided under former Code 1933, § 38-408).

Former statute did not apply to a defendant's statements to the plaintiff to the effect that the defendant had damaged the plaintiff's property and that the defendant would pay the full amount of damage in a few days and the remainder after finding what the damage would be. Wilson v. Wilder, 23 Ga. App. 30, 97 S.E. 447 (1918) (decided under former Civil Code 1910, § 5781).

When an offer was one to pay the hospital bill rather than an offer to settle or compromise the defendant's liability or the prosecutor's right to proceed with a bastardy prosecution, the evidence was admissible and did not come within the proscription of the former statute. Fowler v. State, 111 Ga. App. 856, 143 S.E.2d 553 (1965) (decided under former Code 1933, § 38-408).

Demands for settlement. — There was no error in allowing complainant's attorney to show that demands were made on the defendant for a settlement of the matters in controversy, and the refusal of the latter to comply with such demand. This differed from admitting in evidence negotiations for a compromise. Mayor of Columbus v. Howard, 6 Ga. 213 (1849) (decided under former law); Sasser v. Sasser, 73 Ga. 275 (1884) (decided under former Code 1882, § 3789).

When the same substantial facts affect equally the claims of three clients, that the attorney has settled with one was evidence for the others on an action brought by the clients and was not excluded. Howland v. Barlett, 86 Ga. 669, 12 S.E. 1068 (1891) (decided under former Code 1882, § 3789).

No offer to compromise found. — In action on contract for sale of land, when vendee agrees to deliver truck to vendor as part of consideration, statement of plaintiff vendor that plaintiff had offered to leave settlement of dispute as to condition the truck was to be in "to disinterested men," after testifying that defendant vendee would do nothing toward fixing the truck, did not show such an offer or proposition made with a view to compromise as to come within the prohibition of the former statute. Walker v. Smith, 87 Ga. App. 517, 74 S.E.2d 374 (1953) (decided under former Code 1933, § 38-408).

Admission is not admissible in evidence as an admission of guilt if the admission was made with a view to compromise or to effect a postponement of the case and was, therefore, not made freely and voluntarily by the defendant. Jester v. State, 133 Ga. App. 652, 211 S.E.2d 909 (1975) (decided under former Code 1933, § 38-408).

Evidence of a tender of money designed to prevent the rebuilding of a dam alleged to be a nuisance related to a proposition with a view to compromise and was not admissible. Mayor of Montezuma v. Minor, 73 Ga. 484 (1884) (decided under former Code 1882, § 3789).

Evidence of a settlement with a third person injured in the same casualty ought to be excluded. Firemen's Ins. Co. v. Larsen, 52 Ga. App. 140, 182 S.E. 677 (1935) (decided under former Code 1933, § 38-408).

Conservator's argument that the probate court improperly considered an offer of compromise and settlement by the conservator's surety for $25,000 to settle the claims of the ward's estate against the conservator was rejected. The probate court was aware of the offer but nothing in the record indicated that the court assigned any probative value to the fact that the administrator and the surety had agreed to settle the estate's claim against the conservator. In re Hudson, 300 Ga. App. 340, 685 S.E.2d 323 (2009) (decided under former O.C.G.A. § 24-3-37).

Statements by attorney. — When an attorney for the plaintiff met with a member of the plaintiff's firm and the defendant for the purpose of discussing an account in issue between the parties, and made statements including that the attorney hoped they would be able to settle it without any resort to the courts, admissions by the defendant which were induced by such suggestions were inadmissible as evidence in behalf of the plaintiff in a subsequent suit upon the account. Hill Bros. v. Render, 33 Ga. App. 13, 125 S.E. 79 (1924) (decided under former Civil Code 1910 § 5781).

Letters. — Letter written by the attorney of record for plaintiff to attorney of record for defendant, containing admissions as to client's indebtedness to defendant, and offering a compromise settlement pending litigation, was not admissible in evidence. Georgia Chem. Works v. Malcolm, 186 Ga. 275, 197 S.E. 763 (1938) (decided under former Code 1933, § 38-408).

Letter written with a view toward settlement, and cross-examination of a witness in regard to that letter are properly excluded as not being proper evidence. Brooks v. Fincher, 150 Ga. App. 201, 257 S.E.2d 326 (1979) (decided under former Code 1933, § 38-408).

In dispossessory proceeding wherein the plaintiff alleged that the defendant was the plaintiff's tenant and was holding over, a letter written to the plaintiff by the defense attorney with a view toward settlement and compromise between the plaintiff and the bank being represented by the defense attorney following the defendant's bankruptcy was properly refused admission into evidence. Hogan v. Tiger Auto Parts, Inc., 163 Ga. App. 448, 294 S.E.2d 655 (1982) (decided under former O.C.G.A. § 24-3-7).

Plaintiff's letter which did not make a demand for an exact sum but instead set out what plaintiff believed was owed to plaintiff and invited the defendant to respond and to set forth defendant's contentions and defendant's letter which set forth a figure defendant was willing to pay which amounted to a difference of less than $400 than the amount plaintiff used in plaintiff's letter constituted evidence of offers of compromise on behalf of each of the parties and therefore was inadmissible as evidence. Allen v. Brackett, 165 Ga. App. 415, 301 S.E.2d 486 (1983) (decided under former O.C.G.A. § 24-3-7).

Correspondence from plaintiff's former attorney, written within the context of good faith negotiations, was properly excluded. McDevitt & Street Co. v. K-C Air Conditioning Serv., Inc., 203 Ga. App. 640, 418 S.E.2d 87, cert. denied, 203 Ga. App. 906, 418 S.E.2d 87 (1992) (decided under former O.C.G.A. § 24-3-7).

In the slip and fall case, the owner should have been barred under former O.C.G.A. § 24-3-37 from admitting into evidence certain portions of a letter, allegedly conflicting with the occupant's position at trial, sent by the occupant to the owner setting out the reasons for the fall and seeking to enter settlement negotiations; the letter's statement as to how the occupant fell was made with a view toward compromise of the claim, and the letter was an offer to compromise a doubtful or disputed claim. Nevitt v. CMD Realty Inv. Fund IV, L.P., 282 Ga. App. 533, 639 S.E.2d 336 (2006) (decided under former O.C.G.A. § 24-3-7).

Neither former O.C.G.A. § 24-3-37 nor former O.C.G.A. § 24-3-37.1 (see now O.C.G.A. § 24-4-416) prevented admitting a letter from the defendant medical device manufacturer because there was evidence plaintiff patient's surgeon re-

Application and Illustrations (Cont'd)

quested that the manufacturer pay for third surgery to replace the device, and the letter in response confirmed the terms; further, there was evidence the offer was made to maintain the surgeon's goodwill due to the number of devices the surgeon implanted in patients on a yearly basis. Trickett v. Advanced Neuromodulation Sys., 542 F. Supp. 2d 1338 (S.D. Ga. 2008) (decided under former O.C.G.A. § 24-3-7).

Insurance claims. — In an action by the assignee of a claim under a fire insurance policy, evidence as to whether other companies, having policies covering the same property, had paid claims under those policies, was inadmissible. Firemen's Ins. Co. v. Larsen, 52 Ga. App. 140, 182 S.E. 677 (1935) (decided under former Code 1933, § 38-408).

Evidence that the plaintiff, in attempting to discuss plaintiff's claims arising out of an automobile collision, could not get a response from the defendant, plaintiff's insurer, did not show "negotiations and offers of compromise or settlement," which were not proper evidence under former O.C.G.A. § 24-3-37, but was properly admitted under O.C.G.A. § 13-6-11 to show that the defendant acted in bad faith, or was stubbornly litigious, or put the plaintiff to unnecessary trouble or expense. U-Haul Co. v. Ford, 171 Ga. App. 744, 320 S.E.2d 868 (1984) (decided under former O.C.G.A. § 24-3-37).

In action for abuse of process, the trial court properly allowed the plaintiff to testify as to the offers of settlement made by the defendant's attorney immediately prior to trial. The settlement offers were not made during the course of the litigation in which they were offered in evidence, but in the context of settling the original suit by the defendant. Ostroff v. Coyner, 187 Ga. App. 109, 369 S.E.2d 298 (1988) (decided under former O.C.G.A. § 24-3-37).

Conditional offer to pay half of claim. — When a person held a claim against another in a certain amount, a proposition by the latter to pay one-half of the claim provided another person paid the other half, was a proposal of compromise, and inadmissible. This was true even assuming that the person making the proposal and such other person were partners. English v. Moore, 28 Ga. App. 265, 110 S.E. 737, later appeal, 29 Ga. App. 307, 114 S.E. 921 (1922) (decided under former Civil Code 1910, § 5781).

Offer to pay less than contract sum. — On an issue of whether the contract was procured by the fraudulent representation of the plaintiff of a material fact, the admission of evidence that the defendant offered to pay a less sum in compromise of any liability under the contract is harmful error. Dance v. Mize, 134 Ga. 646, 68 S.E. 434 (1910) (decided under former Civil Code 1910, § 5781).

Former statute was applied to reject admission made with view of compromise in the following cases. — Duncan v. Bailey, 162 Ga. 457, 134 S.E. 87 (1926) (decided under former Civil Code 1910, § 5781); Slade v. Raines, 165 Ga. 89, 139 S.E. 805 (1927) (decided under former Civil Code 1910, § 5781).

Erroneous admission. — Trial court erred in admitting evidence of an agreement between the prosecutor and the defendant in a bastardy case for the payment by the defendant of a sum of money in return for an agreement that the case should be dead docketed since such evidence could have had only the purpose of showing an admission of guilt by the accused and as such it was inadmissible as not having been freely and voluntarily made. Simmons v. State, 98 Ga. App. 159, 105 S.E.2d 356 (1958) (decided under former Code 1933, § 38-408).

When trial court informed the jury that testimony leading up to an offer of compromise was being excluded, if the trial court's usage of the word "compromise" was in error, such error was rendered harmless by the trial court clearly stating to the jury that offers in compromise were inadmissible, that the court was sustaining the objection to the extent that it might have any bearing on an offer in compromise, or any element of it, that the court was offering no opinion whatever of any kind, and that if anything had been said about an offer in compromise to disregard it as it was not admissible. Southeastern Metal Prods., Inc. v.

De Vaughn, 99 Ga. App. 569, 109 S.E.2d 305 (1959) (decided under former Code 1933, § 34-408).

RESEARCH REFERENCES

C.J.S. — 31A C.J.S., Evidence, §§ 388, 395 et seq.

ALR. — Admissibility of evidence of unperformed compromise agreement, 26 ALR2d 858.

Admissibility of admissions made in connection with offers or discussions of compromise, 15 ALR3d 13.

Admissibility of confession by one accused of felonious homicide, as affected by its inducement through compelling, or threatening to compel, accused to view victim's corpse, 27 ALR3d 1185.

Admissibility, in civil action, of confession or admission which could not be used against party in criminal prosecution because obtained by improper police methods, 43 ALR3d 1375.

Admissibility of defense communications made in connection with plea bargaining, 59 ALR3d 441.

24-4-409. Payment of medical and similar expenses.

Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury shall not be admissible to prove liability for the injury. (Code 1981, § 24-4-409, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Offers to pay medical and similar expenses, Fed. R. Evid. 409.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-3-37.1 are included in the annotations for this Code section.

Application and illustrations. — Neither former O.C.G.A. § 24-3-37 (see now O.C.G.A. § 24-4-408) nor former O.C.G.A. § 24-3-37.1 (see now O.C.G.A. § 24-4-416) prevented admitting letter from defendant medical device manufacturer because there was evidence plaintiff patient's surgeon requested that manufacturer pay for third surgery to replace the device, and the letter in response confirmed the terms; further, there was evidence the offer was made to maintain the surgeon's goodwill due to the number of devices the surgeon implanted in patients on a yearly basis. Trickett v. Advanced Neuromodulation Sys., 542 F. Supp. 2d 1338 (S.D. Ga. 2008) (decided under former O.C.G.A. § 24-3-37.1).

Evidence properly excluded. — In a medical negligence action, the trial court properly excluded statements of regret made by the doctor sued pursuant to the plain meaning of former O.C.G.A. § 24-3-37.1(c) (see now O.C.G.A. § 24-4-416), despite the suing patient's claim that such should have been admitted as statements against interest and under the res gestae exception to the hearsay rule; moreover, retroactive application was not improper as the Georgia General Assembly intended that the law be applied to cases pending at the time it was passed. Airasian v. Shaak, 289 Ga. App. 540, 657 S.E.2d 600 (2008) (decided under former O.C.G.A. § 24-3-37.1).

24-4-410. Inadmissibility of pleas, plea discussions, and related statements.

Except as otherwise provided by law, evidence of the following shall not, in any judicial or administrative proceeding, be admissible against the criminal defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of nolo contendere;

(3) Any statement made in the course of any proceedings in which a guilty plea or a plea of nolo contendere was entered and was later withdrawn, vacated, or set aside; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn, vacated, or set aside;

provided, however, that the statements described in paragraphs (1) through (4) of this Code section shall be admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it or in a criminal proceeding for perjury or false statement if the statement was made by the accused under oath, on the record, and in the presence of counsel or after the accused voluntarily waived his or her right to counsel. (Code 1981, § 24-4-410, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Pleas, plea discussions, and related statements, Fed. R. Evid. 410.

Editor's notes. — In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Sections 17-7-93 and 17-7-95, which may also be applicable to this Code section.

24-4-411. Liability insurance.

In all civil proceedings involving a claim for damages, evidence that a person was or was not insured against liability shall not be admissible except as provided in this Code section. This Code section shall not require the exclusion of evidence of insurance against liability in proceedings under Code Section 40-1-112 or when such evidence is offered for a relevant purpose, including, but not limited to, proof of agency, ownership, or control, and the court finds that the danger of unfair prejudice is substantially outweighed by the probative value of the evidence. (Code 1981, § 24-4-411, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 141, § 24/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, substituted "Code Section 40-1-112" for "Code Section 46-7-12" in the second sentence of this Code section.

Cross references. — Liability insurance for performance of educational duties authorized, § 20-2-991. Liability insurance, Fed. R. Evid. 411.

24-4-412. Complainant's past sexual behavior not admissible in prosecutions for certain sexual offenses; exceptions.

(a) In any prosecution for rape in violation of Code Section 16-6-1; aggravated assault with the intent to rape in violation of Code Section 16-5-21; aggravated sodomy or sodomy in violation of Code Section 16-6-2; statutory rape in violation of Code Section 16-6-3; aggravated child molestation or child molestation in violation of Code Section 16-6-4; incest in violation of Code Section 16-6-22; sexual battery in violation of Code Section 16-6-22.1; or aggravated sexual battery in violation of Code Section 16-6-22.2, evidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards.

(b) In any prosecution for rape in violation of Code Section 16-6-1; aggravated assault with the intent to rape in violation of Code Section 16-5-21; aggravated sodomy or sodomy in violation of Code Section 16-6-2; statutory rape in violation of Code Section 16-6-3; aggravated child molestation or child molestation in violation of Code Section 16-6-4; incest in violation of Code Section 16-6-22; sexual battery in violation of Code Section 16-6-22.1; or aggravated sexual battery in violation of Code Section 16-6-22.2, evidence relating to the past sexual behavior of the complaining witness may be introduced if the court, following the procedure described in subsection (c) of this Code section, finds that the past sexual behavior directly involved the participation of the accused and finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution.

(c) The procedure for introducing evidence as described in subsection (b) of this Code section shall be as follows:

(1) At the time the defense seeks to introduce evidence which would be covered by subsection (b) of this Code section, the defense shall notify the court of such intent, whereupon the court shall conduct an in camera hearing to examine the accused's offer of proof;

(2) At the conclusion of the hearing, if the court finds that any of the evidence introduced at the hearing is admissible under subsection (b) of this Code section or is so highly material that it will substantially support a conclusion that the accused reasonably believed that the complaining witness consented to the conduct complained of and that justice mandates the admission of such evidence, the court shall by order state what evidence may be introduced by the defense at the trial of the case and in what manner the evidence may be introduced; and

(3) The defense may then introduce evidence pursuant to the order of the court. (Code 1981, § 24-4-412, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For article, "Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System," see 8 Ga. St. U.L. Rev. 539 (1992). For article, "The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws," see 20 Ga. St. U.L. Rev. 565 (2004).

For comment on Teague v. State, 208 Ga. 459, 67 S.E.2d 467 (1951), see 14 Ga. B.J. 363 (1952). For comment on Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955), holding that a defendant has the right to cross-examine all witnesses called against him in all material matters, including the past conduct of the prosecutrix in an action for rape, see 19 Ga. B.J. 95 (1956). For comment, "Can Georgia's Rape Shield Statute Withstand a Constitutional Challenge?," see 36 Mercer L. Rev. 991 (1985).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1976, p. 741, § 1 and former O.C.G.A. §§ 24-2-2 and 24-2-3 are included in the annotations for this Code section.

Constitutionality. — Former O.C.G.A. § 24-2-3 did not violate a defendant's Sixth Amendment right of confrontation; the former statute served a variety of state interests which outweighed that right. Harris v. State, 257 Ga. 666, 362 S.E.2d 211 (1987) (decided under former O.C.G.A. § 24-2-3).

Former statute was a strong legislative attempt to protect the victim-prosecutor in rape cases by the exclusion of evidence which might reflect on the character of the witness without contributing materially to the issue of the guilt or innocence of the accused. Parks v. State, 147 Ga. App. 617, 249 S.E.2d 672 (1978) (decided under Ga. L. 1976, p. 741, § 1).

Former O.C.G.A. § 24-2-3 sought to eliminate the philosophy that women of

promiscuous sexual reputation were entitled to less protection under the rape laws than women of chaste reputation. Singleton v. State, 157 Ga. App. 192, 276 S.E.2d 685 (1981) (decided under Ga. L. 1976, p. 741, § 1); Hardy v. State, 159 Ga. App. 854, 285 S.E.2d 547 (1981) (decided under Ga. L. 1976, p. 741, § 1); Snyder v. State, 201 Ga. App. 66, 410 S.E.2d 173 (1991) (decided under former O.C.G.A. § 24-2-3).

Former O.C.G.A. § 24-2-3 was a legislative attempt to exclude evidence which might reflect on the character of the witness without contributing materially to the issue of the guilt or innocence of the accused. Martin v. State, 196 Ga. App. 145, 395 S.E.2d 391 (1990) (decided under former O.C.G.A. § 24-2-3).

Discretion of court to apply "rape shield" principle. — Trial court did not err in applying the former "rape shield" principle to exclude evidence that the victim had allegedly engaged in sexual activity with her ex-boyfriend immediately prior to the alleged act of sexual battery; the court had discretion to apply such principle even when the exclusion was not mandated under former O.C.G.A. § 24-2-3. Bates v. State, 216 Ga. App. 597, 454 S.E.2d 811 (1995) (decided under former O.C.G.A. § 24-2-3).

Trial court did not abuse the court's discretion in excluding the defendant's claim that his victim had prior consensual sex with him and that he reasonably believed she consented on the night of the offense, since the victim testified to the events of that night, there was a trail of clothing left near the crime scene, and evidence of her injuries was offered. Davis v. State, 235 Ga. App. 362, 509 S.E.2d 655 (1998) (decided under former O.C.G.A. § 24-2-3).

Construction with former O.C.G.A. § 24-3-38. — Despite former O.C.G.A. § 24-3-38 (see now O.C.G.A. § 24-8-822), giving a party the right to have a whole conversation heard, former O.C.G.A. § 24-2-3 prohibited the admission of a portion of defendant's statement in which the defendant said that the victim had sexual intercourse with the victim's cousin. Snow v. State, 228 Ga. App. 649, 492 S.E.2d 564 (1997) (decided under former O.C.G.A. § 24-2-3).

Rape shield law was not implicated since the testimony of the victim concerned prior physical abuse, not sexual abuse. Demetrios v. State, 246 Ga. App. 506, 541 S.E.2d 83 (2000) (decided under former O.C.G.A. § 24-2-3).

Evidence of relationship with boyfriend. — Given that the defendant was not charged with rape, evidence of the victim's sexual activity, and the fact that she had a boyfriend, with whom she allegedly had sexual intercourse during the time of the alleged sexual abuse, should not have been excluded under either the 2004 or 2005 version of the former Rape Shield statute as: (1) that evidence acted as a possible explanation for the victim's physical trauma, placing her credibility and the defendant's guilt into question; (2) the jury's split verdict supported the defendant's argument that even without the excluded testimony, the state's case was far less than overwhelming; and (3) the appeals court could not determine what role the excluded evidence would have played in the jury's deliberations; hence, a new trial as to the charges of child molestation and incest was ordered. Gresham v. State, 281 Ga. App. 116, 635 S.E.2d 316 (2006) (decided under former O.C.G.A. § 24-2-3).

Victim's prior accusations of sexual misconduct. — Former rape shield law did not necessarily prohibit testimony as to the falsity of a victim's prior accusations of sexual misconduct directed against persons other than the defendant. Benton v. State, 265 Ga. 648, 461 S.E.2d 202 (1995) (decided under former O.C.G.A. § 24-2-3).

Defendant was not required to make a threshold showing that the victim's previous molestation allegations were false before the defendant was entitled to a hearing on the reasonable probability of falsity. Peters v. State, 224 Ga. App. 837, 481 S.E.2d 898 (1997) (decided under former O.C.G.A. § 24-2-3).

Testimony of previous false allegations by the victim was not prohibited; however, the defendant failed to make the threshold showing of a reasonable probability that the victim's three previous rape reports were false. Banks v. State, 250 Ga. App. 728, 552 S.E.2d 903 (2001) (decided

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under former O.C.G.A. § 24-2-3).

Pregnancy of victim. — Evidence of a victim's past sexual behavior for the purpose of showing that she may have been pregnant at the time the allegations were made and may have therefore made up the charge to justify or explain the pregnancy was barred by former O.C.G.A. § 24-2-3. Green v. State, 221 Ga. App. 436, 472 S.E.2d 1 (1996) (decided under former O.C.G.A. § 24-2-3).

Evidence that a child rape victim had sex with her boyfriend six months before the alleged rape was properly excluded since, while relevant to show that the victim's pregnancy was not caused by the defendant, it was insufficiently probative due to the time frames involved. Williams v. State, 263 Ga. App. 597, 588 S.E.2d 790 (2003) (decided under former O.C.G.A. § 24-2-3).

"Quite possibly pregnant" evidence disallowed. — Cross-examination of the victim with regard to sexual acts with males other than the defendant and the fact that she was "quite possibly pregnant" was properly disallowed since the only proffer made by the defendant concerning the possible pregnancy as a motive for lying was counsel's mere statement, and the defendant denied ever having sexual relations with the victim. Gibbs v. State, 196 Ga. App. 140, 395 S.E.2d 387 (1990) (decided under former O.C.G.A. § 24-2-3).

Miscarriage by victim. — With regard to a defendant's convictions for aggravated sodomy and kidnapping, the trial court did not abuse the court's discretion by excluding as barred by the former rape shield statute evidence of the victim's prior miscarriage since the former rape shield statute barred evidence relating to the past sexual behavior of the complaining witness. Smith v. State, 294 Ga. App. 692, 670 S.E.2d 191 (2008) (decided under former O.C.G.A. § 24-2-3).

Parent status of minor victim was irrelevant fact. — Trial court correctly excluded all reference to the fact that the 16-year-old victim had a child of approximately 21 months of age. Johnson v. State, 245 Ga. App. 690, 538 S.E.2d 766 (2000) (decided under former O.C.G.A. § 24-2-3).

Former rape shield statute provided the exclusive means for admitting evidence relating to the past sexual behavior of the complaining witness in prosecutions for rape. The res gestae rule, impeachment techniques, and other traditional means for introducing evidence which was otherwise inadmissible could have no effect in this situation. Johnson v. State, 146 Ga. App. 277, 246 S.E.2d 363 (1978) (decided under Ga. L. 1976, p. 741, § 1).

Former rape shield statute superseded all evidentiary exceptions, including the res gestae rule. Phillips v. State, 196 Ga. App. 267, 396 S.E.2d 57 (1990) (decided under former O.C.G.A. § 24-2-3).

Former O.C.G.A. § 24-2-3 did not prohibit testimony of previous false allegations by the victim; however, before such evidence could be admitted, the trial court must make a threshold determination outside the presence of the jury that a reasonable probability of falsity existed. Smith v. State, 259 Ga. 135, 377 S.E.2d 158, cert. denied, 493 U.S. 825, 110 S. Ct. 88, 107 L. Ed. 2d 53 (1989) (decided under former O.C.G.A. § 24-2-3).

Once the court determined that a child-victim's previous allegation of abuse was unreliable, testimony of the previous allegation was no longer subject to the former rape shield statute protection and should have been admitted. Hines v. State, 221 Ga. App. 193, 470 S.E.2d 787 (1996) (decided under former O.C.G.A. § 24-2-3).

On appeal from a conviction for two counts of aggravated child molestation, the trial court did not err in denying the defendant a new trial as no abuse of discretion resulted in excluding evidence that one of the victims made prior false accusations of sexual abuse against an older cousin because the evidence presented a credibility issue for the trial court to resolve in analyzing whether there was a reasonable probability of falsity. Roberts v. State, 286 Ga. App. 346, 648 S.E.2d 783 (2007) (decided under former O.C.G.A. § 24-2-3).

Evidence of prior false claims improperly barred. — Evidence concerning allegedly false prior rape claims made

by the prosecutor was not barred by former O.C.G.A. § 24-2-3 as the subject testimony was admissible, not merely to impeach the witness credibility, but as substantive evidence tending to establish that there had been no rape, but mere consensual sexual intercourse; accordingly, the trial court abused the court's discretion in denying the defendant's motion for a new trial. Humphrey v. State, 207 Ga. App. 472, 428 S.E.2d 362 (1993) (decided under former O.C.G.A. § 24-2-3).

Evidence of prior false claims properly barred. — In a sexual molestation case, the trial court did not abuse the court's discretion in concluding that the defendant's evidence that the victim once falsely alleged that another man had molested the victim did not establish by a reasonable probability that the prior allegation was in fact false. Walker v. State, 308 Ga. App. 176, 707 S.E.2d 122 (2011) (decided under former O.C.G.A. § 24-2-3).

Former rape shield statute prohibited all evidence relating to the past sexual behavior of the complaining witness, including marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards; in other words, her reputation concerning past sexual activity with persons other than the defendant. The exceptions were, if so found by the judge after an in camera hearing, that the past behavior involving participation by the accused, or that the evidence supported an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of. Parks v. State, 147 Ga. App. 617, 249 S.E.2d 672 (1978) (decided under Ga. L. 1976, p. 741, § 1).

Evidence of prior sexual experience was not permitted by former O.C.G.A. § 24-2-3. Roberts v. State, 158 Ga. App. 309, 279 S.E.2d 753 (1981) (decided under Ga. L. 1976, p. 741, § 1); Raines v. State, 191 Ga. App. 743, 382 S.E.2d 738 (1989) (decided under former O.C.G.A. § 24-2-3).

Trial court did not err in refusing to admit evidence of the victim's past marital problems when the defendant admitted that the victim did not tell him which type of marital problem it was. Hence, his lack of knowledge that the victim's marital problem related to infidelity could have had no reasonable bearing on whether the victim would consent to the conduct complained of. Burley v. State, 190 Ga. App. 75, 378 S.E.2d 328 (1989) (decided under former O.C.G.A. § 24-2-3).

Former rape shield statute precluded the introduction of evidence of the victim's past sexual behavior. Obviously, a prior rape committed against the victim had nothing to do with her past sexual behavior. Raines v. State, 191 Ga. App. 743, 382 S.E.2d 738 (1989) (decided under former O.C.G.A. § 24-2-3).

Trial court properly disallowed the defendant's proffer that the victim might have said the defendant raped her on occasions other than the two charged since it was not clear how such evidence would have aided the defendant and there was no indication that the victim was lying about the other incidents of rape. Gibbs v. State, 196 Ga. App. 140, 395 S.E.2d 387 (1990) (decided under former O.C.G.A. § 24-2-3).

Evidence of portions of a conversation between the defendant and the victim that involved her past sexual abuse by family members and others was properly excluded. Hicks v. State, 222 Ga. App. 828, 476 S.E.2d 101 (1996) (decided under former O.C.G.A. § 24-2-3).

Inconsistent victim testimony and ability to question. — Victim's prior statement seemingly fell within the language of the former Rape Shield Statute, former O.C.G.A. § 24-2-3, as the statement related to the victim's "past sexual behavior." However, the record showed that the defense did not seek to use the victim's prior statement to pursue the inadmissible topic of her sexual history with individuals other than the defendant. Rather, the defense sought to use the statement to show that the victim's "past sexual behavior" did not include the defendant and that the victim's trial testimony concerning the victim's sexual experiences with defendant was a fabrication. As one of the purposes of the former Rape Shield Statute was to assist the truth-seeking process, it should not provide "justification for letting the witness affirmatively resort to perjurious testimony in reliance on [a defendant's] dis-

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ability to challenge her credibility." Thus, the trial court erred in restricting defendant from cross-examining the victim concerning the prior statement; however, such error was harmless as the victim explained why the testimony regarding contact with defendant was inconsistent. Mooney v. State, 266 Ga. App. 587, 597 S.E.2d 589 (2004) (decided under former O.C.G.A. § 24-2-3).

Evidence of character or other crimes. — Proffered testimony of a defense witness that the witness had exchanged sex with the victim for money and that defendant knew of this at the time of the incident was not admissible under the "highly material category" of subsection (c)(2) of former O.C.G.A. § 24-2-3. Brown v. State, 214 Ga. App. 676, 448 S.E.2d 723 (1994) (decided under former O.C.G.A. § 24-2-3).

Victim's testimony that victim had not had intercourse in five months admissible. — After the state attempted to prove the defendant's rape of the victim by showing that the defendant passed herpes to the victim, the trial court's permission for the victim to testify that the victim had not had sex for five months prior to the rape did not violate the rape shield law, former O.C.G.A. § 24-2-3, as the victim's testimony was relevant to exclude the possibility that someone other than defendant had sexual contact with the victim and gave the victim herpes. Warner v. State, 277 Ga. App. 421, 626 S.E.2d 620 (2006) (decided under former O.C.G.A. § 24-2-3).

Testimony of defendant concerning overheard conversations was properly disallowed. — Even though the trial court allowed defendant to testify that the defendant had prior sexual intercourse with the complaining witness, the court properly disallowed testimony from defendant that the defendant had overheard conversations by the victim's family members that the victim "ran around." Marks v. State, 192 Ga. App. 64, 383 S.E.2d 626 (1989) (decided under former O.C.G.A. § 24-2-3).

Exceptions to the general rule of inadmissibility listed in the former statute were exclusive and those exceptions were provided solely for the benefit of the defendant who, by proper and timely objection, could prevent the state from introducing the evidence excluded by the former statute. Johnson v. State, 146 Ga. App. 277, 246 S.E.2d 363 (1978) (decided under Ga. L. 1976, p. 741, § 1).

Two exceptions contained in former O.C.G.A. § 24-2-3 were exclusive. Jones v. State, 190 Ga. App. 416, 379 S.E.2d 189 (1989) (decided under former O.C.G.A. § 24-2-3).

Virginity irrelevant. — Admitting testimony that an alleged victim was not a virgin to support an inference that an accused reasonably believed she consented to his advances is erroneous since it is against just such reasoning that rape shield laws have been enacted. Johnson v. State, 146 Ga. App. 277, 246 S.E.2d 363 (1978) (decided under Ga. L. 1976, p. 741, § 1).

Admission of victim's testimony that during the attack she told defendant she was a virgin was harmless error since the defense was based upon a claim of mistaken identity, not alleged consent by the victim. Veal v. State, 191 Ga. App. 445, 382 S.E.2d 131 (1989) (decided under former O.C.G.A. § 24-2-3).

Evidence inadmissible despite physician's testimony that victim was sexually active. — Inquiry into the victim's past sexual experiences was properly refused, even after a physician testified that in examining the victim it was obvious she had been sexually active. Worth v. State, 183 Ga. App. 68, 358 S.E.2d 251, cert. denied, 183 Ga. App. 907, 358 S.E.2d 251 (1987) (decided under former O.C.G.A. § 24-2-3).

Applicability to noncomplaining witness. — Former O.C.G.A. § 24-2-3 included cross-examination of the other witnesses about the sexual conduct of the complaining witness so the argument that the former statute applied only to cross-examination of the complaining witness was without merit. Ellis v. State, 181 Ga. App. 630, 353 S.E.2d 822 (1987) (decided under former O.C.G.A. § 24-2-3).

Harmless to deny examination as to incident victim denied. — Any error in denying the defendant a thorough and

sifting cross-examination of the victim concerning a past sexual experience with the defendant was harmless when the defendant subsequently testified to such an experience and the victim then denied the experience. Clarke v. State, 169 Ga. App. 433, 313 S.E.2d 716 (1984) (decided under former O.C.G.A. § 24-2-3).

When the defendant had never seen or known the victim prior to her abduction, evidence of past sexual activity was not admissible on the question of consent. Fuller v. State, 169 Ga. App. 488, 313 S.E.2d 505 (1984) (decided under former O.C.G.A. § 24-2-3).

Prohibition inapplicable to impeachment as to victim's attire. — Former rape shield law was not applicable to evidence offered to impeach the victim as to her mode of dress at the time in question. Villafranco v. State, 252 Ga. 188, 313 S.E.2d 469 (1984) (decided under former O.C.G.A. § 24-2-3).

Reversible error when defendant was not allowed to show wife's medical records. — When a physician testified that the victim had a venereal disease and that she maintained she had not had sexual intercourse with anyone else, it was reversible error not to allow the defendant to show by his wife's medical records, or otherwise, that his wife was then undergoing medical treatment and tests for pregnancy and showed no sign of the disease and therefore, by logical extension, that defendant did not have the disease. Reece v. State, 192 Ga. App. 14, 383 S.E.2d 572 (1989) (decided under former O.C.G.A. § 24-2-3).

Evidence of infectious discharge in victim's body. — Exclusion of medical testimony regarding an infectious discharge discovered in the victim's body within hours after the alleged rape was reversible error since the excluded testimony was relevant to defendant's claim that he did not penetrate the victim because of the victim's gross physical condition. White v. State, 201 Ga. App. 53, 410 S.E.2d 441 (1991) (decided under former O.C.G.A. § 24-2-3).

Evidence victim dropped out of school and missed prior court date not barred. — Defense's question to the victim concerning her status as a high school dropout and her failure to keep a previous court appointment did not violate former O.C.G.A. § 24-2-3, since the questions did not directly reflect on her past sexual behavior. George v. State, 257 Ga. 176, 356 S.E.2d 882 (1987) (decided under former O.C.G.A. § 24-2-3).

Evidentiary exhibit properly excluded. — Exhibit, which was apparently a fictional work about someone's sexual experiences and was to be used in an attack upon the victim's reputation for prior sexual behavior, was properly excluded under former O.C.G.A. § 24-2-3. Kilgore v. State, 195 Ga. App. 884, 395 S.E.2d 337 (1990) (decided under former O.C.G.A. § 24-2-3).

Denial of hearing held error. — When defendant offered to prove that the complaining witness had prior sexual encounters with the defendant and others and that the defendant knew about the others and of her reputation at the time of the incident on trial, it was error to deny a hearing on the defendant's offer of proof relating to the witness's past sexual behavior. Hamilton v. State, 185 Ga. App. 536, 365 S.E.2d 120 (1987), cert. denied, 185 Ga. App. 910, 365 S.E.2d 120 (1988) (decided under former O.C.G.A. § 24-2-3).

Appellate standard of review. — Appellate court reviewed the trial court's exclusion of evidence under the former rape shield statute, former O.C.G.A. § 24-2-3, for abuse of discretion. Jackson v. State, 254 Ga. App. 562, 562 S.E.2d 847 (2002) (decided under former O.C.G.A. § 24-2-3).

Child Molestation

Former rape shield law applicable in child molestation cases. — In a prosecution for child molestation, evidence of the victim's past sexual behavior and preoccupation with sex was properly excluded. McGarity v. State, 224 Ga. App. 302, 480 S.E.2d 319 (1997), overruled in part by Abdulkadir v. State, 279 Ga. 122, 610 S.E.2d 50 (2005) (decided under former O.C.G.A. § 24-2-3).

Trial court properly refused to allow defense counsel to question an investigator about the victim's prior sexual activity in a child molestation case as the rape shield law, former O.C.G.A. § 24-2-3 (pro-

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hibiting the introduction of evidence of the past sexual behavior of the complaining witness in rape cases), was also applicable in child molestation cases, and no exceptions to the rape shield law was implicated. Flowers v. State, 255 Ga. App. 660, 566 S.E.2d 339 (2002) (decided under former O.C.G.A. § 24-2-3).

Former O.C.G.A. § 24-2-3(b) was applicable in child molestation cases and excluded evidence relating to the past sexual behavior of the complaining witness with some limited exceptions which include: (1) to show that someone other than the defendant caused the injuries to the child; (2) to show lack of victim credibility if the victim's prior allegations of molestation were false; and (3) to show other possible causes for the symptoms exhibited. Since no exception applied, inquiry into a later rape of defendant's victim was properly foreclosed in defendant's rape and incest trial. Taylor v. State, 268 Ga. App. 333, 601 S.E.2d 815 (2004) (decided under former O.C.G.A. § 24-2-3).

In 2005, former O.C.G.A. § 24-2-3 was amended to provide expressly that the former rape shield law applied to prosecutions for child molestations. Brown v. State, 275 Ga. App. 281, 620 S.E.2d 394 (2005) (decided under former O.C.G.A. § 24-2-3).

Early masturbation of victim irrelevant evidence. — In a child molestation case, evidence of the victim's possibly engaging in masturbation at an early age would not have been admissible as the defendant made no allegation that the victim had any unusually early or sudden sexual knowledge; thus, the victim's sexual history was irrelevant under the circumstances. Hughes v. State, 297 Ga. App. 581, 677 S.E.2d 674 (2009) (decided under former O.C.G.A. § 24-2-3).

Expert testimony on abuse accommodation syndrome. — Defendant's claim that the defendant should have been able to question witnesses about the victim's alleged molestation by her stepfather and step-uncle was rejected as a nurse's testimony that the victim's behavioral characteristics were consistent with those of a child who had been sexually molested fell far short of the expert testimony regarding abuse accommodation syndrome that warranted the admission of evidence of previous molestation by others. Brown v. State, 280 Ga. App. 884, 635 S.E.2d 240 (2006) (decided under former O.C.G.A. § 24-2-3).

Rape shield law inapplicable in child molestation cases. — By the former statute's plain terms the former rape shield statute, former O.C.G.A. § 24-2-3(a), applied only in prosecutions for rape and not to child molestation cases; however, the trial court did not err by applying former § 24-2-3(a) to defendant's case because defendant was prosecuted for, among other offenses, rape, and the fact that defendant was acquitted of the rape charge did not require a new trial on the other charges. Abdulkadir v. State, 279 Ga. 122, 610 S.E.2d 50 (2005) (decided under former O.C.G.A. § 24-2-3).

Child abuse accommodation syndrome. — Contrary to the defendant's contention, the trial court properly excluded evidence consisting of any prior abuse committed against the victims by persons other than the defendant on relevancy grounds, given that the state's fact witness, a social worker, did not testify that the victims' demeanor exhibited symptoms consistent with child abuse accommodation syndrome. The court noted that the evidence was not excludable under the former rape shield statute as contended by the state. Segura v. State, 280 Ga. App. 685, 634 S.E.2d 858 (2006) (decided under former O.C.G.A. § 24-2-3).

Evidence of a child sexual abuse victim's previous sexual activity was properly excluded under former O.C.G.A. § 24-2-3(b) because medical evidence indicated the child had been sexually violated within the last 48 hours. Callahan v. State, 256 Ga. App. 482, 568 S.E.2d 780 (2002) (decided under former O.C.G.A. § 24-2-3).

Trial court did not abuse the court's discretion in excluding evidence of a victim's prior false accusation of sexual misconduct made against another person under the former rape shield statute, former O.C.G.A. § 24-2-3(b), based on the state's proffer that the victim told defendant she was sexually active with her boyfriend

because defendant, who was molesting her at the time, kept telling her that he was preparing her for adulthood and kept badgering her as to whether she was having sex with anyone, and because the victim thought that defendant would finally leave her alone if she told him that she was involved in a relationship and was sexually active. After considering the context and circumstances of the allegation, the trial court determined that the victim's prior accusation was the result of coercion and duress from her alleged abuser. Eley v. State, 266 Ga. App. 45, 596 S.E.2d 660 (2004) (decided under former O.C.G.A. § 24-2-3).

In a rape case, the trial court properly found that under former O.C.G.A. § 24-2-3, the defendant failed to show that the child victim had made three prior false allegations of sexual misconduct. In the first case, the defendant asserted a vague claim unsupported by any evidence that when the child was two years old, the child might have made some unspecified allegation against a relative against whom no charges were brought; in the second case, the allegations led to a guilty plea; in the third case, police found that a minor had touched the victim but that no crime had been committed. Osborne v. State, 291 Ga. App. 711, 662 S.E.2d 792 (2008), cert. denied, No. S08C1643, 2008 Ga. LEXIS 783 (Ga. 2008) (decided under former O.C.G.A. § 24-2-3).

With regard to defendant's convictions for sexual battery and child molestation of a step-child, the trial court properly excluded defendant's attempt to introduce evidence of a purported false allegation by the victim that the victim was the victim of date rape in 2006 under the former rape shield law as defendant did not seek to introduce the evidence to show that the victim had psychological problems, rather, defendant argued that the victim had made a previous false allegation. Birkbeck v. State, 292 Ga. App. 424, 665 S.E.2d 354 (2008), cert. denied, No. S08C1917, 2008 Ga. LEXIS 874 (Ga. 2008); overruled in part, State v. Gardner, 286 Ga. 633, 690 S.E.2d 164 (2010) (decided under former O.C.G.A. § 24-2-3).

Evidence not admissible in child molestation case. — In a prosecution for child molestation, the trial court did not abuse the court's discretion by granting the state's motion to exclude evidence that the victim told her physician that she was sexually active with her boyfriend. Cox v. State, 241 Ga. App. 388, 526 S.E.2d 887 (1999) (decided under former O.C.G.A. § 24-2-3).

Evidence not admissible. — At a trial in which defendant was accused of sexual offenses against the daughter, the trial court did not err under former O.C.G.A. § 24-2-3(b) in refusing to admit evidence of the possibility that the daughter was previously sexually molested by the babysitter; such evidence was inadmissible in a molestation case to show the victim's reputation for nonchastity or the victim's preoccupation with sex, and an exception to this rule did not apply as the state presented neither medical evidence showing that the victim had been molested nor evidence showing that the victim had indicated symptoms consistent with the child abuse accommodation syndrome. Zepp v. State, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007) (decided under former O.C.G.A. § 24-2-3).

Trial court did not err by excluding letters the victim wrote to the defendant during the time period between the defendant's arrest and the trial pursuant to the former Rape Shield Statute, former O.C.G.A. § 24-2-3, because the evidence was cumulative to the extent that a portion of a letter from the victim recounting the victim's prior sexual activity supported an inference that the victim consented to sexual conduct since the jury was aware that the victim was pregnant with the defendant's child; to the extent that the portion of a letter from the victim in which the victim described future sexual activities that the victim would like to engage in with the defendant was relevant and admissible to show that the victim still had feelings for the defendant, that evidence was cumulative to the victim's testimony that the victim still loved the defendant and remained in contact with the defendant. Morgan v. State, 303 Ga. App. 358, 693 S.E.2d 504 (2010) (decided under former O.C.G.A. § 24-2-3).

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Trial court did not err by excluding letters the victim wrote to the defendant during the time period between the defendant's arrest and the trial pursuant to the former Rape Shield Statute, former O.C.G.A. § 24-2-3, because although the trial court initially indicated that the former Rape Shield Statute prohibited admission of the letters, the court clearly indicated that it would consider any future proper attempt to admit the evidence, but the defendant declined to do so; assuming that the ruling was erroneous, the verdict was sustainable because the evidence in the letters that the victim had a previous sexual relationship with the defendant before the incident and wanted to have one with the defendant in the future was not relevant to the charges for which the defendant was convicted, namely kidnapping, kidnapping with bodily injury, family violence aggravated assault, and false imprisonment. Morgan v. State, 303 Ga. App. 358, 693 S.E.2d 504 (2010) (decided under former O.C.G.A. § 24-2-3).

Defendant's convictions for child molestation in violation of O.C.G.A. § 16-6-4(a) and sexual battery in violation of O.C.G.A. § 16-6-22.1(b) were vacated because the trial court erred by applying former O.C.G.A. § 24-2-3(a) to the case and striking the testimony regarding the victim's previous alleged sexual conduct with the victim's brother based on the court's conclusion that the former rape shield statute prohibited the defendant from presenting evidence regarding the victim's prior sexual history, and the error in excluding the evidence of the victim's prior sexual history could have contributed to the jury's verdict since the only direct evidence of the defendant's guilt was the victim's testimony that the defendant sexually abused the victim; the former provisions did not apply to prosecutions for child molestation or sexual battery. Robinson v. State, 308 Ga. App. 562, 708 S.E.2d 303 (2011) (decided under former O.C.G.A. § 24-2-3).

Evidence may be excluded even if the charge was not aggravated molestation. — Although the former rape shield statute, former O.C.G.A. § 24-2-3, did not require the exclusion of evidence of a child molestation victim's past boyfriends and difficult past because the charge was not an aggravated charge, the trial court was authorized to evaluate the relevance of any evidence and exclude the evidence on that basis. Cantu v. State, 304 Ga. App. 655, 697 S.E.2d 310 (2010) (decided under former O.C.G.A. § 24-2-3).

Sexual activity of household excluded. — Evidence that a child sexual abuse victim was raised in a household where sexual activity was open was properly excluded, under former O.C.G.A. § 24-2-3(b), because nothing in the proffered evidence showed that this would cause the victim to have knowledge of the sexual acts performed on the victim by defendant. Callahan v. State, 256 Ga. App. 482, 568 S.E.2d 780 (2002) (decided under former O.C.G.A. § 24-2-3).

Evidence of prior false claims properly barred. — Trial court properly excluded evidence offered to show that the victim's prior allegations of molestation were false based on the fact that the officer investigating the matter had failed to seek an arrest warrant for the alleged molester for more than one year after the complaint was made because it was not sufficient to establish that the allegations were false. Mann v. State, 244 Ga. App. 756, 536 S.E.2d 608 (2000) (decided under former O.C.G.A. § 24-2-3).

Evidence that victim had venereal disease not admissible. — Trial court did not err in granting the state's motion to suppress evidence that the victim had a venereal disease one year after the last act of molestation since there was no evidence or offer of proof that the defendant did not have the disease. Ricks v. State, 249 Ga. App. 80, 546 S.E.2d 919 (2001) (decided under former O.C.G.A. § 24-2-3).

Exception did not apply. — When the state did not offer any medical evidence to prove the girl had been molested or any testimony to show that she had displayed symptoms consistent with the child abuse accommodation syndrome, the exception to the admissibility of past sexual activity did not apply and inquiry into the victim's sexual history was precluded by former O.C.G.A. § 24-2-3(b). Rocha v. State, 248

Ga. App. 53, 545 S.E.2d 173 (2001) (decided under former O.C.G.A. § 24-2-3).

Evidence in child sexual abuse cases. — Trial court did not err in refusing to allow cross-examination of a child sex abuse victim concerning alleged prior false accusations of molestation made against the victim's half brother after the trial court conducted a hearing to determine if the allegations at issue had a "reasonable probability of falsity," and ruled that the defense had not carried the defense's burden of showing a reasonable probability that the victim's accusation against the victim's half-brother was false; it was apparent that the trial court was faced with the conflicting testimony of the victim and the victim's half-brother and found that of the victim more credible. Williams v. State, 266 Ga. App. 578, 597 S.E.2d 621 (2004) (decided under former O.C.G.A. § 24-2-3).

Reference to evidence prohibited by rape shield law did not create manifest necessity for mistrial. — At defendant's trial for various sexual offenses based on allegations by his stepdaughter, which were later recanted, there was no manifest necessity for a mistrial over defendant's objection when a child abuse investigator mentioned, in violation of the trial court's ruling on a motion in limine based on former O.C.G.A. § 24-2-3, that the stepdaughter had viewed pornographic movies even though the trial court did not abuse the court's discretion in granting the state's motion in limine to exclude the evidence; defense counsel's question to the investigator did not call for the improper response and, once the issue had been injected, the defense was entitled to clarify that defendant bore no responsibility for the victim's viewing of the pornographic movies. Payne v. State, 267 Ga. App. 498, 600 S.E.2d 422 (2004) (decided under former O.C.G.A. § 24-2-3).

Child molestation victim was not entitled to a new trial based on the victim's testimony that she was a virgin prior to his first assault of her. Even assuming that the testimony violated the former rape shield statute, former O.C.G.A. § 24-2-3(a), the challenged testimony was cumulative of other testimony to which defendant did not object. Collins v. State, 310 Ga. App. 613, 714 S.E.2d 249 (2011) (decided under former O.C.G.A. § 24-2-3).

Although the trial court erred by excluding evidence of one child victim's alleged homosexual relationship in defendant's trial on 14 counts of child molestation and 11 counts of aggravated child molestation, it was highly probable that the error did not contribute to the jury's verdict; even if defendant was given the opportunity to cross-examine the victim about the victim's past sexual behavior, the judge would have been unlikely to have adjudged that evidence as credible, completely disregarding defendant's guilty plea and the other evidence that such a similar transaction did occur. Brown v. State, 275 Ga. App. 281, 620 S.E.2d 394 (2005) (decided under former O.C.G.A. § 24-2-3).

Constitutional challenge of rape shield statute denied. — Evidence that the victim was molested by her stepfather would not have diminished evidence that defendant molested the victim; therefore, application of the former rape shield statute did not deny him a fair trial. Rouse v. State, 204 Ga. App. 845, 420 S.E.2d 779, cert. denied, 204 Ga. App. 922, 420 S.E.2d 779 (1992) (decided under former O.C.G.A. § 24-2-3).

Question regarding victim's previous accusation against defendant. — Defense counsel was properly prohibited from asking the 11-year-old victim on cross-examination whether she had previously accused the defendant, her stepfather, of molesting her. Allen v. State, 210 Ga. App. 447, 436 S.E.2d 559 (1993) (decided under former O.C.G.A. § 24-2-3).

Questioning about motive to fabricate allegations not barred. — Limitation on cross-examination of an alleged child molestation victim, precluding examination of whether she was dating an older man, did not preclude questioning whether she had a motive to fabricate the allegations due to conflicts with defendant over parental discipline. Nixon v. State, 234 Ga. App. 797, 507 S.E.2d 833 (1998) (decided under former O.C.G.A. § 24-2-3).

Evidence of victim's sexually transmitted disease allowed. — Since the defendant was convicted of incest and

Child Molestation (Cont'd)

child molestation, the trial court erred in disallowing the defendant to introduce medical evidence of a sexually transmitted disease for which the victim had tested positive for the purpose of corroborating defendant's defense, not for the purpose of exploring the victim's past or other sexual behavior. Chambers v. State, 205 Ga. App. 78, 421 S.E.2d 326 (1992) (decided under former O.C.G.A. § 24-2-3).

Questioning about promiscuity precluded. — In a prosecution for child molestation and incest, the defendant was properly precluded from questioning the victim about her alleged promiscuity. Walker v. State, 234 Ga. App. 40, 506 S.E.2d 179 (1998) (decided under former O.C.G.A. § 24-2-3).

Because evidence of the victim's disease was inadmissible under former O.C.G.A. § 24-2-3(a), trial counsel's performance could not be considered deficient based on a failure to contest the receipt of the medical information; thus, an order granting defendant's petition for a writ of habeas corpus was reversed because even if counsel had requested a continuance for the purpose of testing the defendant, no reasonable likelihood existed that the outcome of the trial would have been different, and in fact, a negative result for defendant at the time of trial would not have established the medical condition at the time of the crimes, or rule out the possibility that the defendant had molested the victim. Murrell v. Ricks, 280 Ga. 427, 627 S.E.2d 546 (2006) (decided under former O.C.G.A. § 24-2-3).

Evidence of victim's sexual activity improperly excluded. — Trial court abused the court's discretion in excluding evidence that a child molestation victim had been having sex with her boyfriend because the evidence would provide an alternate explanation as to why the victim's hymen had been penetrated, and absent the evidence of the sexual relationship with the boyfriend, the obvious inference was that the defendant had caused the penetration injuries; the state decided to present evidence of the penetration damage to the victim's hymen, and it was the state's affirmative act of "opening the door" to the area that required the trial court to allow the defendant to present evidence that someone other than the defendant caused the injury. Tidwell v. State, 306 Ga. App. 307, 701 S.E.2d 920 (2010) (decided under former O.C.G.A. § 24-2-3).

Inapplicable to victim's prior alleged molestations. — Former O.C.G.A. § 24-2-3 did not bar the introduction of victim's prior alleged molestations to show that someone other than defendant caused the injuries to the two victims. Lemacks v. State, 207 Ga. App. 160, 427 S.E.2d 536 (1993) (decided under former O.C.G.A. § 24-2-3).

Evidence of child victim's alleged viewing of pornography. — Trial court did not err in limiting inquiry into a child victim's alleged viewing of the victim's brother's pornographic materials because there was no showing of relevance when the victim denied seeing the movies and did not use words of a sexual nature that normally would not be in the victim's vocabulary. Montgomery v. State, 277 Ga. App. 142, 625 S.E.2d 529 (2006) (decided under former O.C.G.A. § 24-2-3).

In the absence of a showing of relevance, evidence of a sexual molestation victim's exposure to sexually explicit photographs or sexually explicit conversation was wholly irrelevant to the issue of whether the defendant committed the acts alleged by the victim, and was thus properly excluded by the trial court pursuant to former O.C.G.A. § 24-2-3(a). Walker v. State, 308 Ga. App. 176, 707 S.E.2d 122 (2011) (decided under former O.C.G.A. § 24-2-3).

Evidence of sexually transmitted disease. — Trial court did not err in refusing to allow the offered testimony regarding other sexual assaults upon the victim after defendant failed to offer proof that the victim's stepfather was also infected with gonorrhea. Any evidence of the victim's sexual activity with her stepfather would have shed no light on the origin of the victim's sexually transmitted disease. Rouse v. State, 204 Ga. App. 845, 420 S.E.2d 779, cert. denied, 204 Ga. App. 922, 420 S.E.2d 779 (1992) (decided under former O.C.G.A. § 24-2-3).

Harmless error. — Although the defendant in a child molestation case should

have been allowed to question one of the teenagers involved about her sexual relationship with the defendant's child because at the time of the trial, the former rape shield statute applied only to rape cases, the error was harmless; such a relationship was placed into evidence by the teenager's own statements. Krirat v. State, 286 Ga. App. 650, 649 S.E.2d 786 (2007), cert. denied, No. S07C1788, 2007 Ga. LEXIS 745 (Ga. 2007) (decided under former O.C.G.A. § 24-2-3).

Incest

Incest. — Former rape shield statute was applicable in prosecution for incest. Estes v. State, 165 Ga. App. 453, 301 S.E.2d 504 (1983) (decided under former O.C.G.A. § 24-2-3).

Flirtation between child and parent inadmissible. — Trial court did not err by excluding evidence concerning daughter's alleged flirtation with her stepfather because the former rape shield statute bars such evidence. Murphy v. State, 195 Ga. App. 878, 395 S.E.2d 76 (1990) (decided under former O.C.G.A. § 24-2-3).

Incest was a sexual crime included within former O.C.G.A. § 24-2-3. Haynes v. State, 180 Ga. App. 202, 349 S.E.2d 208 (1986) (decided under former O.C.G.A. § 24-2-3).

Rape

Evidence not admissible in rape case. — In a prosecution for rape and other offenses, the trial court properly precluded defendant from examining an officer regarding intimate photographs and letters written by the victim to her husband while he was in prison. Martin v. State, 219 Ga. App. 277, 464 S.E.2d 872 (1995) (decided under former O.C.G.A. § 24-2-3).

Victim impact statement in which the victim stated that defendant "took her virginity" was not admissible for impeachment purposes under the former rape shield statute. Fetterolf v. State, 223 Ga. App. 744, 478 S.E.2d 889 (1996) (decided under former O.C.G.A. § 24-2-3).

In a rape trial, the trial court did not err in refusing to allow defense counsel to impeach the victim with a certified copy of a misdemeanor conviction for prostitution because moral turpitude was no longer the impeachment standard. The prostitution conviction was inadmissible under former O.C.G.A. § 24-9-84.1(a)(3) (see now O.C.G.A. § 24-6-609) because the conviction did not involve an element of dishonesty or false statement, and the conviction was barred from admission by the rape shield statute because the conviction related to the victim's past sexual behavior and did not come within an exception in former O.C.G.A. § 24-2-3. Green v. State, 291 Ga. 287, 728 S.E.2d 668 (2012) (decided under former O.C.G.A. § 24-2-3).

Evidence concerning a romantic relationship between the victim and a recused prosecuting attorney was inadmissible. Griffin v. State, 224 Ga. App. 225, 480 S.E.2d 608 (1997) (decided under former O.C.G.A. § 24-2-3).

There was no error in the trial court's refusal to allow defendant to introduce evidence of the victim's past sexual behavior to explain how her hymen became perforated. Snow v. State, 228 Ga. App. 649, 492 S.E.2d 564 (1997) (decided under former O.C.G.A. § 24-2-3).

Even though defendant obtained a pretrial order allowing him to present testimony that he and the victim had previously had consensual intercourse, his asking a nurse about the victim's statement to her about a prior act of voluntary intercourse violated the former rape shield statute since this evidence was not included in defendant's proffer. Banks v. State, 230 Ga. App. 258, 495 S.E.2d 877 (1998) (decided under former O.C.G.A. § 24-2-3).

Evidence of victim's prior rape was not admissible as a prior false allegation or otherwise; defendant's argued inference that the victim must have consented because as a previous rape victim she would have exhibited more wariness of strange men was not permissible. Williams v. State, 251 Ga. App. 137, 553 S.E.2d 823 (2001) (decided under former O.C.G.A. § 24-2-3).

Trial court properly excluded evidence as to the victims' past sexual behavior in defendant's rape and aggravated assault trial as defendant failed to satisfy either

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prong of former O.C.G.A. § 24-2-3(b) since: (1) the victims were beaten; (2) one victim testified that she was pushed to the ground and hit in the face; (3) the other victim was dragged to an abandoned yard and told repeatedly to "shut up" while being punched in the face; and (4) the victims testified that they never had sex with defendant before the night in question. Williams v. State, 257 Ga. App. 54, 570 S.E.2d 362 (2002) (decided under former O.C.G.A. § 24-2-3).

Since the victim never claimed that defendant was the father of her child, evidence of her sexual conduct was irrelevant pursuant to former O.C.G.A. § 24-2-3(b). Carson v. State, 259 Ga. App. 21, 576 S.E.2d 12 (2002) (decided under former O.C.G.A. § 24-2-3).

In a prosecution for rape and sodomy, the trial court properly refused to allow the defendant to present evidence as to the victim's past conduct in which she allegedly consented to sex in exchange for drugs as defendant did not proffer any evidence to demonstrate the basis for his belief that the victim consented to his conduct. Brown v. State, 260 Ga. App. 77, 579 S.E.2d 87 (2003) (decided under former O.C.G.A. § 24-2-3).

Former rape shield statute was properly used to exclude testimony of the victim's mother and in limiting victim's cross-examination; the evidence excluded under the former rape shield statute involved the victim's sexual act with a third party and was also excludable on relevancy grounds. Abdulkadir v. State, 264 Ga. App. 805, 592 S.E.2d 433 (2003) (decided under former O.C.G.A. § 24-2-3).

Evidence of the sexual history of defendant's wife was properly excluded under the former Georgia Rape Shield Statute, former O.C.G.A. § 24-2-3, as defendant was charged with the aggravated assault of his wife in conjunction with a rape charge; trial counsel was not ineffective for failing to argue that evidence of the prior sexual history of defendant's wife was admissible. Osterhout v. State, 266 Ga. App. 319, 596 S.E.2d 766 (2004) (decided under former O.C.G.A. § 24-2-3).

Trial court properly refused to allow testimony that a victim of domestic violence had been seen working as a prostitute because that information had no relevance to the aggravated assault and false imprisonment charges for which a defendant was convicted and, further, the defendant failed to produce any evidence that could have provided a nexus between the alleged prostitution and a conclusion that someone else might have inflicted the victim's injuries. Moorer v. State, 290 Ga. App. 216, 659 S.E.2d 422 (2008) (decided under former O.C.G.A. § 24-2-3).

Trial court did not abuse the court's discretion in excluding the defendant's testimony regarding statements the victim allegedly made to the defendant because the statements were prohibited by the former Rape Shield Statute, former O.C.G.A. § 24-2-3(a), since the statements made reference to the victim's past sexual behavior by implying that the victim had sex in the past with her boyfriend and with older men; the defendant would not have reasonably believed that the victim consented to sex because there was testimony that the victim was intoxicated, in and out of consciousness, and unable to move. Turner v. State, 312 Ga. App. 315, 718 S.E.2d 545 (2011) (decided under former O.C.G.A. § 24-2-3).

Trial court did not err in refusing to allow the defendant to cross-examine his daughter, the victim's friend, about a comment she posted on a website concerning the victim because the testimony the defendant sought to elicit, that the victim had sex with other men, was the very type of evidence prohibited by the former Rape Shield Statute, former O.C.G.A. § 24-2-3(a). Turner v. State, 312 Ga. App. 315, 718 S.E.2d 545 (2011) (decided under former O.C.G.A. § 24-2-3).

Testimony about ongoing customer-prostitute relationship should be allowed. — Defendant's aggravated sodomy conviction was reversed after the trial court erroneously refused to allow testimony concerning defendant's five-year relationship with the victim, a prostitute, under Georgia's former Rape Shield Statute, former O.C.G.A. § 24-2-3; the ongoing customer-prostitute relationship between the two would support a reasonable inference that defendant be-

lieved that the defendant's sexual relationship with the victim on the night in question was consensual; the evidence also had a direct bearing on the victim's motivation to fabricate the rape allegation, and therefore was admissible; defendant's proposed cross-examination of the victim was confined to the existence of an ongoing relationship between them. Ivey v. State, 264 Ga. App. 377, 590 S.E.2d 781 (2003) (decided under former O.C.G.A. § 24-2-3).

Use of term "virgin" prohibited. — Any evidence of physical injuries a victim received during the commission of a rape, including the condition of the hymen, was admissible, but the term "virgin" was a comment on prior sexual history and therefore not admissible. Herndon v. State, 232 Ga. App. 129, 499 S.E.2d 918 (1998) (decided under former O.C.G.A. § 24-2-3).

Inquiry about dress prohibited. — Trial court properly refused to permit defendant to introduce evidence or to make inquiry about the mode of the victim's dress on the night of the rape. Alford v. State, 243 Ga. App. 212, 534 S.E.2d 81 (2000) (decided under former O.C.G.A. § 24-2-3).

Victim's desire to keep knowledge of sexual activity from parents. — Despite defendant's contention that defendant should have been allowed to present evidence that the victim had the motive to fabricate her claim of rape in order to prevent her parents from knowing that she had become sexually active, the trial court did not abuse the court's discretion in restricting defendant's cross-examination of the victim regarding her past sexual history based on Green v. State, 221 Ga. App. 436 (1996). Lloyd v. State, 263 Ga. App. 234, 587 S.E.2d 372 (2003) (decided under former O.C.G.A. § 24-2-3).

Effectiveness of counsel in questioning. — Failure of defense counsel to cross-examine rape victim regarding her prior sexual history was not ineffective assistance of counsel since such questioning was clearly prohibited under former O.C.G.A. § 24-2-3. Brown v. State, 225 Ga. App. 49, 483 S.E.2d 318 (1997).

Inquiring about areas of victim fabrication. — When defendant was charged with raping a victim who accepted defendant's offer of a ride as the victim was on her way to return a jacket to a former boyfriend, the former rape shield law, former O.C.G.A. § 24-2-3(a), did not prohibit defendant from inquiring of the victim about a theory that the victim fabricated the rape charge to explain semen stains on the boyfriend's jacket, resulting from the sexual encounter, because she wanted to reestablish a romantic relationship with the boyfriend because defendant was not seeking to inquire about the victim's character for sexual behavior. Richardson v. State, 276 Ga. 639, 581 S.E.2d 528 (2003) (decided under former O.C.G.A. § 24-2-3).

Trial court did not abuse the court's discretion by excluding cross-examination and testimony concerning a 15-year-old rape victim's alleged past sexual encounters under the former Rape Shield Statute, former O.C.G.A. § 24-2-3, despite the defendants' claims that the victim fabricated her story in retaliation for the defendant telling her mother that she was sexually active. McIntyre v. State, 311 Ga. App. 173, 715 S.E.2d 431 (2011) (decided under former O.C.G.A. § 24-2-3).

Former O.C.G.A. § 24-2-3 applied by the former statute's terms to any prosecution for rape, making no distinction between the different phases of the trial. Singleton v. State, 157 Ga. App. 192, 276 S.E.2d 685 (1981) (decided under Ga. L. 1976, p. 741, § 1).

Statutory rape. — Although the former rape shield statute was applicable by the statute's terms to rape cases, logic and the intent of the former statute showed that it should be equally applicable in statutory rape cases, except that the exceptions in the former statute relating to consent and the accused's prior participation would be inapplicable in statutory rape cases. Barnes v. State, 244 Ga. 302, 260 S.E.2d 40 (1979) (decided under Ga. L. 1976, p. 741, § 1); Hill v. State, 159 Ga. App. 489, 283 S.E.2d 703 (1981) (decided under Ga. L. 1976, p. 741, § 1); Brown v. State, 173 Ga. App. 640, 327 S.E.2d 515 (1985) (decided under former O.C.G.A. § 24-2-3).

In a prosecution for statutory rape, evidence of sexual intercourse between the

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victim and other individuals was properly excluded under former O.C.G.A. § 24-2-3; in the absence of any indication that the prior acts of sexual intercourse were forcibly accomplished, evidence of sexual intercourse with others would relate to past sexual behavior and reflect upon the character of the victim. Berry v. State, 210 Ga. App. 789, 437 S.E.2d 630 (1993) (decided under former O.C.G.A. § 24-2-3).

Evidence of other sexual activity with defendant allowed. — Former O.C.G.A. § 24-2-3 permitted introduction of evidence of other sexual activity of the complaining witness only if such behavior involved the defendant or if such evidence supported an inference that the defendant reasonably believed the complaining witness would have consented to his actions. Rouse v. State, 204 Ga. App. 845, 420 S.E.2d 779, cert. denied, 204 Ga. App. 922, 420 S.E.2d 779 (1992) (decided under former O.C.G.A. § 24-2-3).

Evidence that victim had contracted gonorrhea three months before she was raped, that she wore sexually suggestive clothing and acted promiscuously when she frequented nightclubs, and that she demanded money from another man threatening to claim that he raped her was properly ruled inadmissible. Ford v. State, 189 Ga. App. 395, 376 S.E.2d 418 (1988) (decided under former O.C.G.A. § 24-2-3).

Victim's statements to defendant about past relationships. — Former rape shield statute applied to victim's statements to defendant about her having had sexual relations with black men and having had children by these men which defendant sought to introduce as evidence that defendant believed the victim consented to have sex with him. Logan v. State, 212 Ga. App. 734, 442 S.E.2d 883 (1994) (decided under former O.C.G.A. § 24-2-3).

Reasonable belief that victim consented. — Since the defendant knew the victim for only one hour before the alleged rape occurred, and since in that time, it was unlikely that the defendant discovered any past sexual activity on the part of his victim that could justify his claim that she consented to intercourse, the trial court's refusal to admit evidence as to the victim's prior sexual experience was not a denial of defendant's right to a thorough and sifting cross-examination. Lamar v. State, 243 Ga. 401, 254 S.E.2d 353, appeal dismissed, 444 U.S. 803, 100 S. Ct. 23, 62 L. Ed. 2d 16 (1979) (decided under Ga. L. 1976, p. 741, § 1).

Proffered testimony of two young men regarding the victim's advances toward them was inadmissible in a rape case since there was no evidence of consent by the victim, nor any evidence that defendant had knowledge of the alleged conduct between the victim and the two young men. Moore v. State, 195 Ga. App. 851, 395 S.E.2d 13 (1990) (decided under former O.C.G.A. § 24-2-3).

Evidence that a victim of an attempted rape had recorded a phone-sex tape did not support an inference that the defendant could have reasonably believed that she consented to the attempted sexual intercourse. Sweeney v. State, 233 Ga. App. 862, 506 S.E.2d 150 (1998) (decided under former O.C.G.A. § 24-2-3).

Refusal to allow cross-examination of rape victim on existence of pubic hairs found on victim inconsistent with those of appellant and victim was not error. Tremble v. State, 162 Ga. App. 761, 292 S.E.2d 442 (1982) (decided under former O.C.G.A. § 24-2-3).

In rape cases, proof of prior consent without regard to identity of persons or similarity of circumstances may be admitted to allow the jury to weigh or calculate the probability of consent with respect to an entire class of "unchaste" women when the court finds that the evidence supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of. Hardy v. State, 159 Ga. App. 854, 285 S.E.2d 547 (1981) (decided under Ga. L. 1976, p. 741, § 1).

State's introduction of evidence that victims contracted gonorrhea after rape and that defendant had gonorrhea during time in question did not authorize defendant to question victims concerning their prior sexual conduct. McNeese v. State, 170 Ga. App. 118, 316

S.E.2d 564 (1984) (decided under former O.C.G.A. § 24-2-3).

Sexual Battery

No application in sexual battery cases. — Trial court did not err in refusing to charge the jury that it could consider the victim's character in determining whether the sexual contact with defendant was consensual or against the victim's will since the former rape shield statute, former O.C.G.A. § 24-2-3, on which defendant relied in arguing for the instruction, did not apply directly to sexual offenses such as sexual battery or aggravated sexual battery, and also because there was no evidence of any past sexual behavior between defendant and the victim. Stinson v. State, 256 Ga. App. 902, 569 S.E.2d 858 (2002) (decided under former O.C.G.A. § 24-2-3).

Evidence not admissible in sexual assault case. — Trial court correctly granted the state's motion in limine to exclude evidence concerning the sexual assault victim having had consensual sex with her boyfriend before defendant sexually assaulted her because the former Georgia rape shield statute, former O.C.G.A. § 24-2-3, barred the sexual assault victim's prior sexual history as having any relevance to defendant's intent at the time of his sexual assault on the victim. Bing v. State, 256 Ga. App. 88, 567 S.E.2d 731 (2002) (decided under former O.C.G.A. § 24-2-3).

Former O.C.G.A. § 24-2-3 was applicable to prosecutions for aggravated assault with intent to rape, and trial court did not err in sustaining the state's objection to defense counsel's questions concerning the prosecutors' previous sexual conduct. Blount v. State, 172 Ga. App. 120, 322 S.E.2d 323 (1984) (decided under former O.C.G.A. § 24-2-3).

Sodomy

Evidence not admissible in sodomy case. — Evidence of any previous consensual homosexual fantasies the victim may have had was not admissible because it would in no way support an inference that the accused could have reasonably believed that the victim consented to the conduct complained of in the prosecution, which included armed robbery and kidnapping, as well as non-consensual aggravated sodomy at knife point. Rogers v. State, 247 Ga. App. 219, 543 S.E.2d 81 (2000) (decided under former O.C.G.A. § 24-2-3).

In a prosecution for aggravated sodomy, even though the former rape shield statute did not apply, evidence of the victim's sexual behavior with persons other than the defendant was properly excluded as not relevant since the defendant's defense was that he was not there, rather than that the victim had consented. Mobley v. State, 212 Ga. App. 293, 441 S.E.2d 780 (1994) (decided under former O.C.G.A. § 24-2-3).

Evidence of victim's prior relationships with defendant. — Trial court did not abuse the court's discretion in excluding evidence of a rape victim's alleged past sexual behavior with defendant as the evidence of alleged prior sexual encounters with the victim did not lead to an inference of consent since the evidence established that defendant could not have reasonably believed that the victim consented to the sodomy and intercourse at issue based on defendant brandishing a gun and threatening to shoot the victim's friend and the victim if the victim did not comply with defendant's demands for sex. Jennings v. State, 292 Ga. App. 149, 664 S.E.2d 248 (2008) (decided under former O.C.G.A. § 24-2-3).

Procedure

Defense must notify court of need for in camera hearing. — Before a trial court can be faulted for refusing an in camera hearing as provided for by former O.C.G.A. § 24-2-3, the court must be placed on notice as to the intent of the defense to seek to introduce such evidence, and the defense must specifically notify the court of the need for an in camera hearing for its offer of proof. Tucker v. State, 173 Ga. App. 742, 327 S.E.2d 852 (1985) (decided under former O.C.G.A. § 24-2-3); Evans v. State, 180 Ga. App. 1, 348 S.E.2d 561 (1986) (decided under former O.C.G.A. § 24-2-3).

Defendant was not entitled to an in camera hearing on defendant's offer of

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proof of the victim's past sexual behavior when the defendant later testified before the jury that the defendant had consensual sex with the victim and the defendant never made a proffer of anticipated testimony of an independent witness who would testify that the witness saw the consensual sex. Nelson v. State, 210 Ga. App. 249, 435 S.E.2d 750 (1993) (decided under former O.C.G.A. § 24-2-3).

Victim may not appeal finding of admissibility. — Since the victim is not the defendant, the court does not consider any prejudice to her that admission of sexual history evidence may allow as against its probative value; nor is she provided any right of appeal against a finding of admissibility. Once the pertinence of a woman's lack of chastity, and hence its admissibility, is determined at the in camera inspection, this character trait may be proved. Hardy v. State, 159 Ga. App. 854, 285 S.E.2d 547 (1981) (decided under Ga. L. 1976, p. 741, § 1).

Retrial

Reprosecution not barred when evidence inappropriately introduced. — Defendant's introduction of evidence that was prohibited by the former rape shield statute gave the court grounds to find manifest necessity for a mistrial; therefore, state and federal double jeopardy provisions did not bar reprosecution. Banks v. State, 230 Ga. App. 258, 495 S.E.2d 877 (1998) (decided under former O.C.G.A. § 24-2-3).

Trial court did not err in denying a defendant's plea in bar of former jeopardy with regard to kidnapping, rape, and other charges for alleged crimes committed against the defendant's estranged wife as defense counsel violated the former Rape Shield Statute, former O.C.G.A. § 24-2-3, in questioning the defendant's spouse as to how often the spouse had engaged in sexual intercourse after the alleged rape, which entitled the state to a mistrial. The defendant did not have the right to force the state either to endure a prejudiced trial or forego prosecution entirely. Birdsong v. State, 298 Ga. App. 322, 680 S.E.2d 159 (2009) (decided under former O.C.G.A. § 24-2-3).

Retrial not barred by double jeopardy clause. — Trial judge did not abuse the judge's discretion in determining that declaration of a mistrial was required because prejudicial and inadmissible matter injected by the defense in violation of former O.C.G.A. § 24-2-3 made it impossible for an impartial verdict to be reached, and retrial of defendant was not barred by the double jeopardy clause of the Fifth Amendment. Abdi v. State, 249 Ga. 827, 294 S.E.2d 506 (1982), cert. denied, 471 U.S. 1006, 105 S. Ct. 1871, 85 L. Ed. 2d 164 (1985) (decided under former O.C.G.A. § 24-2-3).

Declaration of a mistrial by the trial judge, on the judge's own motion, in a rape prosecution, following the cross-examination of the alleged victim, which culminated in a question by defense counsel concerning the past sexual behavior of the witness, a violation of former O.C.G.A. § 24-2-3 that was "highly improper" and prejudicial, was proper and did not bar a second trial of the defendant for the alleged offense. Abdi v. Georgia, 744 F.2d 1500 (11th Cir. 1984), cert. denied, 471 U.S. 1006, 105 S. Ct. 1871, 85 L. Ed. 2d 164 (1985) (decided under former O.C.G.A. § 24-2-3).

Evidence of victim's character irrelevant. — With regard to a defendant's conviction for child molestation as well as the trial court's denial of the defendant's motion for a new trial, the trial court did not err by limiting the defendant's cross-examination of the victim by refusing to allow the defendant to cross-examine the 11-year-old victim regarding an alleged Internet profile page that listed the victim's age as 17 years old and having an occupation as a cheerleader for a professional sports team. The victim's age was not at issue in the case nor was the fact that the victim had previously stated that the victim was a cheerleader for a professional sports team, thus, the trial court properly ruled that the defendant was merely attempting to run around the prohibition on the admission of prior bad acts and impeach the victim about an immaterial issue. Daniel v. State, 296 Ga. App. 513, 675 S.E.2d 472 (2009), cert. denied, No. S09C1192, 2009

Ga. LEXIS 326 (Ga. 2009) (decided under former O.C.G.A. § 24-2-2).

Evidence of nonchastity of victim inadmissible in trial of child molestation charge. — To the extent that the alleged evidence, sought to be introduced by the defendant, concerning the general reputation and character of the victim, dealt with the victim's reputation for nonchastity, it was inadmissible at trial in a prosecution for child molestation. Lively v. State, 157 Ga. App. 419, 278 S.E.2d 67 (1981) ((decided under former Code 1933, § 38-202).

Whether or not the victim was a prostitute was not relevant to the determination of who killed the victim. Bryant v. State, 249 Ga. 242, 290 S.E.2d 75 (1982) (decided under former O.C.G.A. § 24-2-2).

School disciplinary record of victim inadmissible. — Trial court did not err in granting the state's motion in limine, which sought to prevent the defendant from introducing the victim's school records in an attempt to show that the victim had disciplinary problems, since such evidence was absolutely irrelevant to any issue in the prosecution for child molestation. Lively v. State, 157 Ga. App. 419, 278 S.E.2d 67 (1981) (decided under former Code 1933, § 38-202).

Victim's bomb threat irrelevant. — Because making a bomb threat did not unambiguously reflect on a child victim's credibility, honesty, or imagination, was not related to the victim's testimony, and was not material to the issues on trial, the trial court did not abuse the court's discretion in refusing to allow the defense to introduce the evidence under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405). Bentley v. State, 277 Ga. App. 483, 627 S.E.2d 61 (2006) (decided under former O.C.G.A. § 24-2-2).

Victim's involvement in charitable civic organization inadmissible. — In a rape prosecution, while the prosecutor should not have been allowed to question the victim about the victim's involvement with a civic organization that helped mentally ill children, the admission of such irrelevant material did not warrant a mistrial. Brown v. State, 260 Ga. App. 77, 579 S.E.2d 87 (2003) (decided under former O.C.G.A. § 24-2-2).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 368 et seq.

Am. Jur. Proof of Facts. — Alleged Victim's Commission of Prior Acts of and Reputation for Violence, 15 POF2d 167.

C.J.S. — 32 C.J.S., Evidence, §§ 568 et seq., 776 et seq.

ALR. — Propriety of instructions as to the significance of evidence concerning the defendant's good character as an element bearing upon the question of reasonable doubt, 10 ALR 8; 68 ALR 1068.

Cross-examination as to sexual morality for purpose of affecting credibility of witness, 65 ALR 410.

Admissibility in rape cases of evidence of previous unchastity, or reputation for unchastity, of prosecutrix, 140 ALR 364.

Admissibility of evidence of complaint or details of complaint by alleged victim of rape or other similar offense as affected by fact that she is not a witness or an incompetent to testify because of age or other reason, 157 ALR 1359.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children, and the like, 62 ALR2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy of prosecutrix, 62 ALR2d 1083.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Admissibility of prosecution evidence on issue of consent, that rape victim was a virgin, absent defense attack on her chastity, 35 ALR3d 1452.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

Prejudicial effect of prosecutor's reference in argument to homosexual acts or tendencies of accused which are not material to his commission of offense charged, 54 ALR3d 897.

Modern status of admissibility, in statutory rape prosecution, of complainant's

prior sexual acts or general reputation for unchastity, 90 ALR3d 1300.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 ALR3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 ALR3d 1181.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences, 1 ALR4th 283.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 ALR4th 120.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 ALR4th 310.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 ALR4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 ALR4th 469.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense, 81 ALR4th 1076.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 ALR4th 685.

24-4-413. Evidence of similar transaction crimes in sexual assault cases.

(a) In a criminal proceeding in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense of sexual assault shall be admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a proceeding in which the prosecution intends to offer evidence under this Code section, the prosecutor shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

(d) As used in this Code section, the term "offense of sexual assault" means any conduct or attempt or conspiracy to engage in:

(1) Conduct that would be a violation of Code Section 16-6-1, 16-6-2, 16-6-3, 16-6-5.1, 16-6-22, 16-6-22.1, or 16-6-22.2;

(2) Any crime that involves contact, without consent, between any part of the accused's body or an object and the genitals or anus of another person;

(3) Any crime that involves contact, without consent, between the genitals or anus of the accused and any part of another person's body; or

(4) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person. (Code 1981, § 24-4-413, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Affirmative defense to certain sexual crimes, § 16-3-6. Rape generally, § 16-6-1. Similar crimes in sexual-assault cases, Fed. R. Evid. 413. Notice of prosecution's intent to present evidence of similar transactions, Ga. Sup. Ct. R. 31.3.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-202 and former O.C.G.A. § 24-2-2 are included in the annotations for this Code section.

Exceptions to the general rule have been liberally extended in cases of sexual crimes. Perry v. State, 158 Ga. App. 349, 280 S.E.2d 390 (1981) (decided under former Code 1933, § 38-202); Neal v. State, 159 Ga. App. 450, 283 S.E.2d 671 (1981) (decided under former Code 1933, § 38-202).

Proof of crimes involving moral turpitude is admissible to impeach a witness who places the witness's character in issue through testimony given by the witness on direct examination. Emmett v. State, 199 Ga. App. 650, 405 S.E.2d 707, cert. denied, 199 Ga. App. 905, 405 S.E.2d 707 (1991) (decided under former O.C.G.A. § 24-2-2).

Two conditions imposed on admission of evidence of independent crimes. — Two conditions precedent to the admission of evidence relating to defendant's prior act of exposing oneself are met when first, the witness positively identified defendant as the perpetrator of the crime; second, there was sufficient similarity between the former incident and the latter incident that proof of the former tends to prove the latter. Huckeba v. State, 157 Ga. App. 795, 278 S.E.2d 703 (1981) (decided under former Code 1933, § 38-202).

Three affirmative showings required for admission of similar offenses. — In crimes involving sexual offenses, evidence of similar previous transactions is admissible to show the lustful disposition of the defendant and to corroborate the victim's testimony, but the state must still make three affirmative showings: a proper purpose for the use of the evidence; sufficient proof that the defendant did, in fact, commit the independent act; and sufficient similarity or connection between the two incidents so that proof of the former tends to prove the latter. Hostetler v. State, 261 Ga. App. 237, 582 S.E.2d 197 (2003) (decided under former O.C.G.A. § 24-2-2).

Similar acts or omissions on other and different occasions. — Trial court erred in admitting defendant's statement to an investigating officer that defendant had not been alone with the eight-year-old molestation victim in the room where the victim alleged the molestation occurred since defendant had learned defendant's lesson when the defendant lost the defendant's spouse after the defendant ran off with a 15-year-old girl from defendant's church and got her pregnant since the statement was an improper reference to defendant's character; however, admission of the statement was not reversible error since it was highly-probable that defendant would have been convicted even absent the statement being admitted given the direct and circumstantial evidence against the defendant. Lowther v. State, 263 Ga. App. 282, 587 S.E.2d 335 (2003) (decided under former O.C.G.A. § 24-2-2).

Admission of similar transaction proper. — In a prosecution for the crimes of kidnapping, aggravated sexual battery, sexual battery, and attempted rape, admission of similar transaction evidence was upheld as: (1) the defendant had sufficient notice of the state's intent to

present that evidence; (2) the prior bad acts were sufficiently similar to the charged acts; (3) such was properly admitted for the purposes of showing identity, intent, bent of mind, and course of conduct; (4) both prior victims positively identified the defendant as their assailant; and (5) the evidence showed that the defendant had a modus operandi of luring young women who were strangers to him into his car, driving to isolated areas, making them expose their breasts and genital areas, masturbating, intimidating them with talk of even more violent sexual assault or death, and then returning them to the area of the first encounter. Watley v. State, 281 Ga. App. 244, 635 S.E.2d 857 (2006) (decided under former O.C.G.A. § 24-2-2).

State of feeling between defendant and victim. — Trial court did not err in admitting evidence of a previous difficulty between a defendant and victim which illustrated the state of feeling between them. Wright v. State, 113 Ga. App. 436, 148 S.E.2d 333 (1966) (decided under former Code 1933, § 38-202); Jones v. State, 246 Ga. 109, 269 S.E.2d 6 (1980) (decided under former Code 1933, § 38-202).

Trial court properly admitted similar transaction evidence to show a defendant's course of conduct and intent in the defendant's trial for public indecency and sexual battery as in each of the similar transactions, defendant approached a woman previously unknown to the defendant in a public place, attempted to talk to the woman, and then engaged in sexually inappropriate behavior; in the sexual battery incidents and one similar transaction, the defendant either bit or licked the victims on their buttocks while the victims were shopping and in the public indecency incident and two of the similar transactions, the defendant exposed self. Harmon v. State, 281 Ga. App. 35, 635 S.E.2d 348 (2006), cert. dismissed, 2007 Ga. LEXIS 137 (Ga. 2007) (decided under former O.C.G.A. § 24-2-2).

During the defendant's trial for rape, the trial court did not err by permitting the state to present evidence of a prior similar transaction because the prior transaction evidence was proper and not foreclosed by collateral estoppel since identity and commission of the act were not at issue in the first trial; identity was not an issue in the prior case because the defendant claimed that consensual sex, and in the case before the trial court, identity was one of the purposes for which the state sought to have the similar transaction evidence admitted since the defendant claimed that he did not know the victim and had not raped her. Bell v. State, 311 Ga. App. 289, 715 S.E.2d 684 (2011) (decided under former O.C.G.A. § 24-2-2).

Conviction of sex offense admissible in failure to register as offender trial. — Trial court did not err in admitting into evidence a no contest plea and in "making reference" to the plea with regard to the similar transaction evidence because the defendant's failure to object to the introduction of the evidence precluded review of the issue on appeal; further, the plea was admissible to show a conviction for purposes of the defendant's alleged failure to register as a sex offender under O.C.G.A. § 42-1-12 and the jury was permitted to consider the plea as similar transaction evidence. Bryson v. State, 282 Ga. App. 36, 638 S.E.2d 181 (2006) (decided under former O.C.G.A. § 24-2-2).

Admission of prior conviction for indecent exposure. — In a sexual battery case, it was proper to admit similar transaction evidence of a prior conviction for indecent exposure. Although the present incident involved the defendant groping the victim's breast, during both incidents, the defendant commented on the victim's appearance, asked the victim to look at the defendant, and began masturbating in the victim's presence; the proof of the prior incident tended to establish the charged offense and was also relevant to rebut the defendant's claim that it was the victim who had exposed the victim's breasts to the defendant by showing the defendant's course of conduct, bent of mind, and scheme. Romo v. State, 288 Ga. App. 237, 653 S.E.2d 832 (2007) (decided under former O.C.G.A. § 24-2-2).

Eleven-year lapse does not render prior similar offense inadmissible. — Eleven-year lapse of time between defendant's similar prior sex offense and the one on trial did not itself render evidence of the prior offense inadmissible. It was

one of the more important factors in considering admissibility; once it crossed that threshold, it thereafter affected the weight and credibility of the testimony. Hill v. State, 183 Ga. App. 404, 359 S.E.2d 190 (1987) (decided under former O.C.G.A. § 24-2-2).

Testimony from other rape victims. — In a rape prosecution, similar transaction testimony from the defendant's prior rape victims was properly admitted, as the testimony was probative of the defendant's course of conduct, intent, modus operandi, and lustful disposition, and corroborated the victim's testimony that the defendant claimed to have previously raped persons that "nobody would believe." Sanders v. State, 297 Ga. App. 897, 678 S.E.2d 579 (2009) (decided under former O.C.G.A. § 24-2-2).

Evidence of prior rape admissible. — Trial court acted within the court's discretion in admitting evidence of a prior rape because the state did not seek to introduce evidence of the prior rape to raise an improper inference concerning the defendant's character but rather to show the defendant's intent, bent of mind, and course of conduct, all of which were proper purposes; the prior and present rapes also were sufficiently similar because in both rapes, the defendant sexually attacked a young Spanish-speaking woman after the defendant had been drinking alcohol, the defendant threatened both victims, and the two attacks occurred only a few months apart. Alvarez v. State, 309 Ga. App. 462, 710 S.E.2d 583 (2011) (decided under former O.C.G.A. § 24-2-2).

Admission of irrelevant evidence of affair did not require mistrial. — During a trial for felony murder while in the commission of cruelty to a child, evidence that a defendant's romantic partner did not know that the defendant was married was irrelevant; although the defendant's objection to the admission of the evidence was improperly overruled, the defendant's motion for a mistrial was properly denied because a mistrial was not mandated. Scott v. State, 281 Ga. 373, 637 S.E.2d 652 (2006) (decided under former O.C.G.A. § 24-2-2).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — Trial court did not err in admitting similar transaction testimony concerning defendant's use of keys to gain entry into the apartments of women, ostensibly for maintenance purposes, as the trial court's finding that the evidence was admissible to establish motive, intent, and course of conduct was not clearly erroneous. Oliver v. State, 276 Ga. 665, 581 S.E.2d 538 (2003) (decided under former O.C.G.A. § 24-2-2).

Admission of evidence of a prior attempted rape of a neighbor in defendant's rape trial involving a different victim was not an abuse of discretion since the evidence was admitted to show defendant's lustful disposition, to evince defendant's propensity to sexually assault women defendant knew, and to corroborate the victim's testimony of no consent; a finding that the probative value of the evidence outweighed the prejudicial effect of the evidence was implicit in the trial court's decision to admit the evidence. Rowe v. State, 263 Ga. App. 367, 587 S.E.2d 781 (2003) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion in finding an earlier transaction sufficiently similar to the one for which a defendant was on trial and in admitting the evidence as to the prior transaction to show course of conduct, intent, and modus operandi, as, while some aspects of the earlier crime differed from the one for which the defendant was on trial: (1) the victims in both instances were young women who were strangers to the defendant; (2) both incidents occurred at night, at or near a bar; (3) the defendant approached the women from behind, brandished a weapon, threatened to kill the victims, and caused the victims physical harm; (4) both times the defendant was dressed in camouflage pants and a dark shirt; and (5) while the prior incident occurred more than 15 years earlier, the defendant had been out of jail for just over a year after serving the defendant's sentence for the similar transaction and, thus, the lapse of time was not a significant factor. Ellis v. State, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, No. S07C0324, 2007 Ga. LEXIS 66 (2007) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence admissible. — Similar transaction evidence of crimes against a rape victim was properly admitted for identification purposes in the defendant's trial for assault because the witness testimony, DNA evidence, and the discovery of the rape victim's possessions in the defendant's car tied the defendant to the sexual assaults and because the assailant in both cases hid the assailant's face with a dark-colored raincoat and used the same gun. Lampkin v. State, 277 Ga. App. 237, 626 S.E.2d 199 (2006) (decided under former O.C.G.A. § 24-2-2).

Trial court did not err in admitting similar transaction evidence to show a modus operandi as a modus operandi was similar to "course of conduct" and the state sought to admit the similar transaction for the purpose of showing course of conduct, intent, motive, and bent of mind; while the earlier crime included a sexual assault and the crimes for which the defendant was being tried did not, the addition of a sexual component to the earlier crime did not subtract from the notable similarities. The trial court's statement that "the only reason that there (was) not a sexual content to this crime (was), well, we don't know what would have happened, and certainly the event was abruptly halted, so the ruling (stood)" was made out of the presence of the jury and could not have affected the verdict. Ellis v. State, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, No. S07C0324, 2007 Ga. LEXIS 66 (2007) (decided under former O.C.G.A. § 24-2-2).

Differences between the state's proffer of similar transaction evidence and a witness's testimony at trial were insignificant and affected neither the admissibility of the similar transaction evidence, nor the outcome of the trial, in that: (1) the state proffered that the victims were walking behind a bar, but the witness testified that the victims had passed a bar and were near a restaurant; (2) the state proffered that the defendant showed the victims a gun, but the witness testified that the witness saw the gun but not that the defendant showed the gun to the witness; and (3) the state proffered that the defendant forced both victims to remove all of their clothes, but the witness testified that the witness had to remove some of the witness's clothes. Ellis v. State, 282 Ga. App. 17, 637 S.E.2d 729 (2006), cert. denied, No. S07C0324, 2007 Ga. LEXIS 66 (2007) (decided under former O.C.G.A. § 24-2-2).

Prior attempts by accused concerning same victim. — Testimony concerning a prior effort by an accused to commit the same crime upon the victim for which the accused is now charged is a long recognized exception to the general rule that evidence of prior crimes is inadmissible. Baker v. State, 245 Ga. 657, 266 S.E.2d 477 (1980) (decided under former Code 1933, § 38-202); Haygood v. State, 154 Ga. App. 633, 269 S.E.2d 480 (1980) (decided under former Code 1933, § 38-202).

Admission of prior child molestation plea proper. — In a trial for rape, aggravated sodomy, and aggravated assault with attempt to commit rape, the trial court properly admitted as similar transaction evidence the defendant's prior guilty plea to a charge of child molestation; as both crimes involved forcing sexual acts upon teenage girls, a certified copy of the prior conviction sufficed to show similarity. Washington v. State, 286 Ga. App. 268, 648 S.E.2d 761 (2007) (decided under former O.C.G.A. § 24-2-2).

Character evidence was admissible in the following case. — Dalton v. Jackson, 66 Ga. App. 625, 18 S.E.2d 791 (1942) (character in civil action for rape) (decided under former Code 1933, § 38-202).

Evidence of other conduct or crimes was admissible in the following cases. — See McMichen v. State, 62 Ga. App. 50, 7 S.E.2d 749 (1940) (sexual offenses) (decided under former Code 1933, § 38-202); Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955) (rape) (decided under former Code 1933, § 38-202). Warren v. State, 95 Ga. App. 79, 97 S.E.2d 194 (1957) (prior rape of same victim in assault with intent to rape case) (decided under former Code 1933, § 38-202); Echols v. State, 149 Ga. App. 620, 255 S.E.2d 92 (1979) (sexual offenses) (decided under former Code 1933,

§ 38-202); Allen v. State, 152 Ga. App. 481, 263 S.E.2d 259 (1979) (prior rape of victim by same defendant in rape case) (decided under former Code 1933, § 38-202).

Evidence of other conduct or crimes was inadmissible in the following case. — See Scott v. State, 46 Ga. App. 213, 167 S.E. 210 (1932) (rape) (decided under former Penal Code 1910, § 1019).

RESEARCH REFERENCES

ALR. — Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense, 88 ALR3d 8.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than the accused, 97 ALR3d 967.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix, 2 ALR4th 330.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 ALR4th 120.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 ALR4th 469.

24-4-414. Evidence of similar transaction crimes in child molestation cases.

(a) In a criminal proceeding in which the accused is accused of an offense of child molestation, evidence of the accused's commission of another offense of child molestation shall be admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a proceeding in which the state intends to offer evidence under this Code section, the prosecuting attorney shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that the prosecuting attorney expects to offer, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described under this Code section.

(d) As used in this Code section, the term "offense of child molestation" means any conduct or attempt or conspiracy to engage in:

(1) Conduct that would be a violation of Code Section 16-6-4, 16-6-5, 16-12-100, 16-12-100.2, or 16-12-100.3;

(2) Any crime that involves contact between any part of the accused's body or an object and the genitals or anus of a child;

(3) Any crime that involves contact between the genitals or anus of the accused and any part of the body of a child; or

(4) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child. (Code 1981, § 24-4-414, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Similar crimes in child-molestation cases, Fed. R. Evid. 414. Notice of prosecution's intent to present evidence of similar transactions, Ga. Sup. Ct. R. 31.3.

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-202 and former O.C.G.A. § 24-2-2 are included in the annotations for this Code section.

Purpose of admission of similar sexual offenses. — Evidence of similar or connected sexual offenses against children is admissible in child molestation cases to corroborate the testimony of the victim as well as to show the lustful disposition of the defendant. Sullivan v. State, 162 Ga. App. 297, 291 S.E.2d 127 (1982) (decided under former O.C.G.A. § 24-2-2).

Absolutely identical mode of operation required. — Since three prior incidents and the current child molestation charges against defendant all involved defendant going to locations frequented by children and exposing defendant's genitals to the children, the prior incidents were sufficiently similar to be admitted as similar transaction evidence in defendant's trial for child molestation; the fact that the prior incidents, unlike the current ones, did not involve touching the child victims did not mean that the prior incidents were not sufficiently similar to the current ones to be admitted, as there was no requirement that the prior crime or transaction had to be absolutely identical in every respect, and, in any event, the sexual abuse of young children, regardless of the sex of the victims or the nomenclature or type of acts perpetrated upon the children, was of sufficient similarity to make the evidence admissible. Hostetler v. State, 261 Ga. App. 237, 582 S.E.2d 197 (2003) (decided under former O.C.G.A. § 24-2-2).

Agreement between parents and molester on reporting. — Despite the defendant's claim that the trial court erroneously admitted improper character evidence from the victims' parents when the parents both testified that the defendant agreed to obtain counseling in exchange for the parents' agreement not to report the incidents of molestation to law enforcement, the evidence was properly admitted as: (1) the defendant cited no case law supporting a finding that amounted to improper character evidence; and (2) the testimony was admissible to explain why the victims and their parents did not immediately report the matter to police. Head v. State, 285 Ga. App. 471, 646 S.E.2d 699 (2007) (decided under former O.C.G.A. § 24-2-2).

Defendant's good character not put in issue. — Child molestation defendant did not put the defendant's good character into issue so as to require a jury charge; the defendant's testimony regarding the defendant's attempts to help the victim was more reasonably construed as an explanation for the inordinate amount of time the defendant spent with the victim than as evidence of good character, and the defendant's testimony regarding the defendant's two part-time jobs only inadvertently placed the defendant's good

character into issue. Kurtz v. State, 287 Ga. App. 823, 652 S.E.2d 858 (2007), cert. denied, No. S08C0321, 2008 Ga. LEXIS 184 (Ga. 2008) (decided under former O.C.G.A. § 24-2-2).

Evidence of relative's "touching" did not put defendant's character in issue. — Although the state prematurely bolstered a child victim's testimony, the parties knew that the victim's credibility would be immediately undermined; evidence that defendant told the victim that a relative had been imprisoned for improper "touching" and that defendant masturbated with the victim's underwear were admissible as relevant. Robinson v. State, 275 Ga. App. 537, 621 S.E.2d 770 (2005) (decided under former O.C.G.A. § 24-2-2).

Defendant's character was not erroneously put into issue by the admission of testimony of defendant's niece as to an incident during which defendant, while in the water at the beach and attempting to teach the witness how to float on her stomach, touched the witness in the area of her vagina because the evidence was admissible to show lustful disposition and to corroborate the testimony of the victim as to the acts charged. Evans v. State, 180 Ga. App. 1, 348 S.E.2d 561 (1986) (decided under former O.C.G.A. § 24-2-2).

Specific acts to prove character. — In a prosecution for child molestation, the court properly refused to allow the defendant to present witness evidence of defendant's experience in caring for young girls since character witnesses for a defendant are not permitted to testify about specific instances of conduct by the defendant during direct examination. Shelnutt v. State, 234 Ga. App. 655, 506 S.E.2d 643 (1998) (decided under former O.C.G.A. § 24-2-2).

Jury charge on prior difficulties proper. — Evidence supported the trial court's charge on the law regarding prior difficulties between the defendant and the victim because the defendant was charged with child molestation for placing his penis on or about the victim's vagina with criminal attempt to commit rape, and with false imprisonment for illegally detaining the victim, but the victim also testified to various other instances of the defendant touching her breasts and vagina, all of which constituted evidence of prior difficulties; by giving the charge, the trial court was not commenting on the evidence. Rayner v. State, 307 Ga. App. 861, 706 S.E.2d 205 (2011) (decided under former O.C.G.A. § 24-2-2).

Conviction of sex offense admissible in failure to register as offender trial. — Defendant's motion to sever the failure to register as a sex offender counts under O.C.G.A. § 42-1-12 from the remaining aggravated sodomy and child molestation counts was properly denied as: (1) the defendant was not entitled to severance as a matter of right since the charges involved a series of acts which were connected together; (2) the case was not so complex as to impair the jury's ability to distinguish the evidence and to apply the law intelligently to the counts as joined; and (3) the failure to sever the failure to register as a sex offender counts was proper as the failure to report charges were legally material to the crimes against two children because the failure constituted evasive conduct that was circumstantial evidence of guilt and evidence of the conduct underlying the defendant's conviction of a sex offense that was admissible as a similar transaction. Bryson v. State, 282 Ga. App. 36, 638 S.E.2d 181 (2006) (decided under former O.C.G.A. § 24-2-2).

Prior difficulty with witness properly admitted. — In the defendant's criminal case, the trial court did not err in admitting into evidence pursuant to former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404, 24-4-405, 24-4-413, and 24-4-414) a prior difficulty the defendant previously had with one of the witnesses in the case; the evidence at issue was the defendant's performance of sexual acts on a juvenile victim prior to the acts that were alleged in the indictment, and this was relevant to show the defendant's motive, intent, and bent of mind in committing the acts against the victim for which the defendant was indicted. Clark v. State, 282 Ga. App. 248, 638 S.E.2d 397 (2006) (decided under former O.C.G.A. § 24-2-2).

Testimony from other rape victims. — When the defendant was accused of touching the "private part" of a 12-year-old girl, it was proper to admit

General Consideration (Cont'd)

evidence of a 22-year-old woman's rape. Both victims were females with whom the defendant had a previous good relationship and over whom he had authority, and both incidents occurred in the middle of the night when the victims were not fully alert or fully capable of resisting; a mere difference in the victims' ages would not render a prior transaction inadmissible. Walley v. State, 298 Ga. App. 483, 680 S.E.2d 550 (2009) (decided under former O.C.G.A. § 24-2-2).

Logical connection between crimes. — In a prosecution for child molestation, aggravated child molestation, and statutory rape allegedly committed by the defendant against three of the defendant's children, testimony from one of the defendant's other sons concerning similar transactions committed against that son was properly admitted in order to show the defendant's bent of mind and lustful disposition towards the defendant's own children. McCoy v. State, 278 Ga. App. 492, 629 S.E.2d 493 (2006) (decided under former O.C.G.A. § 24-2-2).

Similar transaction evidence admissible. — Similar transaction evidence of crimes against a rape victim was properly admitted for identification purposes in the defendant's trial for assault because the witness testimony, DNA evidence, and the discovery of the rape victim's possessions in the defendant's car tied the defendant to the sexual assaults and because the assailant in both cases hid the assailant's face with a dark-colored raincoat and used the same gun. Lampkin v. State, 277 Ga. App. 237, 626 S.E.2d 199 (2006) (decided under former O.C.G.A. § 24-2-2).

When the defendant was charged with malice murder, felony murder, and cruelty to children, it was proper to admit similar transaction evidence about the defendant's violent acts toward the defendant's elementary-school-aged siblings and about the defendant's wife-beating; the evidence at issue dealt with the defendant's violent behavior toward family members residing in the same home, even those significantly younger than the defendant. Collum v. State, 281 Ga. 719, 642 S.E.2d 640 (2007) (decided under former O.C.G.A. § 24-2-2).

When there was evidence that the defendant performed an oral act on the vagina of the ten-year-old victim while she was sleeping in a camper, it was proper to admit evidence of an incident 14 years before when the defendant had taken a four-year-old into a bedroom and performed a similar oral act on her vagina; the lapse of 14 years did not make the evidence inadmissible, and the incidents were sufficiently similar. Boileau v. State, 285 Ga. App. 221, 645 S.E.2d 577 (2007) (decided under former O.C.G.A. § 24-2-2).

In a sexual battery case involving a 13-year-old victim, the trial court properly admitted evidence of a similar transaction regarding a 12-year-old girl. The trial court found that both incidents involved girls of a similar age who developed some sort of romantic relationship with the defendant and that the incidents occurred at the same residence and at about the same time. Engle v. State, 290 Ga. App. 396, 659 S.E.2d 795 (2008) (decided under former O.C.G.A. § 24-2-2).

In defendant's prosecution for, inter alia, aggravated child molestation, evidence that the defendant previously engaged in a similar pattern of grooming a nine-year-old victim by, inter alia, giving the victim expensive presents before eventually molesting the victim was properly admitted to show bent of mind, common scheme or plan, and modus operandi; any objection to that victim's recantation of the accusation at the time because of fear for the victim's mother only went to the weight and credibility of the victim's testimony rather than the testimony's admissibility. Cannon v. State, 296 Ga. App. 687, 675 S.E.2d 560 (2009) (decided under former O.C.G.A. § 24-2-2).

Testimony of victim's sibling about unprosecuted offense in child molestation case permitted. — Trial court did not err in allowing similar acts testimony by the victim's half-sister in an aggravated sexual battery and child molestation trial. Although the half-sister did not allege penetration by the defendant, she explained that she awoke after he pulled at her shorts, and she described how the defendant fled across the room in much the same way that the victim testified that the defendant fled from her room when

she stirred; furthermore, the fact that the half-sister did not speak out about the abuse prior to the victim's outcry did not warrant a determination that the trial court abused the court's discretion by allowing the half-sister's testimony. Hilliard v. State, 298 Ga. App. 473, 680 S.E.2d 541 (2009) (decided under former O.C.G.A. § 24-2-2).

"Williams" requirement satisfied. — Evidence of a prior sexual assault was properly admitted in defendant's child molestation trial as similar transaction evidence even though the trial court failed to make a determination as to the proper purposes for which the evidence was offered or as to defendant's identity as perpetrator of the independent act; the error was harmless as the evidence was sufficient for the trial court to have concluded that the Williams (Williams v. State, 261 Ga. 640, 409 S.E.2d 649 (1991) requirements were satisfied. Howse v. State, 273 Ga. App. 252, 614 S.E.2d 869 (2005) (decided under former O.C.G.A. § 24-2-2).

Parents knowing each other did not impact admissibility. — Similar transaction evidence was properly admitted in a prosecution for enticing a minor for indecent purposes and statutory rape because, in each case, the defendant obtained permission from the mothers of girls he knew well to take the girls for a specific purpose, diverted to an apartment, carried the girls to his bedroom, partially disrobed them, attempted to or did perform various sex acts, gave them a food treat, then returned them to their mothers with a fictitious explanation; the similar transaction evidence was not tainted, even though the victims' mothers knew one another. Jackson v. State, 274 Ga. App. 26, 619 S.E.2d 294 (2005) (decided under former O.C.G.A. § 24-2-2).

Defendant's sexual acts at age 12 not admitted. — During a defendant's trial for aggravated child molestation and related charges, evidence of the defendant's sexual misconduct against two younger children at the age of 12 was improperly admitted and was more prejudicial than probative because: (1) there was no logical connection between the charged offenses and the prior misconduct as no pattern of continuous conduct or periods of incarceration between the incidents were shown; (2) the defendant was a child when the previous events occurred and an adult at the time of the charged events; and (3) no sexual misconduct was alleged to have occurred in the intervening years. Maynard v. State, 282 Ga. App. 598, 639 S.E.2d 389 (2006) (decided under former O.C.G.A. § 24-2-2).

Evidence admitted to show bent of mind and course of conduct. — In a prosecution for aggravated sexual battery and aggravated child molestation involving a 12-year-old child, evidence that the defendant had sexual intercourse with a 15-year-old child shortly before committing the charged crimes was properly admitted as the evidence was relevant to show bent of mind, course of conduct, and to corroborate the victim's testimony; the prejudicial effect of the evidence did not outweigh the probative value. Martin v. State, 294 Ga. App. 117, 668 S.E.2d 549 (2008) (decided under former O.C.G.A. § 24-2-2).

Sex crimes against children require unique bent of mind. — Three prior acts of child molestation were admissible in defendant's trial for child molestation and sexual battery of an 11-year-old female victim, although one victim was a male, one was four years younger, and the acts committed were different. The sexual abuse of young children, regardless of the sex of the victims or the nomenclature or type of acts or other conduct perpetrated upon the children, was of sufficient similarity to make the evidence admissible because sex crimes against children require a unique bent of mind. Gunn v. State, 300 Ga. App. 229, 684 S.E.2d 380 (2009) (decided under former O.C.G.A. § 24-2-2).

Evidence of similar sexual offenses against young adult in child molestation trial. — Evidence of a prior sexual assault was sufficiently similar for purposes of the admission of similar transaction evidence in defendant's child molestation trial, despite a difference in the victim's ages, because in the prior assault the victim was 23 years old and in the charged assault the victim was 14 years old as there was sufficient similarity between the two acts; in both cases: (1) the

General Consideration (Cont'd)

events occurred in defendant's trailer home; (2) defendant initiated unwanted sexual attacks; (3) defendant put defendant's hands down the panties of the victim; (4) defendant masturbated and ejaculated on the victims; and (5) defendant unsuccessfully attempted penetration. Howse v. State, 273 Ga. App. 252, 614 S.E.2d 869 (2005) (decided under former O.C.G.A. § 24-2-2).

Internet chat room transcript admissable. — Transcript of an Internet chat room conversation between defendant and a police officer, posing as a 14-year-old girl, was properly admitted as similar transaction evidence in defendant's trial for pimping, contributing to the delinquency of a minor, and sexual exploitation of a minor; the officer was present to testify, personally witnessed the real-time chat recorded in the transcript as it was taking place, and testified that the transcript accurately represented the on-line conversation; the officer's testimony was tantamount to that of a witness to an event and was sufficient to authenticate the transcript. Ford v. State, 274 Ga. App. 695, 617 S.E.2d 262 (2005) (decided under former O.C.G.A. § 24-2-2).

Admission of similar transaction evidence against adult in child molestation case. — Trial court did not abuse the court's discretion in admitting the defendant's prior sexual battery conviction during the defendant's trial for child molestation, O.C.G.A. § 16-6-4(a), and aggravated child molestation, § 16-6-4(c), because the prior sexual battery and the molestation of the victim were similar; the defendant pled guilty to the sexual battery, establishing that the defendant had committed the separate offense, and both the prior sexual battery and the molestation involved the defendant's acts of touching the female victims' breasts and occurred within a three-month time frame. Stepho v. State, 312 Ga. App. 495, 718 S.E.2d 852 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of victim's nonchastity excluded. — When the trial court refused to allow evidence as to whether defendant consented to intercourse with the victim in the sexual molestation case under O.C.G.A. § 16-6-4(a) and evidence that the defendant bragged about it to others after the fact, the trial court did not err; evidence as to the victim's nonchastity was inadmissible as irrelevant under former O.C.G.A. § 24-2-2 (see now O.C.G.A. §§ 24-4-404 and 24-4-405) as was evidence of the victim's preoccupation with sex. Slack v. State, 265 Ga. App. 306, 593 S.E.2d 664 (2004) (decided under former O.C.G.A. § 24-2-2).

Evidence of other conduct or crimes was inadmissible in the following case. — See Spinks v. State, 92 Ga. App. 878, 90 S.E.2d 590 (1955) (sodomy in child molesting case) (decided under former Code 1933, § 38-202).

Halloween mask admitted as going to state of mind. — Halloween mask was properly admitted in a trial for child molestation, aggravated child molestation, and aggravated sexual battery because the mask was relevant to the victim's state of mind as the victim testified that the defendant wore a Halloween mask on the night of the incident. Ward v. State, 274 Ga. App. 511, 618 S.E.2d 154 (2005) (decided under former O.C.G.A. § 24-2-1).

Differences in victim's ages. — During the defendant's trial for child molestation and statutory rape, the trial court did not err in admitting similar transaction testimony regarding the defendant's unwanted sexual advances toward his girlfriend's younger sister because the difference in the victims' ages did not make the similar transaction inadmissible; it is the totality of the similar facts surrounding the crimes that are properly considered in a similar transaction analysis. Gresham v. State, 303 Ga. App. 682, 695 S.E.2d 73 (2010) (decided under former O.C.G.A. § 24-2-2).

Failure of counsel to object to similar transaction evidence. — In a child molestation prosecution, since evidence of the defendant's uncharged molestation of the victim was admissible without notice or a hearing, defense counsel was not ineffective for not objecting to such evidence. Stillwell v. State, 294 Ga. App. 805, 670 S.E.2d 452 (2008), cert. denied, No. S09C0493, 2009 Ga. LEXIS 222 (Ga. 2009) (decided under former O.C.G.A. § 24-2-2).

Other Crimes

Evidence of similar prior offense held admissible. — Defendant was charged with raping a mentally retarded 27-year-old. Evidence that two years earlier the defendant was convicted of taking indecent liberties with an eight- and an 11-year-old child was properly admitted as the evidence was probative to show the defendant's lustful disposition toward persons of limited mental capacity, and the evidence's relevance outweighed any prejudice. Kent v. State, 294 Ga. App. 134, 668 S.E.2d 442 (2008) (decided under former O.C.G.A. § 24-2-2).

Nolo contendere plea impacting admissibility. — Evidence of defendant's prior sexual battery of a juvenile was properly admitted in defendant's trial for child molestation and attempted child molestation of a nine-year-old girl to show defendant's lustful disposition toward molesting young girls because several years earlier defendant had pled nolo contendere to charges arising out of defendant touching the breast of a 16-year-old girl and placing her hand on his genitals. Cook v. State, 276 Ga. App. 803, 625 S.E.2d 83 (2005) (decided under former O.C.G.A. § 24-2-2).

Solicitation of sodomy conviction admitted. — Evidence of the defendant's prior conviction for solicitation of sodomy was properly admitted as a similar transaction in the defendant's trial for child molestation and sexual battery against a child since the victims of the current child molestation and the defendant's prior offense were both young girls whom the defendant knew, and in both instances, while the defendant was alone with the girls, the defendant placed the defendant's hands on their vaginal areas. Attaway v. State, 279 Ga. App. 781, 632 S.E.2d 397 (2006) (decided under former O.C.G.A. § 24-2-2).

Admission of prior aggravated molestation. — During the defendant's trial for aggravated child molestation and child molestation, the trial court did not abuse the court's discretion in admitting the similar transaction evidence regarding the defendant's prior aggravated molestation of another young boy because the evidence of the defendant's prior aggravated child molestation was appropriate for showing the defendant's lustful disposition toward molesting young boys; the state indicated that the state wished to introduce the similar transaction evidence for all appropriate purposes: identity, plan, motive, bent of mind, and course of conduct. Jackson v. State, 309 Ga. App. 450, 710 S.E.2d 649 (2011) (decided under former O.C.G.A. § 24-2-2).

Use of certified copies of prior convictions. — Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. Spradling v. State, 310 Ga. App. 337, 715 S.E.2d 672 (2011) (decided under former O.C.G.A. § 24-2-2).

Evidence of similar or connected sexual offenses against children. — Trial court properly admitted similar transaction evidence during the defendant's trial for aggravated child molestation, aggravated sexual battery, and child molestation because despite the defendant's age at the time, the evidence was relevant to show the defendant's lustful disposition with regard to younger females, the conduct with which the defendant was charged; the trial court properly considered the defendant's youth at the time of the similar transaction, along with the significant age difference between the defendant and the victim, the defendant's attempt to conceal the defendant's behavior by acting in secluded locations, and the nature of the acts the defendant committed before concluding that the evidence was admissible. Ledford v. State, 313 Ga. App. 389, 721 S.E.2d 585 (2011) (decided

Other Crimes (Cont'd)

under former O.C.G.A. § 24-2-2).

Use of defendant's juvenile record proper. — In choosing to have a witness testify as to a defendant's good character, the defendant opened the door for the state to introduce all evidence bearing on the defendant's character, including a juvenile adjudication; the defendant's claim that the trial court erred in permitting the prosecution to cross-examine the defendant's character witness regarding the defendant's prior juvenile adjudication for child molestation because a certified copy of the juvenile adjudication was not tendered was without merit. Redman v. State, 281 Ga. App. 605, 636 S.E.2d 680 (2006) (decided under former O.C.G.A. § 24-2-2).

Character not put in issue in child molestation cases. — When the minor victim testified that she had not initially told her mother about the defendant's sexual offenses because she feared that the defendant, who had been arrested for battery of the mother and who had hit the mother, would harm the victim and her mother, evidence that the defendant had hit the mother and that the defendant had been arrested for assault and battery of the mother did not improperly put the defendant's character into issue; it was properly admitted to explain the victim's delay in reporting the crime. Borders v. State, 285 Ga. App. 337, 646 S.E.2d 319 (2007), cert. denied, No. S07C1374, 2007 Ga. LEXIS 640 (Ga. 2007) (decided under former O.C.G.A. § 24-2-2).

Evidence of domestic violence. — Admission of testimony from the mother of a child molestation victim describing a defendant's incidents of violence toward her was not erroneous admission of character evidence because it explained the mother's three-month delay in reporting the incident. Hernandez v. State, 304 Ga. App. 435, 696 S.E.2d 155 (2010) (decided under former O.C.G.A. § 24-2-2).

Admission of drug crimes involving minors. — Trial court did not abuse the court's discretion in admitting evidence in defendant's trial for child molestation, attempted child molestation, enticing a child for indecent purposes, and statutory rape that defendant pleaded guilty to possession of marijuana and multiple counts of contributing to the delinquency of a minor after defendant was discovered smoking marijuana with a 13-year-old girl. Weathersby v. State, 262 Ga. 126, 414 S.E.2d 200 (1992) (child abuse and child molestation) (decided under former O.C.G.A. § 24-2-2); Leaptrot v. State, 272 Ga. App. 587, 612 S.E.2d 887 (2005) (decided under former O.C.G.A. § 24-2-2).

Time Lapse

Eleven-year lapse does not render prior similar offense inadmissible. — Trial court did not abuse the court's discretion in admitting defendant's conviction for criminal attempt, second-degree sexual assault, in which the victim was over 25 years old, but was developmentally disabled and mildly retarded; this evidence was admissible in defendant's trial for child molestation, attempted child molestation, enticing a child for indecent purposes, and statutory rape to show course of conduct, bent of mind, lustful disposition, and modus operandi and as tending to corroborate the child victims' testimony; the conviction, which occurred almost 11 years earlier, was not too remote to be admissible. Leaptrot v. State, 272 Ga. App. 587, 612 S.E.2d 887 (2005) (decided under former O.C.G.A. § 24-2-2).

Time lapse between offenses goes to credibility. — Evidence that defendant had perpetrated similar sexual offenses against children of the same age and gender using a similar method of operation was properly admitted because the requisite similarity between the independent offenses and the crimes charged was clearly established; a time lapse of about eight years went to the weight and credibility of the evidence. Hogan v. State, 272 Ga. App. 19, 611 S.E.2d 689 (2005) (decided under former O.C.G.A. § 24-2-2).

In a child molestation case involving relations of the defendant, the trial court did not err in introducing evidence of similar transactions involving other child relations that happened 16 to 29 years before the trial on the present charges; the lapse of time between these offenses went to the weight and credibility of the testi-

mony, not to the admissibility of the offenses. Boynton v. State, 287 Ga. App. 778, 653 S.E.2d 110 (2007) (decided under former O.C.G.A. § 24-2-2).

Time lapse still showed bent of mind or lustful disposition. — Testimony that an older granddaughter was molested 25 years ago was not so remote as to be inadmissible in the defendant's trial for the child molestation of a 15-year-old granddaughter; similar transaction evidence, including the older granddaughter's testimony and evidence involving the molestation of the defendant's five-year-old great-granddaughter, was admissible to show the defendant's bent of mind or lustful disposition. Delk v. State, 274 Ga. App. 261, 619 S.E.2d 310 (2005) (decided under former O.C.G.A. § 24-2-2).

24-4-415. Evidence of similar acts in civil or administrative proceedings concerning sexual assault or child molestation.

(a) In a civil or administrative proceeding in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or an offense of child molestation, evidence of that party's commission of another offense of sexual assault or another offense of child molestation shall be admissible and may be considered as provided in Code Sections 24-4-413 and 24-4-414.

(b) A party who intends to offer evidence under this Code section shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

(d) As used in this Code section, the term:

(1) "Offense of child molestation" means any conduct or attempt or conspiracy to engage in:

(A) Conduct that would be a violation of Code Section 16-6-4, 16-6-5, 16-12-100, 16-12-100.2, or 16-12-100.3;

(B) Any crime that involves contact between any part of the accused's body or an object and the genitals or anus of a child;

(C) Any crime that involves contact between the genitals or anus of the accused and any part of the body of a child; or

(D) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child.

(2) "Offense of sexual assault" means any conduct or attempt or conspiracy to engage in:

(A) Conduct that would be a violation of Code Section 16-6-1, 16-6-2, 16-6-3, 16-6-5.1, 16-6-22, 16-6-22.1, or 16-6-22.2;

(B) Any crime that involves contact, without consent, between any part of the accused's body or an object and the genitals or anus of another person;

(C) Any crime that involves contact, without consent, between the genitals or anus of the accused and any part of another person's body; or

(D) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person. (Code 1981, § 24-4-415, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Evidence of similar acts in civil cases concerning sexual assault or child molestation, Fed. R. Evid. 415.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-202, and former O.C.G.A. § 24-2-2 are included in the annotations for this Code section.

Evidence of similar acts in negligence cases. — Allegation that the defendant in a personal injury suit was aware that other persons had slipped and fallen under substantially the same circumstances was not subject to special demurrer as immaterial and irrelevant matter. Belk-Matthews Co. of Macon v. Thompson, 94 Ga. App. 331, 94 S.E.2d 516 (1956) (decided under former Code 1933, § 38-202).

Evidence of prior consensual adulterous relationship not admitted. — Evidence of a dentist's prior consensual adulterous relationship was properly excluded from the evidence as the evidence was irrelevant to a former employee's claim against the dentist for assault and battery and would only have served to impugn the general character of the dentist. Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285 (2008) (decided under former O.C.G.A. § 24-2-2).

24-4-416. Statements of sympathy in medical malpractice cases.

(a) As used in this Code section, the term "health care provider" means any person licensed under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43 or any hospital, nursing home, home health agency, institution, or medical facility licensed or defined under Chapter 7 of Title 31. The term shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity composed of such health care providers.

(b) In any claim or civil proceeding brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities, or conduct expressing regret, apology, sympathy, commiseration, condo-

lence, compassion, mistake, error, or a general sense of benevolence which is made by a health care provider or an employee or agent of a health care provider to the patient, a relative of the patient, or a representative of the patient and which relates to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest. (Code 1981, § 24-4-416, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 141, § 24/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, substituted "composed of" for "comprised of" in the last sentence of subsection (a).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-3-37.1 are included in the annotations for this Code section.

Application and illustrations. — Neither former O.C.G.A. § 24-3-37 (see now O.C.G.A. § 24-4-408) nor former O.C.G.A. § 24-3-37.1 prevented admitting a letter from the defendant medical device manufacturer because there was evidence plaintiff patient's surgeon requested that the manufacturer pay for third surgery to replace the device, and the letter in response confirmed the terms; further, there was evidence the offer was made to maintain the surgeon's goodwill due to the number of devices the surgeon implanted in patients on a yearly basis. Trickett v. Advanced Neuromodulation Sys., 542 F. Supp. 2d 1338 (S.D. Ga. 2008) (decided under former O.C.G.A. § 24-3-37.1).

Evidence properly excluded. — In a medical negligence action, the trial court properly excluded statements of regret made by the doctor sued pursuant to the plain meaning of former O.C.G.A. § 24-3-37.1(c), despite the suing patient's claim that such should have been admitted as statements against interest and under the res gestae exception to the hearsay rule; moreover, retroactive application was not improper as the Georgia General Assembly intended that the law be applied to cases pending at the time the law was passed. Airasian v. Shaak, 289 Ga. App. 540, 657 S.E.2d 600 (2008) (decided under former O.C.G.A. § 24-3-37.1).

RESEARCH REFERENCES

ALR. — Admissibility in action for malpractice, of evidence as to reputation of physician or surgeon for skill and care, 48 ALR 249.

24-4-417. Evidence of similar acts in prosecutions for violations of Code Section 40-6-391.

(a) In a criminal proceeding involving a prosecution for a violation of Code Section 40-6-391, evidence of the commission of another violation of Code Section 40-6-391 on a different occasion by the same accused shall be admissible when:

(1) The accused refused in the current case to take the state administered test required by Code Section 40-5-55 and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident;

(2) The accused refused in the current case to provide an adequate breath sample for the state administered test required by Code Section 40-5-55 and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident; or

(3) The identity of the driver is in dispute in the current case and such evidence is relevant to prove identity.

(b) In a criminal proceeding in which the state intends to offer evidence under this Code section, the prosecuting attorney shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that the prosecuting attorney expects to offer, at least ten days in advance of trial, unless the time is shortened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section. (Code 1981, § 24-4-417, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Character evidence, Fed. R. Evid. 404. Notice of prosecution's intent to present evidence of similar transactions, Ga. Sup. Ct. R. 31.3.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-2-2 are included in the annotations for this Code section.

Statements as to defendant's drinking habits. — Prosecution's characterization of defendant as an "experienced drinker" because defendant had testified that defendant was not rendered intoxicated by .21% blood alcohol did not place defendant's character in issue. Rielli v. State, 174 Ga. App. 220, 330 S.E.2d 104 (1985) (decided under former O.C.G.A. § 24-2-2).

Evidence of alcohol use. — In a prosecution for driving under the influence, failure to stop at a stop sign, violating the open container law, and improper lane usage, evidence that defendant previously drove while under the influence of alcohol and with an open container in the car was admissible as circumstantial evidence of defendant's bent of mind and course of conduct on the night in question. McCullough v. State, 230 Ga. App. 98, 495 S.E.2d 338 (1998) (decided under former O.C.G.A. § 24-2-2).

Trial court did not abuse the court's discretion by admitting evidence of a prior accident involving an incident of driving under the influence to show bent of mind and course of conduct; probative value of the prior incident was not outweighed by the prejudicial effect of the evidence. Harris v. State, 272 Ga. App. 366, 612 S.E.2d 557 (2005) (decided under former O.C.G.A. § 24-2-2).

Defendant's three prior driving under the influence (DUI) convictions were properly admitted in defendant's DUI trial as similar transaction evidence to show bent of mind and course of conduct as in each of the previous cases, defendant was arrested for DUI while driving late at night and consented to a breath test that showed that defendant was well over the legal limit; an almost 15-year lapse of time after one previous conviction went to the weight of the evidence. Moody v. State, 273 Ga. App. 670, 615 S.E.2d 803 (2005) (decided under former O.C.G.A. § 24-2-2).

Proof of other crime required. — In a prosecution for vehicular homicide and driving under the influence (DUI), the trial court properly allowed evidence re-

garding the defendant's prior DUI, as the defendant had pled guilty to that offense, the blood test results appeared on the uniform traffic citation, a certified copy of the accusation and plea was entered into evidence, and an officer testified that the defendant was the person arrested on that charge. Hurston v. State, 278 Ga. App. 472, 629 S.E.2d 18 (2006) (decided under former O.C.G.A. § 24-2-2).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct. — Trial court did not err in admitting similar transaction evidence regarding a previous incident when defendant, while intoxicated, drove through a chain link fence and overturned a car as the evidence was relevant to defendant's bent of mind to get behind the wheel of a vehicle when it was less safe for defendant to do so, especially since defendant claimed in the present case that defendant had not been driving when the van defendant was in struck a guardrail, and the evidence showed that defendant smelled of alcohol. Lanning v. State, 261 Ga. App. 480, 583 S.E.2d 160 (2003) (decided under former O.C.G.A. § 24-2-2).

CHAPTER 5

PRIVILEGES

Sec.
24-5-501. Certain communications privileged.
24-5-502. Communications to clergyman privileged.
24-5-503. Husband and wife as witnesses for and against each other in criminal proceedings.
24-5-504. Law enforcement officers testifying; home address.
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24-5-507. Grant of immunity; contempt.
24-5-508. Qualified privilege for news gathering or dissemination.
24-5-509. Communications between victim of family violence or sexual assault and agents providing services to such victim; termination of privilege.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 enactment of this chapter, see 28 Ga. St. U.L. Rev. 1 (2011).

24-5-501. Certain communications privileged.

(a) There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to, the following:

(1) Communications between husband and wife;

(2) Communications between attorney and client;

(3) Communications among grand jurors;

(4) Secrets of state;

(5) Communications between psychiatrist and patient;

(6) Communications between licensed psychologist and patient as provided in Code Section 43-39-16;

(7) Communications between a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor and patient;

(8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privileged by paragraph (5), (6), or (7) of this subsection; and

(9) Communications between accountant and client as provided by Code Section 43-3-32.

(b) As used in this Code section, the term:

(1) "Psychotherapy" means the employment of psychotherapeutic techniques.

(2) "Psychotherapeutic techniques" shall have the same meaning as provided in Code Section 43-10A-3. (Code 1981, § 24-5-501, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Duty of attorney to maintain confidence of clients, § 15-19-4. Protection of communications between victim assistance personnel and victims, § 17-17-9.1. Compelling of spouses to testify in proceedings relating to enforcement of duty of support, § 19-11-69. Privilege of testimony given before medical peer review organization, § 31-7-133. Treatment of clinical records, §§ 37-3-166, 37-4-125. Maintenance, confidentiality, and release of clinical records; disclosure of confidential or privileged patient information, § 37-7-166. Disciplining of official or employee of Department of Offender Rehabilitation for violating confidence of inmate supplying information regarding abuses and wrongdoing in the penal system, § 42-5-36. Confidentiality of communications between accountant and client, § 43-3-32. Confidentiality of communications between psychologist and client, § 43-39-16.

Law reviews. — For article on the expansion of the attorney-client privilege in Georgia, see 17 Ga. St. B.J. 150 (1981). For article, "Inadvertent Disclosure of Privileged Material," see 18 Ga. St. B.J. 166 (1982). For annual survey of legal ethics, see 38 Mercer L. Rev. 269 (1986). For article, "The Attorney-Client Privilege: The Common Law and Georgia's Uncommon Statutes," see 5 Ga. St. U.L. Rev. 27 (1988). For article, "The Defense Attorney's Ethical Response to Ineffective Assistance of Counsel Claims," see 5 Ga. St. B.J. 40 (1999). For article, "The Marital Privileges in Georgia: What You Should Know," see 6 Ga. St. B.J. 8 (2001). For article, "The Absolute Privilege Between Patient and Psychiatrist in Civil Cases," see 6 Ga. St. B.J. 14 (2001). For article, "Lawyers as 'Tattletales': A Challenge to the Broad Application of the Attorney-Client Privilege and Rule 1.6, Confidentiality of Information," see 20 Ga. St. U.L. Rev. 617 (2004).

For note discussing confidential communication privileges in Georgia, see 2 Ga. St. B.J. 356 (1966). For note discussing discovery proceedings available to creditors, see 12 Ga. L. Rev. 814 (1978). For note, "Conflicts of Interest in the Liability Insurance Setting," see 13 Ga. L. Rev. 973 (1979). For note, "Wills and the Attorney-Client Privilege," see 14 Ga. L. Rev. 325 (1980). For note on the Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege, see 24 Ga. L. Rev. 1115 (1990). For note, "Role of Jaffee v. Redmond's 'Course of Diagnosis or Treatment' Condition in Preventing Abuse of the Psychotherapist-Patient Privilege," see 35 Ga. L. Rev. 345 (2000). For note and comment, "Hope for the Best and Prepare for the Worst: The Capital Defender's Guide to Reciprocal Discovery in the Sentencing Phase of Georgia Death Penalty Trials," see 23 Ga. St. U.L. Rev. 995 (2007).

For comment, "The Government's Privilege to Withhold the Identity of Informers, as Applied to Decoys," see 20 Ga. B.J. 562 (1958). For comment criticizing exclusion from attorney-client privilege of fact and terms of employment in In re Wasserman, 198 F. Supp. 564 (D.D.C. 1961), see 13 Mercer L. Rev. 434 (1962). For comment on Massey v. State, 226 Ga. 703, 177 S.E.2d 79 (1970), cert. denied, 401 U.S. 964, 91 S. Ct. 984, 28 L. Ed. 2d 248 (1971), see 21 J. of Pub. L. 251 (1972). For comment, "Privileged Communications Between Psychiatrist and Patient in Georgia — Termination of the Privilege Upon Death of the Patient," see 9 Ga. St.

B.J. 550 (1973). For comment, "The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved," see 34 Emory L.J. 777 (1985).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3854, former Code 1882, § 3854, former Ga. L. 1887, p. 30, § 1, former Civil Code 1895, §§ 5198, 5271, former Penal Code 1895, § 1011, former Civil Code 1910, §§ 4544, 4554, 5785, 5786, 5860, 5877, former Penal Code 1910, § 1037, former Code 1933, §§ 38-418, 38-419, 38-1102, 38-1205, 38-1605, 38-1711, and former O.C.G.A. §§ 24-9-21, 24-9-24, 24-9-25, and 24-9-27 are included in the annotations for this Code section.

Purpose of privilege. — Attorney-client privilege is for the protection and benefit of the client, not of the attorney, so that the client's disclosures may not be used against the client in controversies with third persons, and it is designed to secure the client's confidence in the secrecy of the client's communication, and to promote greater freedom of consultation between clients and their legal advisers, and its object is to secure freedom in communication between an attorney and the client in order that the attorney may act with full understanding of the matters in which the attorney is employed. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981) (decided under former Code 1933, § 38-419).

Privilege is absolute, and if a matter is privileged it is not discoverable. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-418).

Protected communications. — Georgia law has an exceedingly strict view as to what are privileged communications; not only "communications" but "admissions" are privileged; what is protected is not merely words, but "disclosures made in confidence." Mrozinski v. Pogue, 205 Ga. App. 731, 423 S.E.2d 405, cert. denied, 205 Ga. App. 901, 423 S.E.2d 405 (1992) (decided under former O.C.G.A. § 24-9-21).

Who may invoke privilege. — Court

did not err in allowing the impeachment of a witness through the testimony of the witness's attorney, nor was defense counsel ineffective in failing to challenge the state's calling the attorney to testify; the rules of former O.C.G.A. § 24-9-24 may not be invoked by strangers to the attorney-client relationship. Womack v. State, 260 Ga. 305, 393 S.E.2d 232 (1990) (decided under former O.C.G.A. § 24-9-24).

Rule that communications between an attorney and a client are privileged, and that the attorney is an incompetent witness to testify thereto, cannot be invoked for the benefit of other persons who are strangers to such relationship. Findley v. Davis, 202 Ga. App. 332, 414 S.E.2d 317 (1991) (decided under former O.C.G.A. § 24-9-24).

Privileged communications admissible for limited purpose. — Scope of exclusion of former Code 1933, § 38-413 was the content of the communications, whereas documents sought to be admitted for the limited purpose of comparison of the handwritings were admissible as evidence, as was authorized by former Code 1933, §§ 38-708 and 38-709. Guy v. State, 138 Ga. App. 11, 225 S.E.2d 492 (1976) (decided under former Code 1933, § 38-418).

Separating privileged from nonprivileged information. — When any document sought to be produced contains a mixture of privileged and nonprivileged communication or information, ample remedy is provided to delete privileged matter, and this also would be within the inherent power of the court. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844 (1969) (decided under former Code 1933, § 38-418).

Former statute did not simply proscribe the channel through which the evidence reached the jury, but made the evidence itself inadmissible. Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731 (1976) (decided under former Code 1933, § 38-418).

Waiver of privilege. — Confidential communication, whether orally made or by letter, is privileged, but such privilege may be waived. McCord v. McCord, 140 Ga. 170, 78 S.E. 833 (1913) (decided under former Civil Code 1910, § 5785).

No distinction between advice on specific cases and day-to-day business. — Attorney-client privilege statutes make no distinction between legal advice given to a corporate client in regard to specific cases pending and legal advice concerning day-to-day business matters. Southern Guar. Ins. Co. v. Ash, 192 Ga. App. 24, 383 S.E.2d 579 (1989) (decided under former O.C.G.A. § 24-9-27).

Disclosure by newspaper reporter. — Newspaper reporter cannot claim an exemption from answering material questions on the ground that the reporter promised not to divulge the name of the informant. Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781, 35 L.R.A. (n. s.) 583, 1972B Ann. Cas. 1259 (1911) (decided under former Civil Code 1910, §§ 4544, 4554, 5877).

Admissions as to property value were not advice. — Admissions and other evidence in requested documents as to the value of the property in question were not the advice of a professional adviser and could not be considered part of a privileged consultation simply because that evidence was included in a loan application. Clayton County Bd. of Tax Assessors v. Lake Spivey Golf Club, Inc., 207 Ga. App. 693, 428 S.E.2d 687 (1993) (decided under former O.C.G.A. § 24-9-27).

Communications Between Husband and Wife

1. In General

General description of privilege between spouses. — Meaning of this provision simply is that neither of the married pair shall be permitted to testify as a witness concerning such communications or to furnish to another, for the purpose of being introduced in evidence, writings of any kind received under the seal of confidence during coverture. Knight v. State, 114 Ga. 48, 39 S.E. 928, 88 Am. St. R. 17 (1901) (decided under former Civil Code 1895, § 5198); Lowry v. Lowry, 170 Ga. 349, 153 S.E. 11 (1930) (decided under former Civil Code 1910, § 5785); Gorman v. State, 183 Ga. 307, 188 S.E. 455 (1936) (decided under former Code 1933, § 38-418); R. & J. Dick Co. v. Bass, 295 F.

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Supp. 758 (N.D. Ga. 1968) (decided under former Code 1933, § 38-418); Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731 (1976) (decided under former Code 1933, § 38-418).

Rule modified by former statute. — Former Code 1933, § 38-1604, which provided that a spouse shall be competent, although not compellable, to testify against the other spouse, modified former Code 1933, § 38-418. Hubbard v. State, 145 Ga. App. 714, 244 S.E.2d 639 (1978) (decided under former Code 1933, § 38-418); Chancey v. State, 256 Ga. 415, 349 S.E.2d 717 (1986), cert. denied, 481 U.S. 1029, 107 S. Ct. 1954, 95 L. Ed. 2d 527 (1987) (decided under former O.C.G.A. § 24-9-21).

"Confidential communications" between spouses defined. — "Confidential communications" are those when one spouse derives knowledge from the other by virtue of the special confidence of the husband-wife relationship. Wilcox v. State, 250 Ga. 745, 301 S.E.2d 251 (1983), aff'd in part and rev'd in part, 813 F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987) (decided under former O.C.G.A. § 24-9-21).

Every spoken word between a husband and wife is not confidential; if the communication is an impersonal one not made in reliance on the marital relationship, the communication is not confidential, and no policy reason bars its admissibility. Wilcox v. State, 250 Ga. 745, 301 S.E.2d 251 (1983), aff'd in part and rev'd in part, 813 F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987) (decided under former O.C.G.A. § 24-9-21).

Nonprivileged communications generally. — Nonprivileged communications relate to husband-wife conversations through third parties or in the presence of third parties, when the communication constitutes a ground of action by one spouse against the other, or when the conversation was of an impersonal nature spoken or performed without the special confidence one spouse reposes in the other in the marital relation. Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731 (1976) (decided under former Code 1933, § 38-418).

Privilege belongs to communicator and is perpetual. — Since the privilege belongs to the communicator, the privilege cannot be waived by the administrator nor by the surviving spouse since communications between husband and wife survive death and are protected forever. Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731 (1976) (decided under former Code 1933, § 38-418).

Waiver of privilege. — Spouse may waive his or her privilege by voluntarily taking the stand and testifying. Duncan v. State, 232 Ga. App. 157, 500 S.E.2d 603 (1998) (decided under former O.C.G.A. § 24-9-21).

Trial court did not err in allowing a probationer's spouse to testify without informing the spouse of the marital privilege pursuant to former O.C.G.A. §§ 24-9-21 and 24-9-23 (see now O.C.G.A. §§ 24-5-501 and 24-5-503) because the spouse was aware of the privilege but never asserted the privilege to the trial court, and it was assumed that the spouse waived the right not to testify; the spouse was informed by defense counsel of the spouse's rights under the marital privilege, and the spouse did not assert the privilege even after defense counsel voiced objections to the testimony in the spouse's presence. Geter v. State, 300 Ga. App. 396, 685 S.E.2d 342 (2009) (decided under former O.C.G.A. § 24-9-21).

Bank statement addressed to wife did not constitute "communication" between husband and wife. Leventhal v. Seiter, 208 Ga. App. 158, 430 S.E.2d 378 (1993) (decided under former O.C.G.A. § 24-9-21).

Husband and wife communication must be confidential to be privileged. — Paragraph (1) of former O.C.G.A. § 24-9-21 provided that communications between a husband and wife were inadmissible on grounds of public policy; however, for this exclusion to apply, the communications must be confidential. Wilcox v. State, 250 Ga. 745, 301 S.E.2d 251 (1983), aff'd in part and rev'd in part, 813

F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987) (decided under former O.C.G.A. § 24-9-21).

Indifference of one spouse to presence of the other. — When the act is done solely for the sake of doing the act, the indications being that the husband is indifferent to the presence of the wife, there is no communication. In such cases the privilege should not be allowed to deprive the court of the evidence. Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731 (1976) (decided under former Code 1933, § 38-418).

No evidence establishing element of confidentiality. — Though the rule establishes the wife as an incompetent witness for or against the husband in regard to any information derived from his confidence in her, when there is nothing to indicate that the knowledge was derived from any special confidence which one spouse reposed in the other, or that there was any occasion for the one spouse to make to the other any confidential communication concerning the matter, the knowledge gained is not privileged. Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731 (1976) (decided under former Code 1933, § 38-418).

Testimony as to injury of husband. — Wife of the injured party is not incompetent to testify as to the nature of the injury received by him and its effect upon his physical condition when there is nothing to indicate that her knowledge on the subject was gained because of any confidence which he reposed in her as his wife. Macon Ry. & Light Co. v. Mason, 123 Ga. 773, 51 S.E. 569 (1905) (decided under former Civil Code 1895, § 5198).

Wife's statements in a summary judgment affidavit as to the reasons her husband did not want to buy property were protected by the marital communications privilege. Century 21 Pinetree Properties, Inc. v. Cason, 220 Ga. App. 355, 469 S.E.2d 458 (1996) (decided under former O.C.G.A. § 24-9-21).

Rule was applied to exclude evidence in the following cases. — See Keaton v. McGwier, 24 Ga. 217 (1858) (testimony that might discredit spouse's testimony) (decided under former Civil Code 1910, § 5785); McKie v. State, 165 Ga. 210, 140 S.E. 625 (1927) (letters written by wife to husband) (decided under former Civil Code 1910, § 5785); Gorman v. State, 183 Ga. 307, 188 S.E. 455 (1936) (facts that might discredit spouse's testimony) (decided under former Code 1933, § 38-418); Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731 (1976) (writing from one spouse to another concerning domestic relationships) (decided under former Code 1933, § 38-418).

No common law marriage found. — When there was evidence to support the trial court's finding that the defendant and the witness did not have a common law marriage, there was no error in allowing the witness to testify. Abrams v. State, 272 Ga. 63, 525 S.E.2d 86 (2000), overruled on other grounds, Baugh v. State, 276 Ga. 736, 585 S.E.2d 616 (2003) (decided under former O.C.G.A. § 24-9-21).

Time of objection to testimony between spouses. — Objection to testimony on the ground that the testimony was in the nature of confidential communications between husband and wife, and therefore to be excluded under the provisions of the former statute, came too late when urged for the first time in the brief of counsel for the plaintiff in error in the reviewing court. Holloway v. Hoard, 140 Ga. 380, 78 S.E. 928 (1913) (decided under former Civil Code 1910, § 5785); Maxwell v. Maxwell, 177 Ga. 483, 170 S.E. 362 (1933) (decided under former Civil Code 1910, § 5785).

E-mail communication not subject to marital privilege. — An e-mail from the defendant to the defendant's husband was not evidence given under compulsion by the defendant's spouse and so was not subject to the marital privilege under former O.C.G.A. § 24-9-23(b) (see now O.C.G.A. § 24-5-503) in a case charging the defendant with malice murder and related offenses in connection with the death of the defendant's 11-year-old step-daughter. Reaves v. State, 284 Ga. 236, 664 S.E.2d 207 (2008) (decided under former O.C.G.A. § 24-9-21).

2. Third Parties

No protection for financial documents prepared by third party. — Al-

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though communications between a husband and a wife are confidential and privileged, such protections do not apply to financial documents either prepared or seen by third parties; a trial court did not err in granting a motion to compel an employee and the husband to produce financial documents such as checks, account statements, and tax returns. Dempsey v. Kaminski Jewelry, Inc., 278 Ga. App. 814, 630 S.E.2d 77 (2006) (decided under former O.C.G.A. § 24-9-21).

Third person overhearing communication between married couple. — Former statute was not intended to forbid one who overhears a conversation between husband and wife from testifying with respect to the conversation. If they are unsuccessful in keeping secret that which they intend each other shall so regard, the mere fact that they did so intend will not render incompetent the testimony of an outsider. Knight v. State, 114 Ga. 48, 39 S.E. 928, 88 Am. St. R. 17 (1901) (decided under former Civil Code 1895, § 5198). See also Ford v. State, 124 Ga. 793, 53 S.E. 335 (1906) (decided under former Civil Code 1895, § 5198); Cocroft v. Cocroft, 158 Ga. 714, 124 S.E. 346 (1924) (decided under former Civil Code 1910, § 5785); Sims v. State, 36 Ga. App. 266, 136 S.E. 460 (1927) (decided under former Civil Code 1910, § 5785).

Presence of third party. — Wife can testify as to what was said by the husband to some other person in the presence of the wife. R. & J. Dick Co. v. Bass, 295 F. Supp. 758 (N.D. Ga. 1968) (decided under former Code 1933, § 38-418).

Testimony of third party as to communications. — Former O.C.G.A. § 24-9-21 did not prohibit testimony about communications between spouses by someone who overheard the communication. Helton v. State, 217 Ga. App. 691, 458 S.E.2d 872 (1995) (decided under former O.C.G.A. § 24-9-21).

3. Criminal Cases

Calling wife as defense witness did not waive husband's privilege. — Defendant was entitled to have the testimony of his wife excluded based upon his marital privilege as provided by former O.C.G.A. § 24-9-21 as proper objection was made at trial. Although under certain circumstances the marital privilege may be waived by the communicator, the act of calling his wife as a defense witness did not, in and of itself, waive his privilege regarding protected confidential communications as the direct examination did not in any way touch on the privileged matters or open the door thereto. White v. State, 211 Ga. App. 694, 440 S.E.2d 68 (1994) (decided under former O.C.G.A. § 24-9-21).

Testimony as to child molestation by ex-spouse. — With regard to a defendant's conviction on child molestation charges, the defendant's trial counsel was not deficient in failing to object to certain testimony of the defendant's ex-wife, the mother of the victim, concerning a prior bad act on the ground that the testimony violated the marital privilege, because the defendant was not on trial for the prior act; therefore, the ex-wife was competent, although not compellable, to testify concerning the prior act, and thus since the ex-wife did not invoke the privilege and was able to waive the privilege by voluntarily taking the stand and testifying, trial counsel was not ineffective for failing to object to the testimony of the ex-wife on the basis of marital privilege. Nichols v. State, 288 Ga. App. 118, 653 S.E.2d 300 (2007) (decided under former O.C.G.A. § 24-9-21).

No privilege for mere acts or gestures. — Husband, who took a container of crack cocaine from an evidence file cabinet in the district attorney's office while his wife was present in the room, could not invoke the husband-wife privilege, when there was no clear proof that his acts or gestures were as much a communication as would have been his words to her describing the act. Brown v. State, 199 Ga. App. 188, 404 S.E.2d 469, cert. denied, 199 Ga. App. 905, 404 S.E.2d 469 (1991) (decided under former O.C.G.A. § 24-9-21).

Announcement of victim's name as witness. — Knowing that the victim was going to invoke the marital privilege, de-

fendant was not entitled to a mistrial because the defendant did not timely object to the announcement of the defendant's wife's name as a witness; in any event, the mere announcement of the victim's name, without more, did not constitute the creation by the state of an "unwarranted negative inference" against the defendant. Carter v. State, 275 Ga. App. 483, 621 S.E.2d 503 (2005) (decided under former O.C.G.A. § 24-9-21).

Communications Between Attorney and Client

1. In General

Purpose of privilege. — Attorney-client privilege is for the protection and benefit of the client, not of the attorney, so that the client's disclosures may not be used against the client in controversies with third persons, and it is designed to secure the client's confidence in the secrecy of the client's communication, and to promote greater freedom of consultation between clients and their legal advisers, and its object is to secure freedom in communication between attorney and client in order that the former may act with full understanding of the matters in which the attorney is employed. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981) (decided under former O.C.G.A. § 24-9-21).

Privilege is absolute, and if a matter is privileged it is not discoverable. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-419).

A narrow construction of the attorney-client privilege, inasmuch as the exercise of the privilege results in the exclusion of evidence, comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is "the object of all legal investigation." Tenet Healthcare Corp. v. Louisiana Forum Corp., 273 Ga. 206, 538 S.E.2d 441 (2000) (decided under former O.C.G.A. § 24-9-21).

Court should confine the attorney-client privilege to its narrowest permissible limits under the former statute of its creation in order to permit liberal discovery. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, §§ 38-418 and 38-419).

Rule modified by former statute. Chancey v. State, 256 Ga. 415, 349 S.E.2d 717 (1986), cert. denied, 481 U.S. 1029, 107 S. Ct. 1954, 95 L. Ed. 2d 527 (1987) (decided under former O.C.G.A. § 24-9-21).

Mere fact of employment between attorney and client is not protected from disclosure. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844 (1969) (decided under former Code 1933, § 38-418).

Former statute not restrictive. — It was not the intention of the former statute to restrict the admission of evidence, but to enlarge the rule for the admission of evidence. Strickland v. Wynn, 51 Ga. 600 (1874) (decided under former Code 1873, § 3854).

Rule set forth in the former statute cannot be invoked by strangers to relationship. O'Brien v. Spalding, 102 Ga. 490, 31 S.E. 100, 66 Am. St. R. 202 (1897) (decided under former Civil Code 1895, § 5271); Neal v. Dover, 217 Ga. 545, 123 S.E.2d 760 (1962) (decided under former Code 1933, § 38-1605); Cleary v. Burlington Indus., Inc., 193 Ga. App. 81, 387 S.E.2d 36 (1989) (decided under former O.C.G.A. § 24-9-25).

Communications not intended to be confidential. — Communications made by a client to an attorney for the purpose of being imparted by the attorney to others do not fall within the inhibition of the former statute. Fowler v. Sheridan, 157 Ga. 271, 121 S.E. 308 (1924) (decided under former Civil Code 1910, § 5860).

Under former O.C.G.A. § 24-9-25, in general, an attorney may not be compelled to testify against a client to any matter or thing, the knowledge of which the attorney may have acquired by virtue of the individual's employment as an attorney; this rule, however, does not prohibit an attorney from testifying about matters that occurred in the presence of the opposing party because such communications were not intended to be confidential. Martinez v. Hous. Auth., 264 Ga. App. 282, 590 S.E.2d 245 (2003) (decided under former O.C.G.A. § 24-9-25).

Communications Between Attorney and Client (Cont'd)
1. In General (Cont'd)

Client's request that identity be kept confidential. — Because a client's identity is not covered by the attorney-client privilege, the trial court correctly declined to permit an attorney to use the privilege to justify the attorney's refusal to reveal the identity of a client who requested that the client's identity be kept confidential. Tenet Healthcare Corp. v. Louisiana Forum Corp., 273 Ga. 206, 538 S.E.2d 441 (2000) (decided under former O.C.G.A. §§ 24-9-21, 24-9-24, and 24-9-25).

Inadvertent disclosure to defense counsel of a letter from plaintiff to plaintiff's attorneys did not waive the attorney-client privilege. Lazar v. Mauney, 192 F.R.D. 324 (N.D. Ga. 2000) (decided under former O.C.G.A. § 24-9-21).

No privilege in joint representation. — If two or more persons jointly consult or retain an attorney the communications which either makes to the attorney are not privileged in the event of any subsequent litigation between the parties. In such situations it is considered that the attorney does not have an attorney-client relationship with either of the joint parties. Peterson v. Baumwell, 202 Ga. App. 283, 414 S.E.2d 278 (1991), cert. denied, 202 Ga. App. 907, 414 S.E.2d 278 (1992) (decided under former O.C.G.A. §§ 24-9-24 and 24-9-25).

If, by consenting to joint representation, the parties waived the attorney-client privilege as to communications affecting the interest of the other, then such communications should be discoverable by each one of the parties against the other. The fact that there is present in this litigation a third party who will gain access to these communications does not change the fact of the initial waiver. Peterson v. Baumwell, 202 Ga. App. 283, 414 S.E.2d 278 (1991), cert. denied, 202 Ga. App. 907, 414 S.E.2d 278 (1992) (decided under former O.C.G.A. §§ 24-9-24 and 24-9-25).

Terms of attorney's contract do not come within the statutory privilege. Bank of Lumpkin v. Farmers State Bank, 161 Ga. 801, 132 S.E. 221 (1926) (decided under former Civil Code 1910, § 5785).

Facts attending execution of contract. — These provisions had no application to competency of an attorney as a witness with respect to essential facts attending execution of a contract in the preparation and as to the attestation of which the attorney rendered professional service. Jones v. Smith, 206 Ga. 162, 56 S.E.2d 462 (1949) (decided under former Code 1933, § 38-418); Smith v. Smith, 222 Ga. 694, 152 S.E.2d 560 (1966) (decided under former Code 1933, § 38-418).

Relation of attorney and client does not exist between prosecutor and prosecuting witness for the state and, therefore, communications had between such witness and the prosecutor are not confidential, and on the trial of the defendant are admissible in evidence to prove contradictory statements. Vernon v. State, 49 Ga. App. 187, 174 S.E. 548 (1934) (decided under former Code 1933, § 38-418).

Penalties for breaching confidence. — There are no statutory criminal penalties visited upon an attorney who in violation of the attorney's ethical relation to the attorney's client divulges a confidential communication. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844 (1969) (decided under former Code 1933, § 38-418).

Disqualification without consideration of former statute error. — Trial court order disqualifying an attorney from acting as counsel for a party on the ground that the party was a necessary witness at trial was overruled since the trial court did not consider the applicability of former O.C.G.A. § 24-9-25 in the context of the evidence adduced at the disqualification hearing. Southern Shipping Co. v. Oceans Int'l Corp., 174 Ga. App. 91, 329 S.E.2d 263 (1985) (decided under former O.C.G.A. § 24-9-25).

Attorney may not be called to testify as to client's competency. — It is not legally permissible for the state to call defendant's counsel as a witness for the purpose of extracting facts and counsel's opinion as to the client's competency, which is gained from the attorney's partic-

ipation in the attorney-client relationship with the defendant. Almond v. State, 180 Ga. App. 475, 349 S.E.2d 482 (1986) (decided under former O.C.G.A. § 24-9-25).

2. When Privilege Attaches

Prior statements. — Mere fact that at some later time statements are transmitted to an attorney for use in preparing a defense to litigation that may have arisen out of the occurrence to which the statements referred does not render the statements communications to the attorney or bring the statements within the privileged category. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-419).

Acquisition of knowledge during and by reason of relationship. — To make an attorney incompetent to testify to a fact, knowledge of the fact must have been acquired by the attorney both during the relationship of client and attorney and by reason of that relationship. Parker v. Wellons, 43 Ga. App. 721, 160 S.E. 109 (1931) (decided under former Civil Code 1910, § 5860).

Matters communicated to attorney by source other than client. — Attorney-client privilege does not encompass matters of which the attorney has or gains knowledge through some source other than the communications of the attorney's client in preparation for litigation. If the attorney has knowledge from another source, testimony concerning that is proper. Buffington v. McClelland, 130 Ga. App. 460, 203 S.E.2d 575 (1973) (decided under former Code 1933, § 38-418).

Offspring acquired no attorney-client privilege resulting from deceased parent's relationship. — Trial court did not err in admitting testimony of an attorney who represented the testator as the daughter could not invoke the attorney-client privilege to prevent that testimony since the daughter was a stranger to that attorney-client relationship. White v. Regions Bank, 275 Ga. 38, 561 S.E.2d 806 (2002) (decided under former O.C.G.A. § 24-9-25).

Placing material with attorney does not invoke privilege. — One cannot render privileged that which is otherwise not privileged merely by placing it in the hands of an attorney. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-418).

When an attorney speaks with a defendant as a family friend, not as a legal advisor, and tells the defendant that the attorney does not represent the defendant and to contact an attorney if the defendant needs legal advice, no attorney-client relationship exists. Spence v. State, 252 Ga. 338, 313 S.E.2d 475 (1984) (decided under former O.C.G.A. § 24-9-24).

3. By Reason of Anticipated Employment

Former statute created no "privilege as attorney" giving an attorney at law the right to refuse to answer pertinent questions asked for the purpose of proving that the attorney was not employed by a designated person to institute a given proceeding. Alger v. Turner, 105 Ga. 178, 31 S.E. 423 (1898) (decided under former Civil Code 1895, § 5271).

Objection should state unqualifiedly that the attorney represented the party to whom the testimony related. Brannan v. Mobley, 169 Ga. 243, 150 S.E. 76 (1929) (decided under former Civil Code 1910, § 5860).

Communication in anticipation of employment. — Attorney was neither compellable nor competent to testify to any matter or thing, knowledge of which the attorney may have acquired by reason of the anticipated employment of the person as attorney by one seeking the attorney's professional aid and advice, whether, as a matter of fact, the attorney so consulted was or was not afterwards employed to undertake the service concerning which the confidential communication sought to be introduced in evidence was made. Atlanta Coca-Cola Bottling Co. v. Goss, 50 Ga. App. 637, 179 S.E. 420 (1935) (decided under former Code 1933, § 38-419).

Testimony of an attorney to the effect that on a visit to the mother of the defendant, made in anticipation of employment as attorney for the defendant, the mother delivered a pistol and watch to the wit-

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3. By Reason of Anticipated Employment (Cont'd)

ness, with instructions to deliver them to a named police officer, was not inadmissible in evidence upon the ground that it was confidential communication between an attorney and a client. Riley v. State, 180 Ga. 869, 181 S.E. 154 (1935) (decided under former Code 1933, § 38-419).

Rule applied regardless of eventual employment. — Confidential communications, made to an attorney not actually employed at the time, but which were made in anticipation of employing the attorney, come within the rule protecting privileged communications, and this was true whether as a matter of fact the attorney so consulted was or was not afterwards employed to undertake the services concerning which the confidential communications ought to be introduced in evidence were made. Young v. State, 65 Ga. 525 (1880) (decided under former Code 1873, § 3854); Peek & Sullivan v. Boone, 90 Ga. 767, 17 S.E. 66 (1893) (decided under former Ga. L. 1887, p. 30, § 1). See also Haywood v. State, 114 Ga. 111, 39 S.E. 948 (1901) (decided under former Civil Code 1895, § 5271).

Termination of relationship. — Law had no application as to communication made by a former client to the attorney after the relationship of attorney and client ceased to exist. Philman v. Marshall, 103 Ga. 82, 29 S.E. 598 (1897) (decided under former Civil Code 1895, § 5271).

Privilege continues after client's death. Smith v. Smith, 222 Ga. 694, 152 S.E.2d 560 (1966) (decided under former Code 1933, § 38-1605).

4. Facts in Connection with Employment

Mere fact of employment between an attorney and a client was not protected from disclosure. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844 (1969) (decided under former Code 1933, § 38-419).

An attorney may testify with respect to essential facts attending execution of a contract in preparation and as to attestation of which the attorney rendered professional service. Jones v. Smith, 206 Ga. 162, 56 S.E.2d 462 (1949) (decided under former Code 1933, § 38-419).

Attorney at law who witnesses a contract as a subscribing witness, and who was employed to prepare the contract, is competent, in a trial involving the mental capacity of the maker thereof to execute a valid contract, to testify as a witness concerning the maker's mental condition, and as to facts showing the latter's knowledge or ignorance of the contents of the paper, and as to all other pertinent facts attending signing and attestation of the instrument. Smith v. Smith, 222 Ga. 694, 152 S.E.2d 560 (1966) (decided under former Code 1933, § 38-419).

Client accusing attorney of failure to inform. — When there was no claim of misconduct or incompetent representation, a habeas corpus petitioner cannot claim that the petitioner was not informed of the sentence consequences of a guilty plea, and then invoke the attorney-client privilege to prevent the attorney from testifying. Bailey v. Baker, 232 Ga. 84, 205 S.E.2d 278 (1974) (decided under former Code 1933, § 38-419).

Client accusing attorney of previous misconduct. — When accused in statement to jury charged that the attorney who represented the accused in a previous prosecution for murder entered a plea of guilty over the accused's protests of innocence, the accused waived the accused's right to have their transactions considered as privileged, and the attorney was competent to give testimony to show that the attorney did not act basely in the transaction as the attorney's one-time client claimed. Hyde v. State, 70 Ga. App. 823, 29 S.E.2d 820 (1944) (decided under former Code 1933, § 38-419).

5. Communications

Rule has broad scope, and is not confined merely to communicated matters, but extends to items as to which the attorney has acquired the attorney's knowledge by the attorney's own observation when this observation was the result of the attorney's professional employment. Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582

(1934) (decided under former Code 1933, § 38-419).

Rule is not confined to matters relating to litigation, but extends to all cases when the attorney is consulted by a client in the line of the attorney's profession. Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934) (decided under former Code 1933, § 38-419).

Conversations not with attorney. — When it appears from a transcript that none of the conversations about which a witness was questioned was had with an attorney, the attorney-client privilege was not applicable. Bridges v. State, 242 Ga. 251, 248 S.E.2d 647 (1978) (decided under former Code 1933, § 38-419).

Communications made for purpose of being imparted by the attorney to others are not privileged. Riley v. State, 180 Ga. 869, 181 S.E. 154 (1935) (decided under former Code 1933, § 38-419).

Placing material with attorney invokes no privilege. — It is axiomatic that one cannot render privileged that which is otherwise not privileged merely by placing it in the hands of one's attorney. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965).

Photographs not "communications." — In a prosecution for sexual offenses, photographs given by the defendant to his attorney depicting sexual activity between defendant's wife and a 13-year-old girl were not "communications," but were admissible as evidence of a similar crime. Johnson v. State, 222 Ga. App. 722, 475 S.E.2d 918 (1996) (decided under former O.C.G.A. § 24-9-24).

6. Work Product

Work product rule. — Under the work product rule, the attorney-client privilege protects correspondence between defendant's claims examiners and counsel, letters between inside and outside counsel, correspondence between defendant's employees and insurance carrier, and handwritten notes by inside counsel; but not plaintiff's medical records, statements by plaintiff, or correspondence between defendant's agent and third parties. Shipes v. BIC Corp., 154 F.R.D. 301 (M.D. Ga. 1994) (decided under former O.C.G.A. § 24-9-24).

Work product rule. — Test to determine whether a document constitutes work product is whether it was prepared by the party or the party's representative because of the prospect of litigation. Shipes v. BIC Corp., 154 F.R.D. 301 (M.D. Ga. 1994) (decided under former O.C.G.A. § 24-9-24).

Privilege extends to attorney's work product. — Once the attorney-client relationship obtains as to a particular matter, the attorney may have investigations made or statements taken under the attorney's direct instruction and supervision, and these may be deemed a part of what the attorney has done, and thus a part of the attorney's work product, which may not be discovered absent a showing of necessity. Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, § 38-418).

Mixture of privileged and nonprivileged matter. — When any document sought to be produced contains a mixture of privileged and nonprivileged communication or information, ample remedy is provided to delete privileged matter, and this also would be within the inherent power of the court. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844 (1969) (decided under former Code 1933, § 38-419).

Information obtained for preparing bankruptcy schedules gained during intake interview questioning was protected by the attorney-client privilege. In re Stoutamire, 201 Bankr. 592 (Bankr. S.D. Ga. 1996) (decided under former O.C.G.A. § 24-9-24).

E-mails within attorney-client privilege. — Appellants produced no evidence showing that the appellees waived their attorney-client privilege. The disclosure of e-mails during document production by counsel did not preclude later objection to their use by the appellees. Waiver of the attorney-client privilege occurs in very limited circumstances. Alston & Bird LLP v. Mellon Ventures II, L.P., 307 Ga. App. 640, 706 S.E.2d 652 (2010) (decided under former O.C.G.A. §§ 24-9-21 and 24-9-24).

Letters — Letter from the plaintiff in a case to plaintiff's attorney, and from the attorney delivered to defendant's counsel,

Communications Between Attorney and Client (Cont'd)
6. Work Product (Cont'd)

is not admissible. Southern Ry. v. White, 108 Ga. 201, 33 S.E. 952 (1899) (decided under former Civil Code 1895, § 5271).

Inadvertent disclosure to defense counsel of a letter from the plaintiff to the plaintiff's attorneys did not waive the attorney-client privilege. Lazar v. Mauney, 192 F.R.D. 324 (N.D. Ga. 2000) (decided under former O.C.G.A. § 24-9-24).

Letters between a private investigator and defendant's attorneys. — With regard to a defendant's conviction for malice murder, the trial court did not err by allowing the introduction of one letter by a private investigator and two letters by the defendant's attorneys in violation of the attorney-client privilege since the three letters did not involve any communications between the defendant and the defendant's attorneys. Rather, they were all communications between the private investigator and the attorneys, and the letters did not contain confidential information and, instead, concerned only the fact of the investigator's employment and the attorneys' claims that the investigator's services in the divorce case between the defendant and an estranged spouse fell under the attorney-client privilege. Davis v. State, 285 Ga. 343, 676 S.E.2d 215 (2009) (decided under former O.C.G.A. § 24-9-24).

Wills. — Under the mandate of the former statute, the trial court errs in allowing decedent's attorney to testify as to confidential communications arising out of preparation of an unexecuted will for the decedent in an action for specific performance of an alleged oral contract to make a will. DeLoach v. Myers, 215 Ga. 255, 109 S.E.2d 777 (1959).

In an action against the estate of decedent's wife for breach of a contract to make a will, the decedent's nephew and decedent's secretary were barred from giving testimony regarding communications by the decedent to the nephew when the nephew was acting in the nephew's capacity as an attorney for the decedent. Spence v. Hamm, 226 Ga. App. 357, 487 S.E.2d 9 (1997) (decided under former O.C.G.A. § 24-9-25).

Inadvertent disclosure to defense counsel of a letter from plaintiff to plaintiff's attorneys did not waive the attorney-client privilege. Lazar v. Mauney, 192 F.R.D. 324 (N.D. Ga. 2000) (decided under former O.C.G.A. § 24-9-25).

Production of medical records. — Medical records in defendant's claim files are subject to neither the work product privilege nor the doctor patient privilege and should be produced for plaintiff's review. Shipes v. BIC Corp., 154 F.R.D. 301 (M.D. Ga. 1994) (decided under former O.C.G.A. § 24-9-24).

Certain documents in an insurer's claim file were protected under the attorney-client privilege of former O.C.G.A. § 24-9-24 because the documents related to retaining an attorney to defend the insured and were related to the attorney's representation of the insured, along with the attorney's mental impressions that were protected under the work product doctrine. Underwriters Ins. Co. v. Atlanta Gas Light Co., 248 F.R.D. 663 (N.D. Ga. 2008) (decided under former O.C.G.A. § 24-9-24).

Testimony of investigator hired by attorney. — In a proceeding on a motion to quash a subpoena requiring a private investigator to appear before a grand jury and produce evidence acquired by the investigator during employment in the defendant's divorce proceeding, there was no violation of the defendant's procedural rights because the investigator's in-camera testimony authorized the court to find that the subject communications from the defendant were made after the investigator ceased acting as an agent or employee of the attorney, and that the communications fell within the crime-fraud exception to the attorney-client privilege. In re Fulton County Grand Jury Proceedings, 244 Ga. App. 380, 535 S.E.2d 340 (2000) (decided under former O.C.G.A. § 24-9-24).

Attorney-client privilege did not cover the identity of documents a party reviewed to prepare for a deposition. McKinnon v. Smock, 264 Ga. 375, 445 S.E.2d 526 (1994) (decided under for-

mer O.C.G.A. §§ 24-9-21 and 24-9-24).

Service performed as a favor. — When an attorney who prepared a deed was not employed to do so, but prepared the deed merely as a "friendly act" for the grantor, such attorney was not incompetent to testify as to statements made by the grantor at the time. Lifsey v. Mims, 193 Ga. 780, 20 S.E.2d 32 (1942) (decided under former Code 1933, § 38-1605).

7. Third Parties

Presence of third party. — When the communication made by a client to an attorney is in the presence of the other party to a contract, and it comes within the attorney's knowledge, such communication is not embraced in the rule which prohibits that it may be given in evidence by the attorney when called on so to do. Griffin v. Williams, 179 Ga. 175, 175 S.E. 449 (1934) (decided under former Code 1933, §§ 38-418 and 38-419).

Defendant's conversation with the defendant's attorney, made through a three-way call by the defendant's girlfriend and recorded at the jail, were admissible and not privileged under former O.C.G.A. § 24-9-24 because the defendant's girlfriend remained on the call and the telephone had signs and a message indicating that calls could be recorded. Rogers v. State, 290 Ga. 18, 717 S.E.2d 629 (2011) (decided under former O.C.G.A. § 24-9-24).

Defendant's act of delivering to his wife a statement for her to read, rewrite, sign and have notarized prior to his giving it to his attorney was a waiver of the attorney-client privilege as to such document. Osborn v. State, 233 Ga. App. 257, 504 S.E.2d 74 (1998) (decided under former O.C.G.A. § 24-9-24).

An eavesdropper or a wiretapper is not incompetent to testify to the communications one overhears. Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934) (decided under former Code 1933, § 38-419).

Documents obtained from third parties. — Attorney client privilege does not apply to documents obtained by the attorney from a third party, or even documents which a party filters through its attorney. Shipes v. BIC Corp., 154 F.R.D. 301 (M.D. Ga. 1994) (decided under former O.C.G.A. § 24-9-24).

Presence of opposite party. — When a client makes to an attorney a communication or statement in the presence of the opposite party as to the transaction in hand, it is not confidential or privileged. Stone v. Minter, 111 Ga. 45, 36 S.E. 321, 50 L.R.A. 356 (1900) (decided under former Civil Code 1895, § 5271).

Use of agent to transmit communication. — When legal advice of any kind is sought from a duly accredited professional legal advisor in the advisor's capacity as such, the communications relevant to that purpose, made in confidence by the client, are at the client's instance permanently protected from disclosure by the client, the legal advisor, or the agent of either confidentially used to transmit the communication, unless the client waives the protection; and clearly, therefore, since the client has used a confidential agent of transmission, which, under the circumstances, it was reasonably necessary for the client to do, the client will be protected against betrayal of this confidence by such agent to the same extent as against betrayal of confidence by the client's attorney. Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934) (decided under former Code 1933, § 38-419).

Inapplicable to defendant-requested communications to third parties. — Former O.C.G.A. § 24-9-25 was not implicated as to testimony relating to information the defendant instructs defense counsel to convey to third persons. Shelton v. State, 206 Ga. App. 579, 426 S.E.2d 69 (1992) (decided under former O.C.G.A. § 24-9-25).

Clerk or amanuensis of attorney cannot testify as to confidential communications in clerk's presence between the attorney and client. Taylor v. Taylor, 179 Ga. 691, 177 S.E. 582 (1934) (decided under former Code 1933, § 38-419).

Attorney-client relationship extends to the network of employees acting under the direction of the attorney. In re Stoutamire, 201 Bankr. 592 (Bankr. S.D. Ga. 1996) (decided under former O.C.G.A. § 24-9-24).

Paralegal's testimony in eviction proceeding. — Trial court did not err by

Communications Between Attorney and Client (Cont'd)
7. Third Parties (Cont'd)

admitting the testimony of a paralegal with a tenant's former attorney's office as, assuming the attorney-client privilege applied to paralegals, the paralegal testified about meetings and other communications the paralegal had with the housing authority on the tenant's behalf, not about any private communications the paralegal had with the tenant. Martinez v. Hous. Auth., 264 Ga. App. 282, 590 S.E.2d 245 (2003) (decided under former O.C.G.A. § 24-9-25).

8. Testimony by Attorneys

In general. — Attorney at law was not incompetent to testify to facts which did not come to the attorney's knowledge by reason of the relationship or contemplated relationship of attorney and client between oneself and another. Harkless v. Smith, 115 Ga. 350, 41 S.E. 634 (1902) (decided under former Civil Code 1895, § 5271).

Attorney is both competent and compelable to testify, for or against a client, as to any matter or thing, knowledge of which the attorney may have acquired in any other manner than by virtue of the attorney's relationship as attorney, or by reason of the attorney's anticipated employment as attorney. Bracewell v. State, 21 Ga. App. 133, 94 S.E. 91 (1917) (decided under former Civil Code 1910, § 5860).

Attorney-client privilege does not encompass matters of which the attorney has or gains knowledge through some source other than the communications of a client in preparation for litigation. If the attorney has knowledge from another source, testimony concerning that is proper. Buffington v. McClelland, 130 Ga. App. 460, 203 S.E.2d 575 (1973) (decided under former Code 1933, § 38-1605).

Attorney's involvement in disclosure irrelevant. — Privilege bars communications regardless of whether the communications were voluntarily produced by the attorney to be used against the client, or were surreptitiously or otherwise taken from the possession of the attorney. McKie v. State, 165 Ga. 210, 140 S.E. 625 (1927) (decided under former Civil Code 1910, § 5786).

Attorney is not incompetent to testify as to mental condition of a deceased client, based upon the attorney's observations while representing the client in litigation. Smith v. Smith, 222 Ga. 694, 152 S.E.2d 560 (1966) (decided under former Code 1933, § 38-1605).

Compelling attorney to produce title papers. — Court has no power to compel the counsel of one of the parties to disclose on oath, in spite of one's claim of privilege, that one has in court one of the client's title papers, and to produce the papers to be used in the suit as evidence for the opposite party, especially if notice to produce has not been previously given. Dover v. Harrell, 58 Ga. 572 (1877) (decided under former Code 1873, § 3854).

In a dispossessory action brought by a mortgage company against a possessor, the trial court properly granted the mortgage company a writ of possession as the company produced a recorded certified copy of the security deed, which the possessor failed to prove was a fraud since the possessor's signature on the deed matched that as appeared on the answer filed. The trial court properly rejected the possessor's attempt to examine the mortgage company's counsel regarding the authenticity of the deed since counsel represented the mortgage company and was, therefore, not competent to testify. Egana v. HSBC Mortg. Corp., 294 Ga. App. 456, 669 S.E.2d 159 (2008) (decided under former O.C.G.A. § 24-9-25).

Attorney competency to testify on execution of wills. — Former statute had no application to the competency of an attorney as a witness with respect to essential facts attending the execution of a will in preparation and as to attestation of which the attorney rendered professional services. O'Brien v. Spalding, 102 Ga. 490, 31 S.E. 100, 66 Am. St. R. 202 (1897) (decided under former Civil Code 1895, § 5271); Waters v. Wells, 155 Ga. 439, 117 S.E. 322 (1923) (decided under former Civil Code 1910, § 5860); Manley v. Combs, 197 Ga. 768, 30 S.E.2d 485 (1944) (decided under former Code 1933, § 38-1605).

Facts attending execution of will. — Former statute had no application to the

competency of an attorney as a witness with respect to essential facts attending execution of a will. Manley v. Combs, 197 Ga. 768, 30 S.E.2d 485 (1944) (decided under former Code 1933, § 38-418).

Attorney withholding name of client. — Attorney who delivered an anonymous campaign contribution on behalf of a client in violation of O.C.G.A. § 21-5-30(e) was improperly held in contempt for failing to disclose the client's name to the State Ethics Commission; the attorney invoked the self-incrimination privilege and the trial court found the attorney in contempt without first determining whether the commission's proposed questions might have been incriminating. Begner v. State Ethics Comm'n, 250 Ga. App. 327, 552 S.E.2d 431 (2001) (decided under former O.C.G.A. § 24-9-27).

9. Corporations as Clients

Corporation can avail itself of the attorney-client privilege. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981) (decided under former Code 1933, §§ 38-418 and 38-419).

Burden is upon a corporation seeking to invoke the attorney-client privilege to establish that corporate counsel's advice was privileged legal advice and thus not subject to discovery. Southern Guar. Ins. Co. v. Ash, 192 Ga. App. 24, 383 S.E.2d 579 (1989) (decided under former O.C.G.A. §§ 24-9-21 and 24-9-24).

No distinction between advice on specific cases and day-to-day business. — Attorney-client privilege statutes make no distinction between legal advice given to a corporate client in regard to specific cases pending and legal advice concerning day-to-day business matters. Southern Guar. Ins. Co. v. Ash, 192 Ga. App. 24, 383 S.E.2d 579 (1989) (decided under former O.C.G.A. §§ 24-9-21 and 24-9-24).

Attorney-client privilege was applicable to a corporate employee's communication if: (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of the employee's corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication was within the scope of the employee's corporate duties; and (5) the communication was not disseminated beyond those persons who, because of the corporate structure, need to know its contents; moreover, the corporation had the burden of showing that the communication in issue met all of the above requirements. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981) (decided under former Code 1933, §§ 38-418, 38-419).

Communications between attorney and client are excluded from consideration of public policy and the privilege applied to communications to the officers and employees of a corporate client as well as to individual clients. Associated Grocers Coop. v. Trust Co., 158 Ga. App. 115, 279 S.E.2d 248 (1981) (decided under former Code 1933, § 38-419).

Letters between attorney and agent of corporation. — Letters written between the attorney and the agent of a corporation, which was the attorney's client, containing confidential communications between the two, should not have been forced to be produced for use in evidence against the client. Fire Ass'n v. Fleming, 78 Ga. 733, 3 S.E. 420 (1887) (decided under former Code 1882, § 3854).

Disclosure of reasons for suit in individual capacity. — An action was originally commenced against an individual, the sole shareholder of a corporation, instead of the corporation itself, the proper party. In a later action for abuse of process, the trial court properly allowed evidence to show that the defendant (the original plaintiff) was unwilling to allow the defendant's original attorney to divulge the reasons why the present plaintiff had been sued in an individual capacity, and to draw any reasonable inferences from this taking of the attorney-client privilege. Ostroff v. Coyner, 187 Ga. App. 109, 369 S.E.2d 298 (1988) (decided under former O.C.G.A. §§ 24-9-24 and 24-9-25).

10. Criminal Matters

Crime-fraud exception to privilege. — Under the crime-fraud exception to the attorney-client privilege, the privilege

Communications Between Attorney and Client (Cont'd)
10. Criminal Matters (Cont'd)

does not extend to communications which occur before perpetration of a fraud or commission of a crime and which relate thereto. In re Fulton County Grand Jury Proceedings, 244 Ga. App. 380, 535 S.E.2d 340 (2000) (decided under former O.C.G.A. § 24-9-24).

Privilege not to be used to carry out crimes. — Privileged communication may be a shield of defense as to crimes already committed, but the privilege cannot be used as a sword or weapon of offense to enable persons to carry out contemplated crimes against society, frauds, or perjuries. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981) (decided under former Code 1933, §§ 38-418 and 38-419).

Communication of criminal plans. — As to violations of law or commissions of fraud, the protection extends only to communications after the act or transaction is finished, and does not cover communications respecting proposed infractions of the law in commission of a crime or perpetration of a fraud. Atlanta Coca-Cola Bottling Co. v. Goss, 50 Ga. App. 637, 179 S.E. 420 (1935) (decided under former Code 1933, § 38-419).

Testimony sought fell within attorney-client privilege. — Testimony that defendant sought from a codefendant's lawyer relating to an alleged deal to provide substantial assistance to the prosecution fell within the attorney-client privilege because there was no evidence of any fraud or crime; although the defendant insisted that the codefendant committed perjury when testifying that the codefendant's attorney did not discuss "substantial assistance" with the codefendant, these arguments were merely speculative. Pihlman v. State, 292 Ga. App. 612, 664 S.E.2d 904 (2008), cert. denied, No. S08C1954, 2008 Ga. LEXIS 977 (Ga. 2008) (decided under former O.C.G.A. §§ 24-9-21 and 24-9-24).

When no request is made by accused or the accused's counsel to confer privately without the presence of the marshal, the mere existence of such right would not affect the validity of the conviction, since there must be denial of such right by the trial judge before the accused may complain. Fowler v. Grimes, 198 Ga. 84, 31 S.E.2d 174, cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626 (1944) (decided under former Code 1933, §§ 38-418 and 38-419).

Testimony of coconspirator's lawyer barred in criminal proceeding. — Criminal defendant's request to call defendant's coconspirator's counsel to rebut the coconspirator's testimony that the coconspirator had not been offered any "deal" by the state in exchange for the coconspirator's testimony was properly denied because the testimony the defendant sought to elicit came within the attorney-client privilege. Avery v. State, 244 Ga. App. 177, 534 S.E.2d 897 (2000) (decided under former O.C.G.A. §§ 24-9-21, 24-9-24, and 24-9-25).

Attorney revealing location of victim's body to court. — While the state is likely correct that defendant's attorney had a positive obligation to reveal the location of the victim's body to law enforcement officers, it does not follow of necessity that the state should disclose to the jury that the source of the information that led to the discovery of the body was the attorney. Offering such testimony is a dangerous practice, and one the Supreme Court disapproves. Williams v. State, 258 Ga. 281, 368 S.E.2d 742 (1988), cert. denied, 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 606 (1989) (decided under former O.C.G.A. §§ 24-9-21, 24-9-24, and 24-9-25).

School records when mental capacity raised as defense. — Pre-trial discovery of defendant's school records was permissible and not in error because the defendant, on trial for murder, raised the issue of mental retardation and put the defendant's mental capacity at issue, thus causing the affirmative defense of privilege to be waived. Perkinson v. State, 279 Ga. 232, 610 S.E.2d 533, cert. denied, 546 U.S. 896, 126 S. Ct. 229, 163 L. Ed. 2d 214 (2005) (decided under former O.C.G.A. § 24-9-21).

Admission of certain letters did not violate privilege. — Admission of three

letters from attorneys to the defendant in a malice murder trial did not violate the attorney-client privilege: the first letter was not privileged as the letter merely showed employment of an attorney; the second letter simply forwarded a letter noting the enclosure of a final payment for a real estate transaction; and the third letter was a follow-up letter asking the defendant if there was a mortgage or another indebtedness on the property and whether the defendant had a deed. Bryant v. State, 282 Ga. 631, 651 S.E.2d 718 (2007) (decided under former O.C.G.A. § 24-9-24).

Knowledge of plea deal. — Testimony that defendant sought from a codefendant's lawyer relating to an alleged deal to provide substantial assistance to the prosecution fell within the attorney-client privilege because there was no evidence of any fraud or crime; although the defendant insisted that the codefendant committed perjury when by testifying that the codefendant's attorney did not discuss "substantial assistance" with the codefendant, these arguments were merely speculative. Pihlman v. State, 292 Ga. App. 612, 664 S.E.2d 904 (2008), cert. denied, No. S08C1954, 2008 Ga. LEXIS 977 (Ga. 2008) (decided under former O.C.G.A. § 24-9-25).

Statement ceases to be privileged when renounced by criminal defendant. — When the defendant in a murder trial testified, without objection, at the defendant's previous trial that the defendant lied to the defendant's attorney by telling the attorney that someone at the scene of the shooting handed the defendant the murder weapon, the defendant's testimony caused the information to cease to be a privileged communication, and proof of the statement at the defendant's later trial became permissible. Felts v. State, 244 Ga. 503, 260 S.E.2d 887 (1979) (decided under former Code 1933, § 38-418).

Habeas proceeding. — Habeas petitioner who asserted a claim of ineffective assistance of counsel made a limited waiver of the attorney-client privilege and work product doctrine and the state was entitled only to counsel's documents and files relevant to the specific allegations of ineffectiveness. Waldrip v. Head, 272 Ga. 572, 532 S.E.2d 380 (2000) (decided under former O.C.G.A. § 24-9-21).

Habeas petitioner who asserted a claim of ineffective assistance of counsel made a limited waiver of the attorney-client privilege and work product doctrine; thus, the state was entitled only to counsel's documents and files relevant to the specific allegations of ineffectiveness. Waldrip v. Head, 272 Ga. 572, 532 S.E.2d 380 (2000) (decided under former O.C.G.A. §§ 24-9-24, 24-9-25).

11. Application in Other Specific Actions

Actions by client against attorney. — Rule as to privilege has no application if the client, in an action against the attorney, charges negligence, malpractice, or fraud, or other professional misconduct. In such cases it would be a manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of the attorney. Daughtry v. Cobb, 189 Ga. 113, 5 S.E.2d 352 (1939) (decided under former Code 1933, § 38-1605).

Testimony pertaining to attorney fees is not a matter the knowledge of which the lawyer obtains from the client, and it is not necessary that the attorney be listed as a witness in the pre-trial order in order to testify as to such fees. Halpern v. Lacy Inv. Corp, 259 Ga. 264, 379 S.E.2d 519 (1989) (decided under former O.C.G.A. § 24-9-25).

No disqualification in adversarial bankruptcy action after former representation in arbitration proceeding. — Bankruptcy court denied a trustee's motion to disqualify an attorney who represented a church that was sued in an adversary proceeding; although the attorney represented the church during an arbitration proceeding that led to a settlement agreement, and the trustee claimed that the attorney was a potential witness who had information relevant to the claim that the church breached the settlement agreement, the court noted that former O.C.G.A. § 24-9-25 protected the attorney from being called to testify about information the attorney obtained while performing legal services for the church, and that evidence regarding nonprivileged matters

Communications Between Attorney and Client (Cont'd)
11. Application in Other Specific Actions (Cont'd)

was attainable from other sources, and the court found that allowing the attorney to represent the church would not be a violation of Ga. St. Bar R. 4-102:3.7. Hays v. Paradise Mission Church, Inc. (In re Harrington, George & Dunn, P.C.), No. 05-91725, 2007 Bankr. LEXIS 2160 (Bankr. N.D. Ga. May 29, 2007) (decided under former O.C.G.A. § 24-9-25).

Consider statute in disqualifying attorneys. — When there was no evidence showing the attorneys acquired knowledge regarding the surety's denial of a general contractor's claim in a capacity other than as surety's attorneys, and when it was unclear from the trial court's order whether the trial court considered former O.C.G.A. § 24-9-25 applicable to the decision to disqualify the attorneys, and the former statute being directly relevant to the issue of disqualification, the trial court's order disqualifying the surety's counsel was reversed and the case remanded for a determination of whether the attorneys could even be competent witnesses in the case. Amwest Sur. Ins. Co. v. Interstate Constr. Co., 212 Ga. App. 590, 442 S.E.2d 772 (1994) (decided under former O.C.G.A. § 24-9-25).

Incompetency does not relate solely to admissions made by the client. Freeman v. Brewster, 93 Ga. 648, 21 S.E. 165 (1894) (decided under Ga. L. 1887, p. 30, § 1).

Testimony of client as to advice given to the client by counsel is incompetent, and on timely motion should be excluded. Braxley v. State, 17 Ga. App. 196, 86 S.E. 425 (1915) (decided under former Penal Code 1910, § 1037).

Whether a law firm may claim privilege to legal advice regarding duties to a current client from in-house counsel depends on whether there is a conflict of interest between firm counsel's duty to the law firm and firm counsel's duty to the outside client. This question is largely a factual one, to be decided by the trial court. Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC, 317 Ga. App. 1, 730 S.E.2d 608 (2012) (decided under former O.C.G.A. §§ 24-9-24, 24-9-25, and 24-9-27).

Declaring book to be original. — Allowing defendant to state, under oath, that the book which defendant proposed to offer in evidence was the defendant's original book of entry was not such testimony or evidence in relation to the cause of action in issue or on trial as was contemplated by former statute. Strickland v. Wynn, 51 Ga. 600 (1874) (decided under former Code 1873, § 3854).

Contracts. — Former statute had no application to the competency of an attorney as a witness with respect to essential facts attending the execution of a contract in preparation and as to attestation of which the attorney rendered professional service. In such a matter the attorney was not testifying "for or against his client." Smith v. Smith, 222 Ga. 694, 152 S.E.2d 560 (1966), later appeal, 223 Ga. 560, 156 S.E.2d 901 (1967) (decided under former Code 1933, § 38-1605).

Evidence of employment of attorney. — It was competent to show the fact of an attorney's employment, either by the client or the attorney, and evidence confined to this fact was not objectionable on the ground that it involved confidential relations. Fowler v. Sheridan, 157 Ga. 271, 121 S.E. 308 (1924) (decided under former Civil Code 1910, § 5860).

Insurance carried by client. — Rule applies with reference to the attorney's knowledge concerning insurance which the client may have carried. Weatherbee v. Hutcheson, 114 Ga. App. 761, 152 S.E.2d 715 (1966) (decided under former Code 1933, § 38-1605).

Attorney's knowledge of contents of insurance policy. — When knowledge of an attorney of the contents of an insurance policy was acquired while acting in the attorney's professional capacity under employment to collect the policy, and by reason of that relationship, the attorney was an incompetent witness to testify to those facts, it was error to admit this evidence. Freeman v. Brewster, 93 Ga. 648, 21 S.E. 165 (1894) (decided under Ga. L. 1887, p. 30, § 1).

No privilege between principal and agent. — Communications between prin-

cipal and agent are not privileged, even if such communications ultimately reach the principal's attorney and are used in preparing a defense to litigation arising out of the occurrence forming the subject matter of the communications. GMC v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302 (1994) (decided under former O.C.G.A. § 24-9-21).

Communications between principal and agent are not privileged, even if such communications ultimately reach the principal's attorney and are used in preparing a defense to litigation arising out of the occurrence forming the subject matter of the communications. GMC v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302 (1994) (decided under former O.C.G.A. § 24-9-24).

Confidential informants. — Trial court did not abuse the court's discretion in denying disclosure of the identity of a confidential informant who may have seen defendant in the possession of contraband, but who was not present, did not participate in the arrest, and did not take part in the offense. Leonard v. State, 228 Ga. App. 792, 492 S.E.2d 747 (1997) (decided under former O.C.G.A. § 24-9-21).

Public policy in Georgia favored nondisclosure of the identity of a confidential informant (CI); because a CI did not participate in a controlled drug buy, the defendant's request to disclose the CI's identity was properly denied; while the defendant argued that the CI was a witness to whether or not the defendant consented to a search of the defendant's car, whether the defendant consented was immaterial because an officer was authorized to arrest the defendant for drug possession, and based on that arrest, the officer had the authority to search the car. Little v. State, 280 Ga. App. 60, 633 S.E.2d 403 (2006) (decided under former O.C.G.A. § 24-9-21).

Pursuant to former O.C.G.A. §§ 24-9-21 and 24-9-27 (see now O.C.G.A. §§ 24-5-501 and 24-5-505), the trial court correctly denied the defendant's motion to reveal a confidential informant's identity because the informant was a mere tipster; while the informant saw the victim and the defendant interact prior to entering a wooded area, the informant did not witness the actual rape, the offense forming the basis of the defendant's prosecution, and was not a participant in the attack. Strozier v. State, 314 Ga. App. 432, 724 S.E.2d 446 (2012) (decided under former O.C.G.A. § 24-9-21).

Identity of confidential informant. — In a prosecution for possession of cocaine with intent to distribute, the trial court did not err in not revealing the identity of a confidential informant since the informant's testimony was not material to the issue of guilt or punishment as the defendant was not charged with selling cocaine to the informant and the informant was not present during the search and arrest and was neither a participant in nor a witness to the specific offense with which the defendant was charged. Turner v. State, 247 Ga. App. 775, 544 S.E.2d 765 (2001) (decided under former O.C.G.A. § 24-9-21).

No privilege between applicant and employer. — Communications between an applicant for a job and the prospective employer, or between an applicant for unemployment insurance and the State Department of Labor, are not privileged communications for purposes of the former statute. Guy v. State, 138 Ga. App. 11, 225 S.E.2d 492 (1976) (decided under former Code 1933, § 38-418).

Out-of-state order prohibiting unprivileged testimony. — Michigan order, by facially prohibiting former corporate litigation consultant from testifying as to matters outside the scope of any privilege, violated Georgia public policy; therefore, the Full Faith and Credit Clause did not require the federal district court in Georgia to give full effect to the Michigan Court order. Williams v. GMC, 147 F.R.D. 270 (S.D. Ga. 1993) (decided under former O.C.G.A. §§ 24-9-21, 24-9-24, and 24-9-25).

Attorney attacking judgment. — Attorney of record who represented a plaintiff in bringing suit and taking judgment will not be heard to urge, in the attorney's own behalf, the invalidity of the judgment for want of process. Kennedy v. Redwine, 59 Ga. 327 (1877) (decided under former Code 1873, § 3854).

Communications with Grand Jurors

Privilege not waived by testifying before grand jury. — Civil plaintiff's counsel did not waive the work product privilege by testifying before a grand jury regarding information allegedly covered by the privilege and therefore did not render oneself a potential witness in the civil trial. Wrisco Indus., Inc. v. Hinely, 733 F. Supp. 106 (N.D. Ga. 1990) (decided under former O.C.G.A. § 24-9-24).

Secrets of State

Secrets of state created no disclosure privilege. — "Secrets of state" privilege did not exempt cost estimates of the DOT from disclosure under the Open Records Act, O.C.G.A. § 50-14-1 et seq. Hardaway Co. v. Rives, 262 Ga. 631, 422 S.E.2d 854 (1992) (decided under former O.C.G.A. § 24-9-21).

Existence of "open government" does not negate existence of attorney-client privilege as to matters discussed between county officials and county attorney. Dodson v. Floyd, 529 F. Supp. 1056 (N.D. Ga. 1981) (decided under former Code 1933, §§ 38-419 and 38-1605).

Communications Between Psychiatrist and Patient

Definition of psychiatrist. — "Psychiatrist" in former O.C.G.A. § 24-9-21 meant a person licensed to practice medicine, or reasonably believed by the patient so to be, who devoted a substantial portion of his or her time engaged in the diagnosis and treatment of a mental or emotional condition, including drug or alcohol addiction. Wiles v. Wiles, 264 Ga. 594, 448 S.E.2d 681 (1994) (decided under former O.C.G.A. § 24-9-21).

Nature of privilege between psychiatrist and patient. — As a matter of public policy, Georgia excludes communications between psychiatrist and patient. This privilege is absolute, although it may be waived. Without a waiver, there is no basis for the admission of testimony about communications between psychiatrist and patient. Freeman v. State, 196 Ga. App. 343, 396 S.E.2d 69 (1990) (decided under former O.C.G.A. § 24-9-21).

Prerequisite relationship. — Before the privilege may be invoked, the requisite relationship of psychiatrist and patient must have existed to the extent that treatment was given or contemplated. Massey v. State, 226 Ga. 703, 177 S.E.2d 79 (1970), cert. denied, 401 U.S. 964, 91 S. Ct. 984, 28 L. Ed. 2d 248 (1971), for comment, see 21 J. of Pub. L. 251 (1972) (decided under former Code 1933, § 38-418). Strickland v. State, 260 Ga. 28, 389 S.E.2d 230 (1990) (decided under former O.C.G.A. § 24-9-21); Mrozinski v. Pogue, 205 Ga. App. 731, 423 S.E.2d 405 (1992) (decided under former O.C.G.A. § 24-9-21).

When a party goes to a psychiatrist on the party's own volition for the purpose of gaining professional psychiatric assistance, this creates the requisite confidential relationship of psychiatrist and patient to claim the privilege. Kimble v. Kimble, 240 Ga. 100, 239 S.E.2d 676 (1977) (decided under former Code 1933, § 38-418).

Existence of a "voluntary" psychiatrist-patient relationship rendered any testimony whatsoever by the psychiatrist excludable from evidence at the election of the patient. Wilson v. Bonner, 166 Ga. App. 9, 303 S.E.2d 134 (1983) (decided under former O.C.G.A. § 24-9-21).

When the defendant, the father of a child, retained a psychiatrist and paid the psychiatrist's fee for the purpose of obtaining testimony for use in a contempt action for visitation rather than for the purpose of obtaining psychiatric treatment or counseling, no psychiatrist-patient relationship existed as contemplated by former O.C.G.A. § 24-9-21 and the psychiatrist was properly permitted to testify in a criminal action against the defendant. Fulbright v. State, 194 Ga. App. 827, 392 S.E.2d 298 (1990) (decided under former O.C.G.A. § 24-9-21).

No psychiatrist/patient relationship was created if: (1) the defendant was not seeking out psychiatric care in the usual sense of the term; and (2) no real treatment was given or contemplated. Rachals v. State, 184 Ga. App. 420, 361 S.E.2d 671 (1987), aff'd, 258 Ga. 48, 364 S.E.2d 867, cert. denied, 487 U.S. 1238, 108 S. Ct. 2909, 101 L. Ed. 2d 941 (1988)

(decided under former O.C.G.A. § 24-9-21).

Psychiatric medical records are not absolutely privileged. Donalson v. State, 192 Ga. App. 37, 383 S.E.2d 588 (1989), cert. denied, 493 U.S. 1030, 110 S. Ct. 742, 107 L. Ed. 2d 760 (1990) (decided under former O.C.G.A. § 24-9-21).

Contents of a psychiatrist's records were privileged as to communications between the psychiatrist and a patient; however, the privilege did not extend to communications made to nurses or attendants, unless the nurses or attendants were acting as agents of the psychiatrist, nor did it preclude discovery of the fact and dates of treatment. Plunkett v. Ginsburg, 217 Ga. App. 20, 456 S.E.2d 595 (1995) (decided under former O.C.G.A. § 24-9-21).

Parent's standing to sue for violation of child's privilege. — Father had standing to file suit for unauthorized disclosure of his minor daughter's clinical records and for unauthorized release of privileged material regarding his minor daughter. Mrozinski v. Pogue, 205 Ga. App. 731, 423 S.E.2d 405, cert. denied, 205 Ga. App. 901, 423 S.E.2d 405 (1992) (decided under former O.C.G.A. § 24-9-21).

Communications with physicians generally distinguished. — Former paragraph (5) of O.C.G.A. § 24-9-21 read with former O.C.G.A. § 24-9-40 (see now O.C.G.A. § 24-12-1) reflected that the physician shield law applied to physicians generally but required physicians to release information upon proper order, whereas the confidentiality of communications to psychiatrists was protected by public policy and such communications were expressly excepted from the shield statute. Gilmore v. State, 175 Ga. App. 376, 333 S.E.2d 210 (1985) (decided under former O.C.G.A. § 24-9-21).

Communications absolutely privileged. — When plaintiff's decedent took an overdose of prescription drugs and subsequently died during hospitalization, prior communications between decedent as patient and decedent's psychiatrist were not discoverable as objective evidence of decedent's mental state. Dynin v. Hall, 207 Ga. App. 337, 428 S.E.2d 89 (1993) (decided under former O.C.G.A. § 24-9-21).

Communications to coordinate care were proper. — Trial court properly directed a verdict in favor of the defendant, a psychiatrist, with regard to the plaintiff's invasion of privacy complaint, which asserted that the defendant's letters to the other treating physicians of the plaintiff violated the plaintiff's right to privacy because the evidence established that the information in the three letters disclosed to the plaintiff's other treating physicians was disclosed in an attempt to coordinate care; the sharing of the information did not amount to a public disclosure and there was no evidence that the other treating physicians shared the information with anyone else. Haughton v. Canning, 287 Ga. App. 28, 650 S.E.2d 718 (2007), cert. denied, No. S07C1869, 2008 Ga. LEXIS 157 (Ga. 2008) (decided under former O.C.G.A. § 24-9-21).

In an action arising from the unauthorized release of plaintiff's psychiatric records by a hospital authority, under the facts of the case, and because of the strong public policy of maintaining strict compliance with the requirements governing release of psychiatric records, the trial court erred in granting summary judgment to the defendants. Sletto v. Hospital Auth., 239 Ga. App. 203, 521 S.E.2d 199 (1999) (decided under former O.C.G.A. § 24-9-21).

Court-appointed psychiatrist may testify. — Psychiatrist appointed by the court for a sanity examination of the defendant may not be regarded as a prosecution witness, but is instead a witness for the court, and the psychiatrist's testimony as to statements made to the psychiatrist by the defendant during the course of the psychiatrist's examination of the defendant is admissible. Massey v. State, 226 Ga. 703, 177 S.E.2d 79 (1970), cert. denied, 401 U.S. 964, 91 S. Ct. 984, 28 L. Ed. 2d 248 (1971) (decided under former Code 1933, § 38-418). For comment, see 21 J. of Pub. L. 251 (1972).

Privileged relationship between psychiatrist and patient did not exist in criminal cases when the defendant pled not guilty by reason of insanity, and the psychiatrist

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was appointed by the court to determine the issue of sanity. Kimble v. Kimble, 240 Ga. 100, 239 S.E.2d 676 (1977) (decided under former Code 1933, § 38-418).

When a psychiatrist or psychologist was appointed by the court to conduct a preliminary examination of a criminal defendant, the psychiatrist or psychologist was a witness for the court, and the privilege concerning communications with a client did not apply. Christenson v. State, 261 Ga. 80, 402 S.E.2d 41 (1991), cert. denied, 502 U.S. 855, 112 S. Ct. 166, 116 L. Ed. 2d 130 (1991) (decided under former O.C.G.A. § 24-9-21).

Objective results of court-ordered examination are admissible. — When the examination of the defendant by a physician had been ordered by the court at the request of the defendant's counsel, communications between the defendant and the physician were protected, but the objective result of the examination was not so protected, and the objective result of the examination was admissible. Plummer v. State, 229 Ga. 749, 194 S.E.2d 419 (1972) (decided under former Code 1933, § 38-418).

Doctor's opinion that ward needed guardian. — In a proceeding to terminate a guardianship proceeding, even if a psychiatrist-patient relationship existed between the doctor and ward, admission of the doctor's opinion that the ward needed a guardian of the ward's estate was harmless because the testimony was cumulative of other evidence which was properly admitted. In re Vincent, 240 Ga. App. 876, 525 S.E.2d 409 (1999) (decided under former O.C.G.A. § 24-9-21).

Cross-examination after testimony about communication. — By calling the doctor as a witness and allowing the doctor to testify as to the mental condition of the accused, the defense waived the right to object to relevant cross-examination of the doctor on the ground that such matter was privileged communication between the patient and psychiatrist. Fields v. State, 221 Ga. 307, 144 S.E.2d 339 (1965) (decided under former Code 1933, § 38-418); Griggs v. State, 241 Ga. 317, 245 S.E.2d 269 (1978) (decided under former Code 1933, § 38-418).

Prosecutor's reference to the defendant's right to have psychiatrist not testify was not a violation of defendant's right against self-incrimination. Willett v. State, 223 Ga. App. 866, 479 S.E.2d 132 (1996) (decided under former O.C.G.A. § 24-9-21).

Since the defendant was not at a mental hospital for treatment nor did the record reflect that the defendant received any, the psychiatrist-patient privilege did not apply. Moody v. State, 244 Ga. 247, 260 S.E.2d 11 (1979) (decided under former Code 1933, § 38-418).

Joint counseling statement inadmissible. — Psychiatric-patient privilege applied to statements made by her husband in joint counseling sessions even though the wife requested admission at her trial for his murder. Sims v. State, 251 Ga. 877, 311 S.E.2d 161 (1984) (decided under former O.C.G.A. § 24-9-21).

Joint treatment with other persons. — Psychiatrist-patient privilege was not diminished by the fact that the patient sought or contemplated treatment jointly with other persons, or primarily for the benefit of another person who was in treatment by the same psychiatrist. Mrozinski v. Pogue, 205 Ga. App. 731, 423 S.E.2d 405, cert. denied, 205 Ga. App. 901, 423 S.E.2d 405 (1992) (decided under former O.C.G.A. § 24-9-21).

Facts of patient treatment and dates not within privilege. — Facts that two hospitals treated the defendant as a patient and the dates of those treatments were not within the psychiatrist-patient privilege. Johnson v. State, 254 Ga. 591, 331 S.E.2d 578 (1985), cert. denied, 490 U.S. 1072, 109 S. Ct. 2079, 104 L. Ed. 2d 644 (1989) (decided under former O.C.G.A. § 24-9-21).

Clinical record from psychiatric hospital producible, except for privileged communications. — When ex-husband, in a child custody proceeding, duly subpoenaed ex-wife's clinical record from the psychiatric hospital where she had voluntarily admitted herself, that record was producible, except for the portions containing any privileged communications. Weksler v. Weksler, 173 Ga. App.

250, 325 S.E.2d 874 (1985) (decided under former O.C.G.A. § 24-9-21).

Since the mental health records of an incompetent, deaf, and speechless criminal defendant contain both privileged communications under former O.C.G.A. § 24-9-21 and O.C.G.A. § 43-39-16, and nonprivileged communications, records which contain privileged material were not to be produced in response to a request for production, but the remaining documents must be produced. Annandale at Suwanee, Inc. v. Weatherly, 194 Ga. App. 803, 392 S.E.2d 27 (1990) (decided under former O.C.G.A. § 24-9-21).

Trial court erred by not conducting an in-camera inspection of a plaintiff's mental health records to determine whether the records contained any nonprivileged information relevant to the plaintiff's claims for damages in a civil suit. Aetna Cas. & Sur. Co. v. Ridgeview Inst., Inc., 194 Ga. App. 805, 392 S.E.2d 286 (1990) (decided under former O.C.G.A. § 24-9-21).

Discoverability in nonparty document production request. — Patient's failure to object within 10 days to a request for nonprivileged matter under a nonparty document production request did not amount to an affirmative waiver of privileged communications with the patient's psychiatrist. Hopson v. Kennestone Hosp., 241 Ga. App. 829, 526 S.E.2d 622 (1999), aff'd, 273 Ga. 145, 538 S.E.2d 742 (2000) (decided under former O.C.G.A. § 24-9-21).

Rule that a party's failure to object to a discovery request within the time required generally will result in a waiver of the right to object does not apply to requests under O.C.G.A. § 9-11-34(c) to nonparties for the production of documents that are protected by the psychiatrist-patient privilege. Hopson v. Kennestone Hosp., 241 Ga. App. 829, 526 S.E.2d 622 (1999), aff'd, 273 Ga. 145, 538 S.E.2d 742 (2000) (decided under former O.C.G.A. § 24-9-21).

In order to abrogate the psychiatrist-patient privilege, the defendant must make a showing of necessity, that is, that the evidence in question is critical to defendant's defense and that substantially similar evidence is otherwise unavailable to the defendant. Bobo v. State, 256 Ga. 357, 349 S.E.2d 690 (1986); King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834 (2002) (decided under former O.C.G.A. § 24-9-21).

Fact that plaintiff was seeking to recover damages for injuries of a mental and emotional nature would not constitute a waiver of the privilege to exclude testimony of defendant's psychiatrist. Wilson v. Bonner, 166 Ga. App. 9, 303 S.E.2d 134 (1983) (decided under former O.C.G.A. § 24-9-21).

Compositions written by defendant at the request of a psychiatrist were not subject to the evidentiary privilege for "communications between psychiatrist and patient" because the compositions were found in a trash can in defendant's home with no showing that the compositions were ever given to the psychiatrist. Daker v. State, 243 Ga. App. 848, 533 S.E.2d 393 (2000), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717 (2002), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717 (2002) (decided under former O.C.G.A. § 24-9-21).

Privilege waived. — Trial court in civil proceeding brought by an injured police officer against an individual who suffered from a mental condition did not err in ruling that the individual lost the statutory psychiatric privilege by involuntary commitment to a state mental health facility. Trammel v. Bradberry, 256 Ga. App. 412, 568 S.E.2d 715 (2002) (decided under former O.C.G.A. § 24-9-21).

Trial court did not abuse the court's discretion in admitting a 1980 report during the defendant's murder trial, which admitted a psychologist's testimony and materials, performed for evaluation purposes, specifically to explore the possibility of an insanity plea, rather than for professional treatment, as under Georgia law, there can be no expectation of confidentiality based on the psychologist/patient privilege when the sole purpose of the relationship is evaluation. Even if such a privilege existed as to the 1980 report, when the defendant raised the claim of mental retardation, putting the defendant's mental capacity at issue, such

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affirmative defense waived any privilege. Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747; reh'g denied, 554 U.S. 930, 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008) (decided under former O.C.G.A. § 24-9-21).

Other Mental Health Professionals

Communications with mental health professionals other than psychiatrists or psychologists. — When defendant's counselors were not psychiatrists nor clinical psychologists, defendant's communications with the counselors were not privileged. While it is arguable that disclosures made in confidence to mental health professionals other than psychiatrists and psychologists ought to be privileged, the legislature has not seen to make them so. Lipsey v. State, 170 Ga. App. 770, 318 S.E.2d 184 (1984) (decided under former O.C.G.A. § 24-9-21).

Communication with mental health professional. — Trial court erred in requiring a plaintiff to produce any confidential communications made between the plaintiff and the plaintiff's mental-health-care providers because the plaintiff's handling of discovery, albeit troublesome, did not amount to a decisive and unequivocal waiver of the plaintiff's mental-health privilege as the law required; the plaintiff's arguably misleading responses to opposing counsel's questions regarding a previous diagnosis of depression did not amount to a "decisive" and "unequivocal" waiver of the mental-health privilege, and the plaintiff's decision to answer the deposition question posed to the plaintiff (whether the plaintiff suffered from a history of depression), rather than object to the question at the time the issue of depression was raised, did not constitute an explicit waiver of the privilege. Mincey v. Ga. Dep't of Cmty. Affairs, 308 Ga. App. 740, 708 S.E.2d 644 (2011) (decided under former O.C.G.A. § 24-9-21).

Communication with psychologist. — Since the psychologist-patient privilege set forth in O.C.G.A. § 43-39-16 arises only when the patient voluntarily seeks treatment, the communications between a mother and a psychologist in the course of a court-ordered mental evaluation were not privileged, and there was no error in admitting evidence of that evaluation. In re L.H., 236 Ga. App. 132, 511 S.E.2d 253 (1999), overruled in part by State v. Herendeen, 279 Ga. 323, 613 S.E.2d 647 (2005) (decided under former O.C.G.A. § 24-9-21).

Defendant failed to show that trial counsel's failure to object to the admission of court-appointed psychologists' statements was indicative of ineffectiveness and was not a conscious and deliberate trial strategy. Johnson v. State, 255 Ga. App. 544, 566 S.E.2d 353 (2002), overruled in part by State v. Herendeen, 279 Ga. 323, 613 S.E.2d 647 (2005) (decided under former O.C.G.A. § 24-9-21).

Communication with referred therapist for evaluation in sexual abuse case was privileged. — Although the mother had been referred to the therapist for evaluation in the sexual abuse case, the mother's communications with the therapist during therapy were privileged under former O.C.G.A. § 24-9-21; the therapist provided mental health treatment to the mother as the therapist had seen the mother for counseling for two and a half years, the mother had not missed a session, and the mother found the treatment to have been beneficial. In the Interest of I.M.G., 276 Ga. App. 598, 624 S.E.2d 236 (2005) (decided under former O.C.G.A. § 24-9-21).

Psychologist-patient privilege applied to treatment records, regardless of whether that treatment was voluntary; since treatment of children had been directed by a case plan and a juvenile court, an in camera inspection of records sought in a criminal prosecution arising out of facts developed in the dependency investigation was proper, but the case was remanded for the trial court to consider in the court's examination the established parameters of the psychotherapist-patient privilege. Herendeen v. State, 268 Ga. App. 113, 601 S.E.2d 372 (2004), aff'd, 279 Ga. 323, 613 S.E.2d 647 (2005) (decided under former O.C.G.A. § 24-9-21).

Cross-examination of therapist limited. — In a prosecution for child molestation, the trial court did not err by limiting the defendant's cross-examination of the child's therapist and thereby preventing the defendant from engaging in a fishing expedition to dredge up evidence of domestic problems totally unrelated to the act of molestation. Atkins v. State, 243 Ga. App. 489, 533 S.E.2d 152 (2000) (decided under former O.C.G.A. § 24-9-21).

Refreshing recollection of defense psychologist improperly. — Trial court erred in permitting the state, on cross-examination, to have the defense psychologist refresh the psychologist's recollection, thereby effectively impeaching the defendant, by use of a privileged and confidential communication to the defense attorney's investigator; but because the impermissibly refreshed recollection was entirely consistent with, and cumulative of, other competent evidence, the error was harmless. Revera v. State, 223 Ga. App. 450, 477 S.E.2d 849 (1996) (decided under former O.C.G.A. § 24-9-24).

Communications between Physician and Patient

Patient-physician communications. — Confidential communications excluded from testimony do not include those made by a patient to a physician. Collins v. Howard, 156 F. Supp. 322 (S.D. Ga. 1957) (decided under former Code 1933, § 38-418).

Trial court did not err in admitting the testimony of a family practice physician from whom the defendant sought psychiatric referral two days after an alleged rape and who also consulted with the victim and attempted an examination of her pelvic area. Barnes v. State, 171 Ga. App. 478, 320 S.E.2d 597 (1984) (decided under former O.C.G.A. § 24-9-21).

Defendant offered no evidence that the information the defendant provided in the medical questionnaire was ever imparted to a medical professional so it could not be said that the document constituted a privileged communication within the meaning of paragraphs (5) or (6) of former O.C.G.A. § 24-9-21. Manning v. State, 231 Ga. App. 584, 499 S.E.2d 650 (1998) (decided under former O.C.G.A. § 24-9-21).

If nurse is agent of hospital rather than communicant's doctor, the doctor's privilege will not protect communications made to the nurse. Myers v. State, 251 Ga. 883, 310 S.E.2d 504 (1984) (decided under former O.C.G.A. § 24-9-21).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Code 1933, § 38-418, and former O.C.G.A. §§ 24-9-21 and 24-9-24 are included in the annotations for this Code section.

Court order or subpoena did not abrogate privilege created by statute relating to the confidentiality of the patient-psychiatrist relationship; any response to a subpoena or court order must take these provisions into consideration. 1974 Op. Att'y Gen. No. U74-86 (decided under former Code 1933, § 38-418).

Attorneys employed by state agencies. — Although state agencies may employ persons with legal training and experience to serve as administrative legal service officers, those persons may not provide legal advice or representation to the agency, and no attorney-client relationship or privilege arises between the legal services officer and other agency officers or employees, or the agency itself. 1995 Op. Att'y Gen. No. 95-1 (decided under former O.C.G.A. §§ 24-9-21 and 24-9-24).

ADVISORY OPINIONS OF THE STATE BAR

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Code 1933, § 38-419 are included in the annotations for this Code section.

It is ethically proper for a lawyer to reveal the confidences or secrets of clients in any proceedings in which revelation may be necessary to defend the

lawyer against charges of professional misconduct. Adv. Op. No. 80-27 (November 21, 1980) (decided under former Code 1933, § 38-419).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 273, 293, 325, 427, 431, 436, 449, 450, 505.

Am. Jur. Pleading and Practice Forms. — 19A Am. Jur. Pleading and Practice Forms, Physicians, Surgeons, and Other Healers, § 163.

Am. Jur. Proof of Facts. — Interference with Attorney-Client Relationship, 19 POF2d 335.

Protected Communication Between Physician and Patient, 45 POF2d 595.

Existence of Attorney-Client Relationship, 48 POF2d 525.

Proof of Waiver of Attorney-Client Privilege, 32 POF3d 189.

Proof of Basis for, and Grounds for Lifting, Work Product Protection Against Discovery, 39 POF3d 1.

C.J.S. — 27 C.J.S., Discovery, §§ 5, 18, 19. 32 C.J.S., Evidence, § 500. 98 C.J.S. (Rev), Witnesses, §§ 242 et seq., 350, 355, 391, 396, 404, 438, 457, 458.

ALR. — Admissibility of statements by attorney out of court as to probability of verdict or decision adverse to client, 8 ALR 1334.

Right to recover property held by public authorities as evidence for use in a criminal trial, 13 ALR 1168.

Applicability and effect in suit for alienation of affections of rule excluding confidential communications between husband and wife, 36 ALR 1068; 82 ALR 825.

Effect of knowledge of third person acquired by overhearing or seeing communication between husband and wife upon rule as to privileged communication, 63 ALR 107.

Privilege as to communications to attorney in connection with drawing of will, 64 ALR 144; 66 ALR2d 1302.

Concession, admission, or statement by defendant's attorney in criminal case as obviating necessity of introducing evidence on the point, 70 ALR 94.

Expression of willingness by witness that another should testify as waiver of privilege in respect of latter's testimony, 72 ALR 148.

Refusal of attorney to disclose identity of, whereabouts of, or other information relating to, his client as contempt, 101 ALR 470.

Attorney's comment on opposing party's refusal to permit introduction of, or to offer, privileged testimony, or to permit privileged witness to testify, 116 ALR 1170.

Attorney-client privilege as affected by wrongful or criminal character of contemplated acts or course of conduct, 125 ALR 508.

Physician-patient, attorney-client, or priest-penitent privilege as applicable in nonjudicial proceeding or investigation, 133 ALR 732.

Evidence: attorney-client privilege as applicable to communications between attorney and client's agent, employee, spouse, or relative, 139 ALR 1250.

Attorney-client privilege as applied to communications in presence of two or more persons interested in the subject matter to which the communications relate, 141 ALR 553.

Right of attorney to introduce evidence, and to cross-examine, in summary proceeding against him by, or in interest of, his client, 141 ALR 655.

Right to insist that opponent's claim of privilege shall be made in presence of jury, or to ask him if he is willing to waive privilege, 144 ALR 1007.

Evidence: statement or report by servant or agent to master or principal, in respect of matters then or afterward involved in litigation, as a privileged communication, 146 ALR 977.

Withdrawal, during same trial, of waiver of privilege of confidential communication, 158 ALR 219.

Right of one against whom testimony is offered to invoke privilege of communication between others, 2 ALR2d 645.

Conversations between husband and wife relating to property or business as within rule excluding private communications between them, 4 ALR2d 835.

"Communications" within testimonial

privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 10 ALR2d 1389.

Discovery or inspection of trade secret, formula, or the like, 17 ALR2d 383.

Court's power to determine, upon government's claim of privilege, whether official information contains state secrets or other matters disclosure of which is against public interest, 32 ALR2d 391.

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Party's waiver of privilege as to communications with counsel by taking stand and testifying, 51 ALR2d 521.

Privilege as to communications to attorney in connection with drawing of will, 66 ALR2d 1302.

Waiver of attorney-client privilege by personal representative or heir of deceased client or by guardian of incompetent, 67 ALR2d 1268.

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Construction of statute creating privilege against disclosure of communications made to stenographer or confidential clerk, 96 ALR2d 159.

Right of corporation to assert attorney-client privilege, 98 ALR2d 241; 26 ALR5th 628; 27 ALR5th 76.

Applicability of attorney-client privilege to communications with respect to contemplated tortious acts, 2 ALR3d 861.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.

Testamentary capacity as affected by use of intoxicating liquor or drugs, 9 ALR3d 15.

Attorney-client privilege as affected by communications between several attorneys, 9 ALR3d 1420.

Attorney-client privilege as affected by its assertion as to communications, or transmission of evidence, relating to crime already committed, 16 ALR3d 1029.

Disclosure of name, identity, address, occupation, or business of client as violation of attorney-client privilege, 16 ALR3d 1047.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings, 21 ALR3d 912.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 ALR3d 1401.

Power of trustee in bankruptcy to waive privilege of communications available to bankrupt, 31 ALR3d 557.

Propriety and prejudicial effect of comment by counsel as to refusal to permit introduction of privileged testimony, 32 ALR3d 906.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege, but owned by another, 37 ALR3d 1373.

Privilege in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient, 44 ALR3d 24.

Defense attorney as witness for his client in state criminal case, 52 ALR3d 887.

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Applicability of attorney-client privilege to matters relating to drafting of nonexistent or unavailable nontestamentary documents, 55 ALR3d 1322.

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Discovery, in medical malpractice action, of names of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 74 ALR3d 1055.

Discovery of hospital's internal records or communications as to qualifications or evaluations of individual physician, 81 ALR3d 944.

Modern status of interspousal tort immunity in personal injury and wrongful death actions, 92 ALR3d 901.

Competency of one spouse to testify against other in prosecution for offense against child of both or either, 93 ALR3d 1018.

Effect, on competency to testify against spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce, 98 ALR3d 1285.

Privilege of newsgatherer against disclosure of confidential sources or information, 99 ALR3d 37.

Spouse's betrayal or connivance as extending marital communications privilege to testimony of third person, 3 ALR4th 1104.

Communication between unmarried couple living together as privileged, 4 ALR4th 422.

Applicability of attorney-client privilege to evidence or testimony in subsequent action between parties originally represented contemporaneously by same attorney, with reference to communication to or from one party, 4 ALR4th 765.

Disqualification of attorney because member of his firm is or ought to be witness in case — modern cases, 5 ALR4th 574.

Testimonial privilege for confidential communications between relatives other than husband and wife — state cases, 6 ALR4th 544; 62 ALR5th 629.

Testimony before or communications to private professional society's judicial commission, ethics committee, or the like, as privileged, 9 ALR4th 807.

Existence of spousal privilege where marriage was entered into for purpose of barring testimony, 13 ALR4th 1305.

Applicability of attorney-client privilege to communications made in presence of or solely to or by third person, 14 ALR4th 594.

Attorney-client privilege as extending to communications relating to contemplated civil fraud, 31 ALR4th 458.

Privilege as to communications between lay representative in judicial or administrative proceedings and client, 31 ALR4th 1226.

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Statute of limitations applicable to third person's action against psychiatrist, psychologist, or other mental health practitioner, based on failure to warn persons against whom patient expressed threats, 41 ALR4th 1078.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 ALR4th 395.

Right of independent expert to refuse to testify as to expert opinion, 50 ALR4th 680.

Insured-insurer communications as privileged, 55 ALR4th 336.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications, 62 ALR4th 1134.

Attorney-client privilege: who is "representative of the client" within state statute or rule privileging communications between an attorney and the representative of the client, 66 ALR4th 1227.

Involuntary disclosure or surrender of will prior to testator's death, 75 ALR4th 1144.

Application of attorney-client privilege to electronic documents, 26 ALR6th 287.

Determination of whether a communication is from a corporate client for purposes of the attorney-client privilege—modern cases, 26 ALR5th 628.

What corporate communications are entitled to attorney-client privilege—modern cases, 27 ALR5th 76.

What persons or entities may assert or waive corporation's attorney-client privilege — modern cases, 28 ALR5th 1.

Waiver of evidentiary privilege by inadvertent disclosure — state law, 51 ALR5th 603.

Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 ALR5th 591.

"Communications" within testimonial privilege of confidential communications between husband and wife as including

knowledge derived from observation by one spouse of acts of other spouse, 23 ALR6th 1.

Application of attorney-client privilege to electronic documents, 26 ALR6th 287.

Construction and application of fiduciary duty exception to attorney-client privilege, 47 ALR6th 255.

Applicability of attorney-client privilege to communications made in presence of or solely to or by nonattorney consultants, professionals, and similar contractors, 66 ALR6th 83.

Applicability of attorney-client privilege to communications made in presence of or solely to or by family members or companion, confidant, or friend of attorneys or client or attesting witnesses for client's will, 67 ALR6th 341.

Construction and application of self-protection or self-defense exception to attorney-client privilege, 71 ALR6th 249.

Waiver of evidentiary privilege by inadvertent disclosure — federal law, 159 ALR Fed. 153.

Views of United States Supreme Court as to attorney-client privilege, 159 ALR Fed. 243.

24-5-502. Communications to clergyman privileged.

Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or any Christian or Jewish minister or similar functionary, by whatever name called, shall be deemed privileged. No such minister, priest, rabbi, or similar functionary shall disclose any communications made to him or her by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, rabbi, or similar functionary be competent or compellable to testify with reference to any such communication in any court. (Code 1981, § 24-5-502, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For note discussing confidential communication privileges in Georgia, see 2 Ga. St. B.J. 356 (1966).

For comment, "The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved," see 34 Emory L.J. 777 (1985).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-22 are included in the annotations for this Code section. The reader is advised to consult the annotations following Code Section 24-5-501, which may also be applicable to this Code section.

Presence of more than one person. — Clerical privilege was not waived by the presence of more than one person seeking spiritual comfort or counseling. Alternative Health Care Sys. v. McCown, 237 Ga. App. 355, 514 S.E.2d 691 (1999) (decided under former O.C.G.A. § 24-9-22).

Trial court did not err when the court denied the defendant's motion to suppress the confession the defendant made to the police chaplain because the trial court obviously believed the chaplain's adamant denial that the chaplain had repeated the defendant's confession to the police. The testimony revealed that the defendant confessed to the police officer in the chaplain's presence. Blocker v. State, 265 Ga. App. 846, 595 S.E.2d 654 (2004) (decided under former O.C.G.A. § 24-9-22).

Pastor who had physical custody of a child for two months was allowed to testify as to the child's condition at a

termination of parental rights proceeding since there was no showing that any communications or observations arose from spiritual counseling or as a profession of religious faith. Jones v. Department of Human Resources, 168 Ga. App. 915, 310 S.E.2d 753 (1983) (decided under former O.C.G.A. § 24-9-22).

Inapplicable to "father figure." — Defendant's conversations with a witness who had served as a father figure for the defendant throughout the defendant's life were not privileged, even though the witness had been ordained two years before the defendant committed the murder with which the defendant was charged. Morris v. State, 275 Ga. 601, 571 S.E.2d 358 (2002) (decided under former O.C.G.A. § 24-9-22).

Inapplicable to "spiritual advisor" or "psychic." — Statutory privilege does not apply to a "spiritual advisor" or "psychic." Manous v. State, 200 Ga. App. 293, 407 S.E.2d 779 (1991) (decided under former O.C.G.A. § 24-9-22).

Inapplicable to conversational statements to friend. — Under former O.C.G.A. § 24-9-22, every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to a clergy person were deemed privileged; however, if such communications were not made to profess religious faith, or to seek spiritual comfort or guidance, but rather were conversational statements to a friend or frequent companion, the ministerial privilege was not applicable. Parnell v. State, 260 Ga. App. 213, 581 S.E.2d 263 (2003) (decided under former O.C.G.A. § 24-9-22).

Son's statements were not privileged. — Defendant's statements to the defendant's father, a minister, were not privileged under former O.C.G.A. § 24-9-22 as the defendant, in talking to the defendant's father, was not seeking comfort or solace of a spiritual nature, but was seeking the help of a parent and a source of secular strength to accompany the defendant to the police station. Parnell v. State, 260 Ga. App. 213, 581 S.E.2d 263 (2003) (decided under former O.C.G.A. § 24-9-22).

Waiver of privilege. — Very general testimony by the plaintiff that a chaplain met with the plaintiff's family and offered spiritual support and comfort, and the plaintiff's deposition statement, in response to the defendants' questioning, that the plaintiff was not upset by anything the chaplain said, did not address in any way the substance of the plaintiff's conversations with the chaplain and did not amount to a waiver of the privilege. Alternative Health Care Sys. v. McCown, 237 Ga. App. 355, 514 S.E.2d 691 (1999) (decided under former O.C.G.A. § 24-9-22).

Because the defendant requested the future assistance of an attorney, not immediate assistance, and because the defendant knew that the defendant's confession would be handed over to law enforcement, the clergy-parishioner privilege in former O.C.G.A. §§ 24-3-51 and 24-9-22 (see now O.C.G.A. §§ 24-5-502 and 24-8-825) was inapplicable; therefore, the defendant's confession to the crimes was voluntary. Willis v. State, 287 Ga. 703, 699 S.E.2d 1 (2010) (decided under former O.C.G.A. § 24-9-22).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 493.

C.J.S. — 98 C.J.S. (Rev), Witnesses, § 440 et seq.

ALR. — Physician-patient, attorney-client, or priest-penitent privilege as applicable in nonjudicial proceeding or investigation, 133 ALR 732.

Withdrawal, during same trial, of waiver of privilege of confidential communication, 158 ALR 219.

Persons other than client or attorney affected by, or included within, attorney-client privilege, 96 ALR2d 125; 31 ALR4th 1226.

Who is "clergyman" or the like entitled to assert privilege attaching to communications to clergymen or spiritual advisers, 49 ALR3d 1205.

Matters to which the privilege covering communications to clergyman or spiritual advisor extends, 71 ALR3d 794.

Subject matter and waiver of privilege covering communications to clergy member or spiritual adviser, 93 ALR5th 327.

Who are "clergy" or like within privilege attaching to communications to clergy members or spiritual advisers, 101 ALR5th 619.

24-5-503. Husband and wife as witnesses for and against each other in criminal proceedings.

(a) A husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other.

(b) The privilege created by subsection (a) of this Code section or by corresponding privileges in paragraph (1) of subsection (a) of Code Section 24-5-501 or subsection (a) of Code Section 24-5-505 shall not apply in proceedings in which:

(1) The husband or wife is charged with a crime against the person of a child under the age of 18, but such husband or wife shall be compellable to give evidence only on the specific act for which the accused is charged;

(2) The husband or wife is charged with a crime against his or her spouse;

(3) The husband or wife is charged with causing physical damage to property belonging to the husband and wife or to their separate property; or

(4) The alleged crime against his or her current spouse occurred prior to the lawful marriage of the husband and wife. (Code 1981, § 24-5-503, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 105, § 1/HB 711.)

The 2012 amendment, effective January 1, 2013, substituted the present provisions of subsection (b) for the former provisions, which read: "The privilege created by subsection (a) of this Code section or by corresponding privileges in paragraph (1) of subsection (a) of Code Section 24-5-501 or subsection (a) of Code Section 24-5-505 shall not apply in proceedings in which the husband or wife is charged with a crime against the person of a child under the age of 18, but such husband or wife shall be compellable to give evidence only on the specific act for which the accused is charged."

Cross references. — Competency of wife to testify against husband in proceeding against husband for abandonment of wife, § 19-10-2.

Law reviews. — For article, "The Marital Privileges in Georgia: What You Should Know," see 6 Ga. St. B.J. 8 (2001). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 204 (2012).

For note, "Circling the Wagons: Informational Privacy and Family Testimonial Privileges," see 20 Ga. L. Rev. 173 (1985).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-23 are included in the annotations for this Code section.

Privilege of refusing to testify belongs to witness and not to accused. Morris v. State, 173 Ga. App. 663, 327 S.E.2d 792 (1985) (decided under former O.C.G.A. § 24-9-23); Mapp v. State, 191 Ga. App. 622, 382 S.E.2d 618, cert. denied, 191 Ga. App. 922, 382 S.E.2d 618 (1989) (decided under former O.C.G.A. § 24-9-23); Brown v. State, 261 Ga. 66, 401 S.E.2d 492 (1991), cert. denied, 502 U.S. 906, 112 S. Ct. 296, 116 L. Ed. 2d 240 (1991) (decided under former O.C.G.A. § 24-9-23); Duncan v. State, 232 Ga. App. 157, 500 S.E.2d 603 (1998) (decided under former O.C.G.A. § 24-9-23).

Defendant had no standing to exclude a spouse's testimony at the trial because the privilege against spousal testimony was available only to the witness-spouse. Corn v. Zant, 708 F.2d 549 (11th Cir. 1983), cert. denied, 467 U.S. 1220, 104 S. Ct. 2670, 81 L. Ed. 2d 375 (1984), vacated in part on other grounds sub nom., Corn v. Kemp, 772 F.2d 681 (11th Cir. 1985), judgment vacated, 478 U.S. 1016, 106 S. Ct. 3326, 92 L. Ed. 2d 732 (1986), remanded for further consideration in light of Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), aff'd, 837 F.2d 1474 (1987), cert. denied, 486 U.S. 1023, 108 S. Ct. 1997, 100 L. Ed. 2d 228 (1988) (decided under former O.C.G.A. § 24-9-23); Chancey v. State, 256 Ga. 415, 349 S.E.2d 717 (1986), cert. denied, 481 U.S. 1029, 107 S. Ct. 1954, 95 L. Ed. 2d 527 (1987) (decided under former O.C.G.A. § 24-9-23).

Trial court did not err in allowing the defendant's spouse to testify in the defendant's trial for shooting their two adult sons to death as the privilege of refusing to testify belonged to the witness, the spouse, and not to the accused; moreover, nothing showed that the spouse's testimony was not voluntary. Biswas v. State, 255 Ga. App. 339, 565 S.E.2d 531 (2002) (decided under former O.C.G.A. § 24-9-23).

Statements of common-law spouse admissible. — In a murder prosecution, where defendant's common-law spouse asserted privilege not to testify against the defendant, statements the spouse made during the official investigation and confirmed at a subsequent pre-trial hearing were admissible as an exception to the hearsay rule without conducting an additional hearing on the statement's reliability. Drane v. State, 265 Ga. 663, 461 S.E.2d 224 (1995) (decided under former O.C.G.A. § 24-9-23). But see Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (1999).

Privilege did not depend upon stability of marriage. — Application of the privilege of refusing to testify did not depend upon the stability of the marriage, either at the time of the communication or at the time the privilege was asserted. Brown v. State, 261 Ga. 66, 401 S.E.2d 492 (1991), cert. denied, 502 U.S. 906, 112 S. Ct. 296, 116 L. Ed. 2d 240 (1991) (decided under former O.C.G.A. § 24-9-23).

Marital testimonial privilege could be asserted even though the marriage was entered into for the purpose of preventing the spouse's testimony. State v. Peters, 213 Ga. App. 352, 444 S.E.2d 609 (1994) (decided under former O.C.G.A. § 24-9-23).

Privilege may be invoked by spouse who testified at previous hearing. — Privilege not to testify may be invoked by the witness spouse even if he or she testified for or against the defendant spouse in a previous hearing. Brown v. State, 261 Ga. 66, 401 S.E.2d 492 (1991), cert. denied, 502 U.S. 906, 112 S. Ct. 296, 116 L. Ed. 2d 240 (1991) (decided under former O.C.G.A. § 24-9-23).

Comments on the failure of a spouse to testify constituted impermissible argument and warranted reversal. Price v. State, 175 Ga. App. 780, 334 S.E.2d 711 (1985) (decided under former O.C.G.A. § 24-9-23).

No protection for documents prepared by third party. — Although communications between a husband and a wife are confidential and privileged, such protections did not apply to financial documents either prepared or seen by third

parties; a trial court did not err in granting a motion to compel an employee and the husband to produce financial documents such as checks, account statements, and tax returns. Dempsey v. Kaminski Jewelry, Inc., 278 Ga. App. 814, 630 S.E.2d 77 (2006) (decided under former O.C.G.A. § 24-9-23).

In prosecution for manslaughter, marital privilege justified exclusion of suicidal statements the decedent allegedly related to the decedent's spouse on the day that the decedent was shot. Robinson v. State, 221 Ga. App. 865, 473 S.E.2d 519 (1996) (decided under former O.C.G.A. § 24-9-23).

Subsection (b) of former O.C.G.A. § 24-9-23 applied when the victim and spouse were the same person; the victim of statutory rape could be compelled to testify even though the victim and the defendant were married at the time of the trial. Hamilton v. State, 210 Ga. App. 398, 436 S.E.2d 522 (1993) (decided under former O.C.G.A. § 24-9-23).

Spouse as victim. — When the victim, defendant's wife, who had refused to testify for the state against her husband, was called by her husband, the fact that she asserted her privilege during the state's case was not conclusive because the privilege not to incriminate one's spouse at the behest of the state is different from the privilege not to testify for one's spouse and she should have been summoned to state her intentions before the presiding judge whether she would testify at the behest of her husband or reassert her privilege. Respres v. State, 244 Ga. App. 689, 536 S.E.2d 586 (2000) (decided under former O.C.G.A. § 24-9-23).

Knowing that the victim was going to invoke the marital privilege, the defendant was not entitled to a mistrial because the defendant did not timely object to the announcement of the defendant's wife's name as a witness; in any event, the mere announcement of the victim's name, without more, did not constitute the creation by the state of an "unwarranted negative inference" against the defendant. Carter v. State, 275 Ga. App. 483, 621 S.E.2d 503 (2005) (decided under former O.C.G.A. § 24-9-23).

Failure of a defendant's spouse to testify was not a legitimate subject matter of argument for counsel for the state, although such a comment did not constitute reversible error when the trial court rebuked the prosecuting attorney immediately in the presence of the jury, instructed the jury that it was not necessary for any defendant or the defendant's spouse ever to take the stand, and that the burden was always upon the state to prove a defendant's guilt beyond a reasonable doubt. Casey v. State, 167 Ga. App. 437, 306 S.E.2d 683 (1983) (decided under former O.C.G.A. § 24-9-23).

State may comment generally when defendant relied upon spouse's actions for corroboration. — It did not appear that it was harmful error for the state to comment generally, without direct reference to the exercise of the spousal privilege, upon the fact that the state has no power to call a defendant's spouse who had not given direct testimony, but whose words and actions were relied upon by the defendant as being somewhat corroborative of the defendant's own exculpatory testimony. Under these circumstances, such a comment by the state would be no more than a statement informing the jury that the state's failure to call the nontestifying spouse did not necessarily signify an acceptance of or acquiescence in a portion of the defendant's exculpatory version of the events to which defendant has testified. Wynn v. State, 168 Ga. App. 132, 308 S.E.2d 392 (1983) (decided under former O.C.G.A. § 24-9-23).

Severance of spouse's trial from defendant not required. — Trial court did not err in denying the defendant's motion to sever the defendant's trial from that of the defendant's spouse because the defendant made no showing that the denial of the motion forced the defendant to choose between the defendant's right to a defense and the defendant's spousal privilege, former O.C.G.A. § 24-9-23; the defendant argued that the defendant was compelled not to testify, which was not safeguarded by former § 24-9-23 and was not a denial of due process, and there was nothing confusing about the evidence and no danger that the evidence against the spouse would be considered against the defendant. Holland v. State, 310 Ga. App. 623, 714 S.E.2d 126 (2011) (decided under former O.C.G.A. § 24-9-23).

Testimony when spouse was charged with a crime against a minor child. — When defendant standing trial for child molestation argued that the prosecuting attorney improperly questioned the defendant's failure to call the defendant's spouse as a witness and that such argument constituted reversible error because the defendant could not compel the defendant's spouse to testify, there was no reversible error in the state's remarks on defendant's failure to call the spouse as a witness, since spousal immunity does not apply to proceedings in which one spouse was charged with a crime against a minor child under subsection (b) of former O.C.G.A. § 24-9-23. Sosebee v. State, 190 Ga. App. 746, 380 S.E.2d 464, cert. denied, 493 U.S. 933, 110 S. Ct. 323, 107 L. Ed. 2d 313 (1989) (decided under former O.C.G.A. § 24-9-23).

Privilege created by former O.C.G.A. § 24-9-23 did not apply in proceedings in which the husband or wife was charged with a crime against the person of a minor, albeit testimony was compellable only with respect to the specific act for which the defendant was charged. Pirkle v. State, 234 Ga. App. 23, 506 S.E.2d 186 (1998) (decided under former O.C.G.A. § 24-9-23).

With regard to a defendant's conviction on child molestation charges, the defendant's trial counsel was not deficient in failing to object to certain testimony of the defendant's ex-spouse, the parent of the victim, concerning a prior bad act on the ground that the testimony violated the marital privilege, because the defendant was not on trial for the prior act; therefore, the ex-spouse was competent, although not compellable, to testify concerning the prior act, and thus since the ex-spouse did not invoke the privilege and was able to waive the privilege by voluntarily taking the stand and testifying, trial counsel was not ineffective for failing to object to the testimony of the ex-spouse on the basis of marital privilege. Nichols v. State, 288 Ga. App. 118, 653 S.E.2d 300 (2007) (decided under former O.C.G.A. § 24-9-23).

Email from the defendant to the defendant's spouse was not evidence given under compulsion by the defendant's spouse and so was not subject to the marital privilege under former O.C.G.A. § 24-9-23(b) in a case charging the defendant with malice murder and related offenses in connection with the death of the defendant's 11-year-old step-daughter. Reaves v. State, 284 Ga. 236, 664 S.E.2d 207 (2008) (decided under former O.C.G.A. § 24-9-23).

Because O.C.G.A. § 16-12-80 prohibited a person from disseminating obscene material of any description, and the definition of obscene material made no reference to a minor, distributing obscene materials was not a crime against the person of a minor child within the plain meaning of former O.C.G.A. § 24-9-23(b). Peck v. State, 300 Ga. App. 375, 685 S.E.2d 367 (2009) (decided under former O.C.G.A. § 24-9-23).

Defendant's alleged violation of O.C.G.A. § 16-5-70(d), cruelty to children, was a "crime against the person of a minor child" within the meaning of former O.C.G.A. § 24-9-23(b), which provided an exception to the marital privilege against testifying in cases of crimes against the person of children, even though no physical contact was involved. Therefore, a trial court did not err in compelling defendant's spouse to testify against the defendant despite invoking the privilege. Sherman v. State, 302 Ga. App. 312, 690 S.E.2d 915, cert. denied, No. S10C0961, 2010 Ga. LEXIS 545 (Ga. 2010) (decided under former O.C.G.A. § 24-9-23).

Trial court did not err in ruling that the state could compel the defendant's spouse to testify even though the spouse was not a witness to the specific act charged, child molestation, because the spouse testified that the spouse did not know that the defendant had been applying ointment to the victim, and that evidence was sufficiently relevant to the molestation acts charged against the defendant so that the spouse's testimony was compellable under former O.C.G.A. § 24-9-23(b). O'Neal v. State, 304 Ga. App. 548, 696 S.E.2d 490 (2010) (decided under former O.C.G.A. § 24-9-23).

Subsequent marriage of a minor victim. — Trial court did not err in concluding that the victim, who subsequently married the defendant, could be com-

pelled to testify against the defendant with regard to the charge of sexual exploitation of children because that charge qualified as a crime against the person of a minor based upon the public policy expressed in former O.C.G.A. § 24-9-23(b), the particular pictures involved in the case, and the specific subsection of O.C.G.A. § 16-12-100 with which the defendant was charged; the pictures in the defendant's possession showed the victim personally engaged in sexually explicit conduct. Peck v. State, 300 Ga. App. 375, 685 S.E.2d 367 (2009) (decided under former O.C.G.A. § 24-9-23).

Common-law marriage, when recognized, is sufficient to invoke the husband-wife privilege. However, in face of conflicting evidence as to a common-law marriage, the trial court is authorized to find that no common-law marriage exists. Jordan v. State, 267 Ga. 442, 480 S.E.2d 18 (1997) (decided under former O.C.G.A. § 24-9-23).

Factual determination by the state court that a witness was not the defendant's common-law spouse was required to be deferred to by the federal courts in a habeas corpus proceeding; therefore, the testimony of this witness was not a violation of the marital privilege and did not render the defendant's trial fundamentally unfair. Holton v. Newsome, 750 F.2d 1513 (11th Cir. 1985) (decided under former O.C.G.A. § 24-9-23).

There was substantial evidence in support of the trial court's finding that there was no common-law marriage between the trial witness and the defendant. Therefore, the defendant could not assert the marital privilege. Schirato v. State, 260 Ga. 170, 391 S.E.2d 116 (1990) (decided under former O.C.G.A. § 24-9-23).

In view of conflicting evidence, no common-law marriage. — Former O.C.G.A. § 24-9-23 was not applicable when, in view of the conflicting evidence as to the existence of a common-law marriage between the defendant and the state's witness, the trial court was authorized to find that no common-law marriage existed. Brown v. State, 187 Ga. App. 347, 370 S.E.2d 203, cert. denied, 187 Ga. App. 907, 370 S.E.2d 203 (1988) (decided under former O.C.G.A. § 24-9-23).

If evidence was in conflict as to existence of marriage, the trial judge may hear evidence to determine whether a marriage existed, and the judge's decision will not be disturbed on appeal if there was any evidence to support the judge's finding or the trial court may submit to the jury with appropriate instructions the question of whether or not a marriage exists. Sheffield v. State, 241 Ga. 245, 244 S.E.2d 869 (1978) (decided under former Code 1933, § 38-1604).

Waiver of privilege presumed. — When the witness voluntarily took the stand and testified, it would be presumed that the witness did so pursuant to a waiver of the witnesse's privilege. Mapp v. State, 191 Ga. App. 622, 382 S.E.2d 618, cert. denied, 191 Ga. App. 922, 382 S.E.2d 618 (1989) (decided under former O.C.G.A. § 24-9-23); White v. State, 211 Ga. App. 694, 440 S.E.2d 68 (1994) (decided under former O.C.G.A. § 24-9-23).

Trial court was not obligated to advise the defendant's spouse of the marital privilege under former O.C.G.A. § 24-9-23(b) relating to the spouse's testimony at defendant's sentencing hearing, and as the defendant's spouse testified voluntarily, it was presumed that the spouse waived the marital privilege. Ingram v. State, 262 Ga. App. 304, 585 S.E.2d 211 (2003) (decided under former O.C.G.A. § 24-9-23).

Trial court did not err in allowing a probationer's spouse to testify without informing the spouse of the marital privilege pursuant to former O.C.G.A. §§ 24-9-21 and 24-9-23 (see now O.C.G.A. §§ 24-5-501 and 24-5-503) because the spouse was aware of the privilege but never asserted the privilege to the trial court, and it was assumed that the spouse waived the right not to testify; the spouse was informed by defense counsel of the spouse's rights under the marital privilege, and the spouse did not assert the privilege even after defense counsel voiced objections to the testimony in the spouse's presence. Geter v. State, 300 Ga. App. 396, 685 S.E.2d 342 (2009) (decided under former O.C.G.A. § 24-9-23).

Termination upon death or divorce. — Unlike the evidentiary prohibition of former O.C.G.A. § 24-9-21(1) (see now O.C.G.A. § 24-5-501), excluding

interspousal communications, the spousal privilege against compellability in former O.C.G.A. § 24-9-23 ceased when the marriage was terminated by death or divorce. Chadwick v. State, 176 Ga. App. 296, 335 S.E.2d 674 (1985), aff'd, 255 Ga. 376, 339 S.E.2d 717 (1986) (decided under former O.C.G.A. § 24-9-23).

Defendant's claim that the former spouse's testimony was improperly admitted was rejected as the spouse's former O.C.G.A. § 24-9-23 privilege ceased before the trial when the marriage was terminated by divorce. Young v. State, 280 Ga. 65, 623 S.E.2d 491 (2005) (decided under former O.C.G.A. § 24-9-23).

Spouse's forced testimony not reversible error. — Even if the trial court erred in compelling the defendant's wife to testify concerning an assault of the wife as a similar transaction, such error was not reversible since there was no reasonable possibility of a different verdict; in addition to the wife's testimony, the state also presented testimony of the defendant's girlfriend, the victim of defendant's assault, a neighbor who witnessed parts of the altercation, other corroborating witnesses, as well as evidence of prior difficulties between defendant and the girlfriend. Phillips v. State, 278 Ga. App. 439, 629 S.E.2d 130 (2006) (decided under former O.C.G.A. § 24-9-23).

Instructions to jury. — Defendant accused of voluntary manslaughter was entitled to a new trial since the trial court failed to give curative instructions to the jury following closing remarks by the state noting the failure of the defendant's spouse to testify. Ferry v. State, 161 Ga. App. 795, 287 S.E.2d 732 (1982) (decided under former O.C.G.A. § 24-9-23).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 230, 284.

C.J.S. — 98 C.J.S. (Rev), Witnesses, §§ 227 et seq., 350 et seq.

ALR. — Rule rendering husband or wife incompetent as a witness for the other in a criminal case as changed without the aid of a statute expressly abrogating it or comprehensively removing disqualification of witnesses, 93 ALR 1144.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 10 ALR2d 1389.

Effect of divorce or annulment on competency of one former spouse as witness against other in criminal prosecution, 38 ALR2d 570.

Calling or offering accused's spouse as witness for prosecution as prejudicial misconduct, 76 ALR2d 920.

Husband or wife as competent witness for or against co-offender with spouse, 90 ALR2d 648.

Competency of one spouse to testify against other in prosecution for offense against child of both or either, 93 ALR3d 1018.

Effect, on competency to testify against spouse or on marital communication privilege, of separation or other marital instability short of absolute divorce, 98 ALR3d 1285.

Spouse's betrayal or connivance as extending marital communications privilege to testimony of third person, 3 ALR4th 1104.

Communication between unmarried couple living together as privileged, 4 ALR4th 422.

Existence of spousal privilege where marriage was entered into for purpose of barring testimony, 13 ALR4th 1305.

Communications between spouses as to joint participation in crime as within privilege of interspousal communications, 62 ALR4th 1134.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution—modern state cases, 74 ALR4th 223.

Competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction, 74 ALR4th 277.

Adverse presumption or inference based on party's failure to produce or examine spouse — modern cases, 79 ALR4th 694.

Competency of one spouse to testify against other in prosecution for offense against child of both or either or neither, 119 ALR5th 275.

"Communications" within testimonial privilege of confidential communications between husband and wife as including knowledge derived from observation by one spouse of acts of other spouse, 23 ALR6th 1.

Marital privilege under Rule 501 of Federal Rules of Evidence, 46 ALR Fed 735.

24-5-504. Law enforcement officers testifying; home address.

Any law enforcement officer testifying in his or her official capacity in any criminal proceeding shall not be compelled to reveal his or her home address. Such officer may be required to divulge the business address of his or her employer, and the court may require any law enforcement officer to answer questions as to his or her home address whenever such fact may be material to any issue in the proceeding. (Code 1981, § 24-5-504, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

RESEARCH REFERENCES

ALR. — Right to cross-examine witness as to his place of residence, 85 ALR3d 541.

24-5-505. Party or witness privilege.

(a) No party or witness shall be required to testify as to any matter which may incriminate or tend to incriminate such party or witness or which shall tend to bring infamy, disgrace, or public contempt upon such party or witness or any member of such party or witness's family.

(b) Except in proceedings in which a judgment creditor or judgment creditor's successor in interest seeks postjudgment discovery involving a judgment debtor pursuant to Code Section 9-11-69, no party or witness shall be required to testify as to any matter which shall tend to work a forfeiture of his or her estate.

(c) No official persons shall be called on to disclose any state matters of which the policy of the state and the interest of the community require concealment. (Code 1981, § 24-5-505, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI.

Law reviews. — For article, "Caught Between a Rock and a Hard Place: Invocation of the Privilege Against Self-Incrimination in Civil Cases," see 15 (No. 1) Ga. St. B.J. 14 (2009).

For note discussing discovery proceedings available to creditors, see 12 Ga. L. Rev. 814 (1978).

For comment discussing the privilege against answers tending to disgrace but not incriminate, see 18 Ga. B.J. 88 (1955). For comment, "The Government's Privilege to Withhold the Identity of Informers, as Applied to Decoys," see 20 Ga. B.J. 562 (1958).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, §§ 3102, 3814, 3870, former Civil Code 1895, §§ 3947, 3957, 5288, former Civil Code 1910, §§ 4544, 4554, 5877, former Code 1933, §§ 38-1102, 38-1205, 38-1711, Ga. L. 1978, p. 2000, § 1, and former O.C.G.A. § 24-9-27 are included in the annotations for this Code section.

Public policy underlying this privilege is to protect and encourage the flow of information to law enforcement officials. Thornton v. State, 238 Ga. 160, 231 S.E.2d 729, later appeal, 239 Ga. 693, 238 S.E.2d 376 (1977), cert. denied, 434 U.S. 1073, 98 S. Ct. 1260, 55 L. Ed. 2d 778 (1978) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Form for invoking privilege. — When it is plain from the context of the questioning in general that the plaintiff was invoking the Fifth Amendment privilege against self-incrimination it is not necessary to invoke the privilege in express terms. Temple v. Temple, 228 Ga. 73, 184 S.E.2d 183 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Self-incrimination and forfeiture provisions compared. — Self-incrimination privilege involved important policy and constitutional implications not applicable to the forfeiture privilege. Kushner v. Mascho, 143 Ga. App. 801, 240 S.E.2d 290 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Witness protected from indirect incrimination. — Protection was not limited to cases if the question or answer had a direct tendency to incriminate the defendant or to expose the defendant to a penalty or forfeiture; the defendant was protected from answering any question which may form a link in the chain by which such cases were to be established. Simpson v. Simpson, 233 Ga. 17, 209 S.E.2d 611 (1974) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Witness must explain silence. — Witness may not stand moot, but must testify that the answer would incriminate or tend to incriminate oneself, work a forfeiture of one's estate, or tend to bring infamy or disgrace or public contempt upon the witness or any member of one's family as the case may be, otherwise one would be in contempt. Wynne v. State, 139 Ga. App. 355, 228 S.E.2d 378 (1976) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Inference may be drawn when privilege invoked. — Although a person does have a right to invoke the privilege in a civil case in order to protect oneself, when the person does so, an inference against the person's interest may be drawn by the factfinder. Simpson v. Simpson, 233 Ga. 17, 209 S.E.2d 611 (1974) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Jefferson Ins. Co. v. Dunn, 224 Ga. App. 732, 482 S.E.2d 383 (1997) (decided under former O.C.G.A. § 24-9-27).

Appeal from motion to disclose identity of informant. — State was without authority to appeal from the grant of a motion to disclose the identity of the confidential informant because it was not among the enumerated instances set forth in O.C.G.A. § 5-7-1, nor was the order dispositive of the charges against the defendant. Glenn v. State, 271 Ga. 604, 523 S.E.2d 13 (1999) (decided under former O.C.G.A. § 24-9-27).

Public policy in Georgia favored nondisclosure of the identity of a confidential informant (CI); because a CI did not participate in a controlled drug buy, the defendant's request to disclose the CI's iden-

tity was properly denied; while the defendant argued that the CI was a witness to whether or not the defendant consented to a search of the defendant's car, whether the defendant consented was immaterial because an officer was authorized to arrest the defendant for drug possession, and based on that arrest, the officer had the authority to search the car. Little v. State, 280 Ga. App. 60, 633 S.E.2d 403 (2006) (decided under former O.C.G.A. § 24-9-27).

Trial court did not err in refusing the defendant's request to disclose the identity of a confidential informant in order to support an entrapment defense as the defendant was unable to present an arguably persuasive case regarding the lack of a predisposition to commit the crime based specifically on: (1) a discussion with a detective about the impending drug sale; (2) the defendant's act of displaying a weapon considered to be protection against a robbery; and (3) the defendant's act of coordinating the movements of the numerous participants in the large-scale transaction the defendant was a part of. Griffiths v. State, 283 Ga. App. 176, 641 S.E.2d 169 (2006) (decided under former O.C.G.A. § 24-9-27).

Instructions. — It was not reversible error for the court to fail or refuse to instruct a witness of the existence of a law designed for the witness's own protection and not for the protection of another person who was on trial; whatever might be its effect if the witness were personally afterward put on trial, a third person, against whom the witness testified, cannot complain that such witness was not so instructed. Guiffrida v. State, 61 Ga. App. 595, 7 S.E.2d 34 (1940) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

When the court instructed the witness as follows: "If at any time there's any question as to whether or not you should answer a question as possibly tending to incriminate you or as holding you up for public contempt, for public ridicule, you may have a right to refuse to answer it," there was no error, since the court gave the witness fair and adequate notice of the witness's privilege against self-incrimination. Wilbanks v. Wilbanks, 220 Ga. 665, 141 S.E.2d 161 (1965) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Privilege against self-incrimination can be waived in praesenti. Feig v. Feig, 246 Ga. 763, 272 S.E.2d 723 (1980) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Waiver of self-incrimination by property settlement agreement. — Privilege against self-incrimination can be voluntarily waived by property settlement agreement as to future income tax returns and financial information covering future financial events unknown at the time of entering into the contract. Feig v. Feig, 246 Ga. 763, 272 S.E.2d 723 (1980) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Notice of waiver. — When a person represented by counsel enters into a property settlement agreement which has the necessary effect of waiving a constitutional right, express notice of or reference to such waiver is not required. Feig v. Feig, 246 Ga. 763, 272 S.E.2d 723 (1980) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Waiver by a witness at a former trial of the same case will not bar the witness's right to exercise the witness's privilege. Georgia R.R. & Banking Co. v. Lybrend, 99 Ga. 421, 27 S.E. 794 (1896) (decided under former Civil Code 1895, §§ 3947, 3957, and 5288); Mallin v. Mallin, 227 Ga. 833, 183 S.E.2d 377 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Party, though introduced as a witness in party's own behalf, may, upon cross-examination as to matters not voluntarily testified about on direct examination, decline to give testimony which would tend to incriminate the party, or to bring infamy, disgrace, or public contempt upon the witness or the witness's family, notwithstanding the fact that at a previous trial of the case the witness had waived the privilege of remaining silent as to these matters. A waiver of this kind is not binding upon a witness at a trial subsequent to that at which the waiver was made. Bass v. Bass, 222 Ga. 378, 149 S.E.2d 818 (1966) (decided under former

General Consideration (Cont'd)

Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Self-Incrimination

Interest of the court in considering a refusal on the grounds of incrimination is not that the defendant may be criminally implicated by an answer but that the defendant might conceivably be so implicated. Tennesco, Inc. v. Berger, 144 Ga. App. 45, 240 S.E.2d 586 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Privilege must be honored. — Questioned party's invocation of a constitutional privilege to be free from compulsion to testify against oneself must be honored. Eason v. Berger & Co., 153 Ga. App. 126, 264 S.E.2d 579 (1980) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Incriminating effect can be under state or federal law. — Witness in a state court can claim the privilege against self-incrimination as to matters which might tend to incriminate the witness under either state or federal law. Mallin v. Mallin, 227 Ga. 833, 183 S.E.2d 377 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Privilege was personal to witness. — Privilege against self-incrimination was that of the person under examination as a witness, and was intended for the witness's protection only. Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980), sentence vacated, 449 U.S. 988, 101 S. Ct. 523, 66 L. Ed. 2d 285 (1980) (remanded for consideration in light of Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980)), aff'd, 247 Ga. 233, 275 S.E.2d 318 (1981) decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Riley v. State, 257 Ga. 91, 355 S.E.2d 66 (1987) (decided under former O.C.G.A. § 24-9-27).

Privilege cannot be asserted in advance of the questions actually propounded in the examination or hearing. Chastain v. State, 113 Ga. App. 601, 149 S.E.2d 195 (1966) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Indiscriminate assertion of privilege prohibited. — What was impermissible was that a defendant in a civil case merely slides out of the defendant's obligations by a brash assertion that any and all questions directed to the defendant would tend to incriminate the defendant, regardless of the likelihood of such result. Tennesco, Inc. v. Berger, 144 Ga. App. 45, 240 S.E.2d 586 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Witness required to answer if evidence was material. — Witness was required to answer questions tending to bring infamy, disgrace, or public contempt upon the witness or the witness's family, if the proposed evidence was material to the issues in the case; it was only if the proposed answer had no effect on the case except to impair the witness's credibility that the witness may fall back on the privilege. Brown v. State, 242 Ga. 536, 250 S.E.2d 438 (1978) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Notice to witness of privilege. — It was not error for the trial court to allow the state to advise a defense witness before the witness testified regarding Miranda warnings and the witness's Fifth Amendment rights when, in an earlier statement, the witness detailed how the defendant had forced the witness to have sexual intercourse with the victim on three occasions creating the possibility that the witness could be charged with felony offenses. Allen v. State, 210 Ga. App. 447, 436 S.E.2d 559 (1993) (decided under former O.C.G.A. § 24-9-27).

Determining the possibility of incrimination. — When a question is propounded it belongs to the court to consider and to decide whether any direct answer to the question can implicate the witness. If this be decided in the negative, then the witness may answer the question without violating the privilege which is secured to the witness by law. If a direct answer to it may incriminate the witness, then the witness must be the sole judge what the witness's answer would be. The court cannot participate with the witness in this judgment. If the question be of such a description that the answer to the ques-

tion may or may not incriminate the witness, according to the purport of that answer, it must rest with the witness, who alone can tell what it would be, to answer the question or not. If in such a case the witness says, upon the witness's oath, that the witness's answer would incriminate the witness, the court can demand no other testimony of the fact. Bass v. Bass, 222 Ga. 378, 149 S.E.2d 818 (1966) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Interstate Life & Accident Ins. Co. v. Wilmont, 123 Ga. App. 337, 180 S.E.2d 913 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Wynne v. State, 139 Ga. App. 355, 228 S.E.2d 378 (1976) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Baker v. State, 162 Ga. App. 606, 292 S.E.2d 451 (1982) (decided under former O.C.G.A. § 24-9-27); Lawrence v. State, 257 Ga. 423, 360 S.E.2d 716 (1987) (decided under former O.C.G.A. § 24-9-27).

When a court cannot say that answers to questions concerning a defendant's financial resources and dealings might not tend to incriminate the defendant in any matter, under either state or federal law, a trial judge does not err in allowing the defendant to determine whether answers to the interrogatories might tend to incriminate the defendant. Mallin v. Mallin, 227 Ga. 833, 183 S.E.2d 377 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Mere say-so of the witness did not establish a substantial, real danger of incrimination: the defendant must also show the defendant had reasonable cause to apprehend danger of incrimination from the answer, and the court must first determine whether there was a proper basis for invoking the privilege. Prince & Paul v. Don Mitchell's WLAQ, Inc., 127 Ga. App. 502, 194 S.E.2d 269 (1972) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

In a civil action the burden was on the reneging defendant to consider each question separately and state the defendant's general reason for any refusal to answer, at which point the trial judge may decide either that the question might be incriminating under certain circumstances (whether or not the defendant had in fact committed any crime) or whether or not the line of questions as a whole, and as a matter of law, might so tend; the discretion of neither was absolute. Tennesco, Inc. v. Berger, 144 Ga. App. 45, 240 S.E.2d 586 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Trial court did not engage in the required analysis for a witness asserting a Fifth Amendment privilege, but merely declared that answering the questions concerning knowledge of the court's order regarding removing a child from a father's home would not incriminate the witness; at a minimum, such knowledge would establish a link in the chain of evidence needed to prove the witness was in contempt of that order and the trial court's finding of contempt based on the witness's refusal to answer the question was improper. In re Tidwell, 279 Ga. App. 734, 632 S.E.2d 690 (2006) (decided under former O.C.G.A. § 24-9-27).

Compelled production of documents did not violate self-incrimination privilege. — There was no blanket right to refuse to answer questions in civil proceedings based on the self-incrimination privilege, and since there was no transcript of the hearing at which the trial court made the court's finding that the privilege was not implicated, the appellate court presumed that evidence supported the trial court's finding and order compelling discovery; further, the trial court's order compelling an employee and the husband to produce financial documents such as checks, account statements, and tax returns in a civil proceeding did not violate the self-incrimination privilege. Dempsey v. Kaminski Jewelry, Inc., 278 Ga. App. 814, 630 S.E.2d 77 (2006) (decided under former O.C.G.A. § 24-9-27).

Requiring suspect to verbalize specified words for identification purposes, whether or not the words used were the same as those allegedly used during the commission of the offense, did not violate an accused's privilege against self-incrimination accorded the accused by the United States Constitution and the state's statutes and constitution. Clark v.

Self-Incrimination (Cont'd)

State, 166 Ga. App. 366, 304 S.E.2d 494 (1983) (decided under former O.C.G.A. § 24-9-27).

Trial court's refusal to allow questions as to sexual relations proper. — Trial court did not err by refusing an ex-husband's questions to his former wife seeking to determine whether she engaged in sexual intercourse with her live-in lover on the grounds of self-incrimination in an ex-husband's action to modify alimony payments. Hathcock v. Hathcock, 249 Ga. 74, 287 S.E.2d 19 (1982) (decided under former O.C.G.A. § 24-9-27).

Instruction to jury necessary if party refuses to answer questions about sexual relations. — Ex-wife litigant's refusal to incriminate herself by answering questions about her sexual relations with a live-in lover required the trial court to instruct the jury about the adverse inference the jury might wish to draw from such an answer. The failure to charge the jury left the jury without instructions as to the nature and effect of the legal basis for this adverse inference, and the error was harmful since proof of sexual intercourse between an ex-wife and the third party was the linch-pin of the former husband's case. Hathcock v. Hathcock, 249 Ga. 74, 287 S.E.2d 19 (1982) (decided under former O.C.G.A. § 24-9-27).

Prior testimony stricken when privilege invoked. — After a female witness was asked if she did not have children and she reluctantly replied in the affirmative and was then asked if she had ever been married, there was no error on the part of the court in instructing the witness that she need not answer the question, nor in ruling out the former answer, on her declining to answer the second question. Gravett v. State, 74 Ga. 191 (1884) (decided under former Code 1882, §§ 3107, 3814, and 3870).

Party as witness. — Party, though introduced as a witness in the party's own behalf, may, upon cross-examination as to matters not voluntarily testified about on direct examination, claim the party's privilege. Bishop v. Bishop, 157 Ga. 408, 121 S.E. 305 (1924) (decided under former Civil Code 1910, §§ 4544, 4554, and 5877).

Form for invoking privilege. — When it is plain from the context of the questioning in general that the plaintiff was invoking the Fifth Amendment privilege against self-incrimination it is not necessary to invoke the privilege in express terms. Temple v. Temple, 228 Ga. 73, 184 S.E.2d 183 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Forfeiture of Estate

Determining the possibility of incrimination. — When a witness testifies under oath that the witness's answer to any question asked of the witness would incriminate the witness and come within the constitutional immunities guaranteed to the witness, the court can demand no further testimony of the fact. Interstate Life & Accident Ins. Co. v. Wilmont, 123 Ga. App. 337, 180 S.E.2d 913 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Extensive questioning concerning financial affairs might tend to incriminate a person as a matter of law. In the particular situation of financial affairs, only the defendant or witness can weigh the effect. Busby v. Citizens Bank, 131 Ga. App. 738, 206 S.E.2d 640 (1974) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Privilege did not cover a pledge by the defendant not to reveal information. Tennesco, Inc. v. Berger, 144 Ga. App. 45, 240 S.E.2d 586 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Privilege inapplicable when earning ability alone was threatened. — Forfeiture of estate objection, if it meant merely that answering would interfere with the defendant's mode of earning a living, was not acceptable. Tennesco, Inc. v. Berger, 144 Ga. App. 45, 240 S.E.2d 586 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); In re Manheim, 259 Ga. 791, 387 S.E.2d 330 (1990) (decided under former O.C.G.A. § 24-9-27).

Post-judgment discovery. — Former statute did not protect a person from answering financial questions on post-judgment discovery because such answer may tend to work a forfeiture of a person's estate. Any forfeiture would not result from answering the questions or producing documents, but rather as a result of the judgment already entered. First Fed. Sav. & Loan Ass'n v. Fisher, 422 F. Supp. 1 (N.D. Ga. 1976), aff'd, 544 F.2d 902 (5th Cir. 1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Kushner v. Mascho, 143 Ga. App. 801, 240 S.E.2d 290 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

State Matters

Identity of informants need not be disclosed. — Ordinarily, one who acts in the capacity of a peace officer or connected therewith will not be required by the courts to disclose the name of their informants concerning a crime for which an accused is being tried. Anderson v. State, 72 Ga. App. 487, 34 S.E.2d 110 (1945) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Morgan v. State, 211 Ga. 172, 84 S.E.2d 365 (1954) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Thomas v. State, 134 Ga. App. 18, 213 S.E.2d 129 (1975) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); State v. Keith, 139 Ga. App. 399, 228 S.E.2d 332 (1976), aff'd, 238 Ga. 157, 231 S.E.2d 727 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); State v. Burnett, 249 Ga. App. 334, 548 S.E.2d 443 (2001) (decided under former O.C.G.A. § 24-9-27).

Disclosure of an informer's name was not required under former O.C.G.A. § 24-9-27. Childs v. State, 158 Ga. App. 376, 280 S.E.2d 401 (1981) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Trial court did not abuse the court's discretion in denying disclosure of the identity of a confidential informant who may have seen the defendant in the possession of contraband, but who was not present, did not participate in the arrest, and did not take part in the offense. Leonard v. State, 228 Ga. App. 792, 492 S.E.2d 747 (1997) (decided under former O.C.G.A. § 24-9-27).

No protection for testimony of eyewitness. — When the defendant was seeking the testimony of an eyewitness to the incident which formed the basis of the crimes charged, the witness was not subject to protection as a confidential informer and the defendant did not have the burden of proving the materiality or necessity of the witness's testimony. Swint v. State, 199 Ga. App. 515, 405 S.E.2d 333 (1991) (decided under former O.C.G.A. § 24-9-27).

In a prosecution for possession of cocaine with intent to distribute, the trial court did not err in not revealing the identity of a confidential informant since the informant's testimony was not material to the issue of guilt or punishment as the defendant was not charged with selling cocaine to the informant and the informant was not present during the search and arrest and was neither a participant in nor a witness to the specific offense with which the defendant was charged. Turner v. State, 247 Ga. App. 775, 544 S.E.2d 765 (2001) (decided under former O.C.G.A. § 24-9-27).

Nondisclosure grounded in public policy. — Privilege of not disclosing sources of information in criminal cases is grounded in a sound public policy which recognizes the need for informants in the enforcement of the criminal laws and the further consideration that revelation of the identity of an informer destroys the informer's usefulness for any other cases. Stanford v. State, 134 Ga. App. 61, 213 S.E.2d 519 (1975) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

When the possible testimony of an informant would be of minimal significance to a defendant and when the information provided was mere evidence tending to establish a public nuisance, the public policy in favor of nondisclosure of the informant's identify must control. Chancey v. Hancock, 233 Ga. 734, 213 S.E.2d 633 (1975) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Absolute privilege against disclosure not permitted. — An absolute priv-

State Matters (Cont'd)

ilege against disclosure of the identity of every informer who supplied the information upon which an arrest was based was impermissible when a motion was made to disclose information favorable to the defendant. Thornton v. State, 238 Ga. 160, 231 S.E.2d 729, later appeal, 239 Ga. 693, 238 S.E.2d 376 (1977), cert. denied, 434 U.S. 1073, 98 S. Ct. 1260, 55 L. Ed. 2d 778 (1978) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Disclosure of informant's identity was discretionary with court. — Disclosure of the name, address, and the other information of an informant was not required as a matter of law, but rested in the discretion of the trial judge, balancing the rights of the defendant and the rights of the state under all the facts and circumstances. Taylor v. State, 136 Ga. App. 31, 220 S.E.2d 49 (1975) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); State v. Keith, 139 Ga. App. 399, 228 S.E.2d 332 (1976), aff'd, 238 Ga. 157, 231 S.E.2d 727 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Thornton v. State, 238 Ga. 160, 231 S.E.2d 729, later appeal, 239 Ga. 693, 238 S.E.2d 376 (1977), cert. denied, 434 U.S. 1073, 98 S. Ct. 1260, 55 L. Ed. 2d 778 (1978); Hatcher v. State, 154 Ga. App. 770, 270 S.E.2d 16 (1980) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Miller v. State, 163 Ga. App. 889, 296 S.E.2d 182 (1982) (decided under former O.C.G.A. § 24-9-27).

Disclosure not warranted if informant is mere tipster. — If the state proves to the court's satisfaction that an informer is a pure tipster, who has neither participated in nor witnessed the offense, any evidence the informer might offer would be hearsay and inadmissible. Thus, the tipster's identity could not be material to the guilt or innocence of the defendant or be relevant and helpful to the defense. The public policy of the state toward nondisclosure would not be overcome and the state may rely on the privilege. Thornton v. State, 238 Ga. 160, 231 S.E.2d 729, later appeal, 239 Ga. 693, 238 S.E.2d 376 (1977), cert. denied, 434 U.S. 1073, 98 S. Ct. 1260, 55 L. Ed. 2d 778 (1978) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

When the interviewing officer testified that the tipster had no personal knowledge of the crime and was merely repeating the conversation of an unknown person the tipster had overheard at a party, and when the tipster's information was not supportable by any evidence the police were able to uncover, the state was empowered to refuse to identify the tipster on the ground that the tipster's contribution was not material to the defense on the issue of guilt or punishment. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 391 (1979) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Pursuant to former O.C.G.A. §§ 24-9-21 and 24-9-27 (see now O.C.G.A. §§ 24-5-501 and 24-5-505), the trial court correctly denied the defendant's motion to reveal a confidential informant's identity because the informant was a mere tipster; while the informant saw the victim and the defendant interact prior to entering a wooded area, the informant did not witness the actual rape, the offense forming the basis of the defendant's prosecution, and was not a participant in the attack. Strozier v. State, 314 Ga. App. 432, 724 S.E.2d 446 (2012) (decided under former O.C.G.A. § 24-9-27).

Disclosure not warranted if informant's life threatened. — If the district attorney objects to a question asking whether a "responsible citizen" in an affidavit is a particular person, and states that the lives of the informants had been threatened and requests the court not to require the witness to name them, there is no error in a court's refusing to disclose the name of the person who gave the information. Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Informant and decoy compared. — When a person merely takes an undercover police officer to a location and identifies, or introduces the officer to the defendant, and the officer arranges for and buys contraband from the defendant, and the person witnesses such sale, or alleged

sale, such person is an informant and not a "decoy" and a disclosure of one's name, address, etc., to the defendant is not required as a matter of law but rests in the discretion of the trial judge, balancing the rights of the defendant and the rights of the state under all the facts and circumstances. Bell v. State, 141 Ga. App. 277, 233 S.E.2d 253 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Miller v. State, 141 Ga. App. 382, 233 S.E.2d 460 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711); Howard v. State, 144 Ga. App. 208, 240 S.E.2d 908 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Court must hear evidence before ordering disclosure. — Mere refusal of the state to disclose the identity of an informer does not authorize a trial judge to exercise the judge's discretion as to whether disclosure should be required when the judge hears no evidence as the judge was required to do under Ga. L. 1966, p. 567, § 13 (now O.C.G.A. § 17-5-30(b)). State v. Keith, 139 Ga. App. 399, 228 S.E.2d 332 (1976), aff'd, 238 Ga. 157, 231 S.E.2d 727 (1977) (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

Disclosure when informant was a witness or participant in trial. — See Henderson v. State, 162 Ga. App. 320, 292 S.E.2d 77 (1982) (decided under former O.C.G.A. § 24-9-27).

Trial court exercised discretion in determining that the witness need not disclose the identity of the informer. — See Carter v. State, 168 Ga. App. 6, 308 S.E.2d 30 (1983) (decided under former O.C.G.A. § 24-9-27).

Failure to compel disclosure of informant not error. — Trial court does not err in failing to compel the state to disclose an informant's identity in camera at a motion to suppress hearing. Miller v. State, 169 Ga. App. 552, 314 S.E.2d 120 (1984) (decided under former O.C.G.A. § 24-9-27).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 38-1102, 38-1205, and 38-1711 are included in the annotations for this Code section.

Georgia Bureau of Investigation is not required to turn its files over to an investigating subcommittee of the United States Senate. 1954-56 Op. Att'y Gen. p. 336 (decided under former Code 1933, §§ 38-1102, 38-1205, and 38-1711).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Criminal Law — Need for Disclosure of identity of Informant, 33 POF2d 549.

C.J.S. — 27 C.J.S., Discovery, §§ 5, 18, 19.

ALR. — Right to recover property held by public authorities as evidence for use in a criminal trial, 13 ALR 1168.

Constitutional immunity against giving incriminating testimony as affecting contractual stipulation to submit to examination, 18 ALR 749.

Plea of privilege by the woman concerned in violation of White Slave Act, 48 ALR 991.

Privilege against self-incrimination as applicable to answer to pleadings, 52 ALR 143.

Footprint evidence as violating rule against self-defense, 64 ALR 1089.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.

What amounts to violation of statute forbidding comment by prosecuting attorney on failure of accused to testify, 68 ALR 1108.

Constitutional provision against self-incrimination as applicable to questions asked or testimony given in proceeding before nonjudicial officer or body, 68 ALR 1503.

Waiver of immunity from testifying and constitutional provision against self-incrimination, by accomplice testifying for prosecution, 87 ALR 882.

Burden of proof as to outlawry by limitation or otherwise of criminal prosecution when relied upon to defeat claim of privilege against self-incrimination, 101 ALR 389.

Constitutionality, construction, and effect of statutes in relation to conduct of driver of automobile after happening of accident, 101 ALR 911.

Right as against objection of one other than voter himself to consider testimony as to how he voted given by him after his claim of privilege had been erroneously overruled, 113 ALR 1228.

Privilege against self-incrimination as justification for refusal to comply with order or subpoena requiring production of books or documents of private corporation, 120 ALR 1102.

Disclosure by witness of fact or transaction as waiver of his privilege against self-incrimination in respect of details and particulars which will elucidate it, 147 ALR 255.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books or papers, 152 ALR 1208.

Testimony of incriminating character which witness as compelled to give, by virtue of immunity statute or otherwise, as admissible in a prosecution of the witness for an offense subsequently committed, 157 ALR 428.

Use in subsequent prosecution of self-incriminating testimony given without invoking privilege, 5 ALR2d 1404.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 ALR2d 1438.

Right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society, or similar organization or group, 19 ALR2d 388.

Inferences arising from refusal of witness other than accused to answer question on the ground that answer would tend to incriminate him, 24 ALR2d 895.

Right of witness to claim privilege against self-incrimination on subsequent criminal trial after testifying to same matter before grand jury, 36 ALR2d 1403.

Sufficiency of witness's claim of privilege against self-incrimination, 51 ALR2d 1178.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 53 ALR2d 1030; 29 ALR5th 1.

Right of state in criminal contempt case to obtain data from defendant by interrogatories or pretrial discovery as permitted in civil actions, 72 ALR2d 431.

Testifying in civil proceeding as waiver of privilege against self-incrimination, 72 ALR2d 830.

Pretrial discovery to secure opposing party's private reports or records as to previous accidents or incidents involving the same place or premises, 74 ALR2d 876.

Accused's right to, and prosecution's privilege against, disclosure of identity of informer, 76 ALR2d 262.

Admissibility of confession, admission, or incriminatory statement of accused as affected by fact that it was made after indictment and in the absence of counsel, 90 ALR2d 732.

Comment on accused's failure to testify, by counsel for codefendant, 1 ALR3d 989.

Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question, 4 ALR3d 545.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification, 24 ALR3d 1261.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Propriety and prejudicial effect of comment by counsel as to refusal to permit introduction of privileged testimony, 32 ALR3d 906.

Propriety of requiring accused to give handwriting exemplar, 43 ALR3d 653.

Witness's refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 ALR3d 1413.

Refusal to answer questions before state grand jury as direct contempt of court, 69 ALR3d 501.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family, 88 ALR3d 304.

Propriety of requiring criminal defen-

dant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 ALR4th 374.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused, 19 ALR4th 368.

24-5-506. Privilege against self-incrimination; testimony of accused in criminal case.

(a) No person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself or herself.

(b) If an accused in a criminal proceeding wishes to testify and announces in open court his or her intention to do so, the accused may so testify. If an accused testifies, he or she shall be sworn as any other witness and, except as provided in Code Sections 24-6-608 and 24-6-609, may be examined and cross-examined as any other witness. The failure of an accused to testify shall create no presumption against the accused, and no comment shall be made because of such failure. (Code 1981, § 24-5-506, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI. Testimony by defendant in pretrial hearing, § 17-7-28.

Law reviews. — For article on the effect of a conviction that is based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979). For article, "Court Ordered Surgery to Retrieve Evidence in Georgia in Light of the Supreme Court Decision in Winston v. Lee," see 37 Mercer L. Rev. 1005 (1986).

For note, "Defendant as a Witness in a Criminal Proceeding," see 3 Mercer L. Rev. 335 (1952). For note on the Georgia right against self-incrimination, see 15 Ga. L. Rev. 1104 (1981).

For comment criticizing Lovett v. State, 108 Ga. App. 478, 133 S.E.2d 595 (1963), as to right of accused to assistance of counsel in making an unsworn statement, see 15 Mercer L. Rev. 512 (1964).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — Prior to the 1962 amendment of former Code 1933, § 38-415, a defendant in a criminal case could not give sworn testimony but could make an unsworn statement in the defendant's behalf. Between 1962 and 1973, a defendant had the option of making an unsworn statement or giving sworn testimony. Effective July 1, 1973, unsworn statements were abolished. Although many of the cases noted below pertain to the making of unsworn statements, the notes have been retained as those cases seem to have continued validity under the present law.

In light of the similarity of the statutory provisions, decisions under Ga. L. 1866, p. 138, § 2, Ga. L. 1868, p. 24, § 1, former Code 1868, § 3798, former Code 1873, §§ 3854 and 4637, Ga. L. 1874, § p. 22, § 1, Ga. L. 1878-79, p. 53, § 1, former Code 1882, §§ 3854, 4637, former Penal Code 1895, §§ 1010, 1011, former Penal Code 1910, §§ 1036, 1037, former Code 1933, §§ 38-415 and 38-416, and former O.C.G.A. § 24-9-20 are included in the annotations for this Code section.

Constitutionality. — See Williams v. State, 220 Ga. 766, 141 S.E.2d 436 (1965) (decided under former Code 1933, §§ 38-415 and 38-416).

Grand jury proceedings. — Grand jury has no lawful right to call the accused before the grand jury while considering the bill of indictment against the accused, and swear or question the accused regarding such charge. It is against the public policy of this state. Jenkins v. State, 65 Ga. App. 16, 14 S.E.2d 594 (1941) (decided under former Code 1933, §§ 38-415 and 38-416).

Former statute was not relevant to a probation revocation hearing since such a hearing was not a criminal trial. Sellers v. State, 107 Ga. App. 516, 130 S.E.2d 790 (1963) (decided under former Code 1933, §§ 38-415 and 38-416).

Right to testify did not apply to hearing on motion to withdraw guilty plea. — Trial court did not deny the defendant's constitutional right to testify on the defendant's own behalf at the hearing on the defendant's motion to withdraw the defendant's guilty plea because the right to testify applied to a trial on the question of guilt or innocence, not to a hearing on a motion to withdraw a guilty plea. Lavendar v. State, 306 Ga. App. 257, 701 S.E.2d 892 (2010) (decided under former O.C.G.A. § 24-9-20).

Former statute not implicated when defendant not in police custody. — Because the defendant was not in police custody at the time of the defendant's secretly taped telephone conversation with a coconspirator, former O.C.G.A. § 24-9-20 was not implicated. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913 (2009) (decided under former O.C.G.A. § 24-9-20).

Testimony not under oath. — Defendant should not have testified without being under oath; however, because the defendant could not show that the defendant was harmed, the error did not require a new trial. Bell v. State, 226 Ga. App. 271, 486 S.E.2d 422 (1997) (decided under former O.C.G.A. § 24-9-20).

If defendant chose to testify in an effort to make defendant's prima facie case of justification, the defendant was subject to cross examination as are other witnesses. Walden v. State, 267 Ga. 162, 476 S.E.2d 259 (1996) (decided under former O.C.G.A. § 24-9-20).

When a defendant voluntarily testifies to matters on direct examination, the defendant can be cross-examined, and required to give a physical demonstration concerning the matters to which the defendant testified on direct examination. Scott v. State, 270 Ga. 93, 507 S.E.2d 728 (1998) (decided under former O.C.G.A. § 24-9-20).

Sobriety test. — Defendant was not in custody nor compelled by force or threats to perform roadside sobriety tests in violation of the defendant's right against self incrimination. Sisson v. State, 232 Ga. App. 61, 499 S.E.2d 422 (1998) (decided under former O.C.G.A. § 24-9-20).

Prosecutor's improper comments during closing is not automatically reversible error. — Even though prosecutorial errors in closing arguments may have occurred, including commenting on defendant's failure to testify and references to matters not in evidence, defendant was not entitled to reversal because

curative instructions were given and there was overwhelming evidence from eyewitnesses and other physical evidence of defendant's guilt to shooting at deputies, killing one and injuring another. Georgia does not follow a cumulative error rule of prejudice, so the number of errors committed was not reversible error. Al-Amin v. State, 278 Ga. 74, 597 S.E.2d 332, cert. denied, 543 U.S. 992, 125 S. Ct. 509, 160 L. Ed. 2d 380 (2004) (decided under former O.C.G.A. § 24-9-20).

Self-Incrimination

1. In General

Failure to give Miranda warnings. — Since the driver was only given a breath test, but was not given Miranda warnings while the driver was in custody, evidence of the driver's refusal to undergo additional testing was inadmissible. State v. Warmack, 230 Ga. App. 157, 495 S.E.2d 632 (1998) (decided under former O.C.G.A. § 24-9-20).

Arrestee was not, under Georgia constitutional or statutory law, entitled to Miranda warnings before deciding whether to submit to the state's request for an additional test of breath, blood, or urine. State v. Coe, 243 Ga. App. 232, 533 S.E.2d 104 (2000), overruling State v. Warmack, 230 Ga. App. 157, 495 S.E.2d 632 (1998) (decided under former O.C.G.A. § 24-9-20).

Trial court's suppression of urine test results could not be sustained on the ground that Miranda warnings were not given to a DUI arrestee before the arrestee decided to submit to a urine test after taking a breath or blood test. State v. Coe, 243 Ga. App. 232, 533 S.E.2d 104 (2000), overruling State v. Warmack, 230 Ga. App. 157, 495 S.E.2d 632 (1998) (decided under former O.C.G.A. § 24-9-20).

Officer's comment to defendant that "I'm just going to shut your car door so some other drunk doesn't take it off," was insufficient to cause a reasonable person to believe that defendant's detention would not have been temporary, and a trial court erred in excluding on the basis of a Miranda violation evidence of the results of roadside sobriety tests performed on defendant thereafter. State v. Pierce, 266 Ga. App. 233, 596 S.E.2d 725 (2004) (decided under former O.C.G.A. § 24-9-20).

Noncustodial defendant. — Defendant whose license was taken and who was placed temporarily in a patrol car for the defendant's own safety was not in custody and, therefore, evidence of the defendant's statements was admissible as was evidence of the defendant's refusals to submit to alco-sensor and HGN tests and of the defendant's failure of other tests administered before the defendant's arrest. Turner v. State, 233 Ga. App. 413, 504 S.E.2d 229 (1998) (decided under former O.C.G.A. § 24-9-20).

After defendant was stopped for a traffic violation and before defendant's Miranda rights were read defendant was told that a DUI task force officer had been called because defendant was under suspicion of DUI, defendant was allowed to walk around, and was not placed in the back of the police car nor handcuffed, defendant's detention had not ripened into an arrest before the sobriety tests were conducted. Harper v. State, 243 Ga. App. 705, 534 S.E.2d 157 (2000) (decided under former O.C.G.A. § 24-9-20).

Striking testimony after claim. — When the defendant asserted a possessory interest in a suit case, the ownership of the suit case was not a collateral matter and was a proper subject of cross-examination but once the defendant claimed the defendant's privilege against self-incrimination, it was proper to strike testimony concerning the case. Rasnake v. State, 164 Ga. App. 765, 298 S.E.2d 42 (1982), cert. denied, 462 U.S. 1132, 103 S. Ct. 3114, 77 L. Ed. 2d 1368 (1983) (decided under former O.C.G.A. § 24-9-20).

Refusal to consent to urine test inadmissible. — In a prosecution for driving under the influence, when defendant was deprived by the totality of the inaccurate, misleading, and/or inapplicable information given to the defendant by the arresting officer of making an informed choice under the implied consent statute, the defendant's refusal to consent to a urine test was rendered inadmissible. State v. Leviner, 213 Ga. App. 99, 443 S.E.2d 688 (1994) (decided under former O.C.G.A. § 24-9-20).

Self-Incrimination (Cont'd)
1. In General (Cont'd)

Use of substances excreted from the body. — Use of a substance naturally excreted by the human body did not violate a DUI suspect's constitutional rights, and therefore there was no requirement that the suspect be informed of the suspect's right against self-incrimination by a police officer giving the suspect the implied consent notice. Nawrocki v. State, 235 Ga. App. 416, 510 S.E.2d 301 (1998) (decided under former O.C.G.A. § 24-9-20).

Evidence voluntarily produced from body cavity. — After a small piece of plastic containing cocaine residue was produced by defendant from a body cavity in acquiescence to a search warrant for the defendant's person while the defendant was in lawful detention, the evidence was admissible. Scott v. State, 216 Ga. App. 692, 455 S.E.2d 609 (1995) (decided under former O.C.G.A. § 24-9-20).

Implied consent warnings administered. — Implied consent warnings administered to motorists suspected of driving under the influence need not inform the motorists of the privilege against self-incrimination. Heller v. State, 234 Ga. App. 630, 507 S.E.2d 518 (1998) (decided under former O.C.G.A. § 24-9-20).

Field sobriety tests given to a person under arrest, without first giving a Miranda warning, were inadmissible under former O.C.G.A. § 24-9-20. State v. O'Donnell, 225 Ga. App. 502, 484 S.E.2d 313 (1997) (decided under former O.C.G.A. § 24-9-20).

After defendant agreed to submit to field sobriety tests, which defendant understood to be voluntary, defendant was not therefore under arrest and the results of the officer's investigation should not be suppressed because defendant was not given the Miranda warnings prior to the tests. Lyons v. State, 244 Ga. App. 658, 535 S.E.2d 841 (2000) (decided under former O.C.G.A. § 24-9-20).

Defendant was not in custody when the officer administered field sobriety tests, nor was defendant compelled by force or threats to perform roadside field sobriety tests in violation of defendant's right against self-incrimination; the officer's admonishment as defendant left the bar that defendant would be arrested if defendant drove was insufficient to turn the subsequent stop into a custody situation. State v. Foster, 255 Ga. App. 704, 566 S.E.2d 418 (2002) (decided under former O.C.G.A. § 24-9-20).

Breath test results. — Admission into evidence of the defendant's consent to a chemical breath test and the results of that test did not violate the statute since, although the defendant was in custody, the defendant was not charged in a criminal proceeding when the defendant consented to take and took the chemical breath test. Scanlon v. State, 237 Ga. App. 362, 514 S.E.2d 876 (1999), cert. denied, 528 U.S. 1078, 120 S. Ct. 795, 145 L. Ed. 2d 671 (2000) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in admitting the results of the defendant's portable alco-sensor test because even though the defendant was in custody for purposes of Miranda, the portable test was administered in response to a demand from the defendant, not the officer; thus, the situation was more akin to a spontaneous outburst from an unwarned suspect or a test conducted pursuant to the Georgia Implied Consent Statute, O.C.G.A. § 40-6-392. Hale v. State, 310 Ga. App. 363, 714 S.E.2d 19 (2011) (decided under former O.C.G.A. § 24-9-20).

DNA tests. — In convictions of aggravated sodomy, kidnapping, burglary, and aggravated assault, use of evidence comparing DNA on lip balm found at the crime scene with defendant's blood sample and with evidence retained from a prior rape prosecution that resulted in defendant's acquittal pursuant to former O.C.G.A. § 24-4-60 et seq. (see now O.C.G.A. § 35-3-160 et seq.) did not violate defendant's right against self-incrimination under former O.C.G.A. § 24-9-20(a). Fortune v. State, 300 Ga. App. 550, 685 S.E.2d 466 (2009) (decided under former O.C.G.A. § 24-9-20).

Database match of DNA profile admissible. — Testimony concerning a CODIS database match of the defendant's DNA profile was relevant and admissible because the DNA evidence did not, in and

of itself, constitute impermissible character evidence since no reference was made as to why the matching sample was collected or stored and no reference was made linking the defendant's DNA profile to other criminal activity. Scales v. State, 310 Ga. App. 48, 712 S.E.2d 555 (2011) (decided under former O.C.G.A. § 24-9-20).

Waiver of privilege. — Allowing a codefendant to give testimony regarding the substance of defendant's prior testimony at a probation revocation hearing, after defendant elected not to take the stand at trial, did not violate the defendant's privilege against self-incrimination since defendant waived the privilege by testifying voluntarily on the defendant's behalf at the prior hearing. Bobbitt v. State, 215 Ga. App. 131, 449 S.E.2d 674 (1994) (decided under former O.C.G.A. § 24-9-20).

Corporate document not protected by self-incrimination privilege. — Defendant in a criminal case, an attorney who was the sole shareholder of a professional corporation, was properly held in civil contempt for not producing a noncompetition agreement between the corporation and a former employee. The agreement was a corporate document, and the defendant had been subpoenaed to produce the document as a corporate agent; thus, the defendant could not assert the defendant's personal right against self-incrimination and the small size of the corporation was immaterial. Thompson v. State, 294 Ga. App. 363, 670 S.E.2d 152 (2008) (decided under former O.C.G.A. § 24-9-20).

2. Compelling Evidence

Courts should liberally construe provision against compelling the accused to be a witness against oneself, and refuse to permit any first or doubtful steps which may invade one's rights in this respect. Underwood v. State, 13 Ga. App. 206, 78 S.E. 1103 (1913) (decided under former Penal Code 1910, §§ 1036 and 1037).

Law embodies constitutional right against self-incrimination. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S. Ct. 2642, 53 L. Ed. 2d 251 (1977), vacated as to sentence sub nom., 243 Ga. 244, 253 S.E.2d 707 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Law was governed by same standards as U.S. Const., amend. 5. Jordan v. State, 239 Ga. 526, 238 S.E.2d 69 (1977) (decided under former Code 1933, §§ 38-415 and 38-416); Classic Art Corp. v. State, 245 Ga. 448, 265 S.E.2d 577 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Scope of statute. — Constitutional guarantee protects one from being compelled to furnish evidence against oneself, either in the form of oral confessions or incriminating admissions of an involuntary character, or of doing an act against one's will which is incriminating in its nature. Day v. State, 63 Ga. 667 (1879) (decided under former Code 1873, §§ 3854 and 4637); Calhoun v. State, 144 Ga. 679, 87 S.E. 893 (1916) (decided under former Penal Code 1910, §§ 1036 and 1037); Smith v. State, 17 Ga. App. 693, 88 S.E. 42 (1916) (decided under former Penal Code 1910, §§ 1036 and 1037); Walter v. State, 131 Ga. App. 667, 206 S.E.2d 662, appeal dismissed, 233 Ga. 10, 209 S.E.2d 605 (1974) (decided under former Code 1933, §§ 38-415 and 38-416).

Compelled evidence was inadmissible. — Evidence of guilt which a defendant, either directly or indirectly, was compelled to disclose was not admissible in a criminal prosecution against the defendant. Hughes v. State, 2 Ga. App. 29, 58 S.E. 390 (1907) (decided under former Penal Code 1905, §§ 1010 and 1011); Davis v. State, 4 Ga. App. 318, 61 S.E. 404 (1908) (decided under former Penal Code 1905, §§ 1010 and 1011).

Forcing defendant to submit to act permitted. — Although evidence may be compulsorily adduced from an accused, it was constitutionally impermissible to compel an accused to perform an act which resulted in the production of incriminating evidence; the distinction was between forcing an accused to do an act against the accused's will and requiring an accused to submit to an act; the latter "takes evidence from the defendant" and was constitutionally acceptable, the former compelled the defendant, in essence,

Self-Incrimination (Cont'd)
2. Compelling Evidence (Cont'd)

to give evidence which violated an individual's right not to incriminate oneself. State v. Armstead, 152 Ga. App. 56, 262 S.E.2d 233 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Although evidence may be compulsorily adduced from an accused, it was constitutionally impermissible to compel an accused to perform an act which resulted in the production of incriminating evidence. The distinction was between forcing an accused to do an act against one's will and requiring an accused to submit to an act. Hambrick v. State, 204 Ga. App. 668, 420 S.E.2d 308, cert. denied, 204 Ga. App. 921, 420 S.E.2d 308 (1992) (decided under former O.C.G.A. § 24-9-20).

Direct tendency to incriminate not required. — Protection was not limited to cases when the question or answer had a direct tendency to incriminate defendant, or to expose the defendant to a penalty or forfeiture; the defendant was protected from answering any question which may form a link in the chain by which such cases were to be established. Simpson v. Simpson, 233 Ga. 17, 209 S.E.2d 611 (1974) (decided under former Code 1933, §§ 38-415 and 38-416).

Provision applied when fine, forfeiture, or penalty involved. — In a proceeding against road commissioners for neglect of duty, it was error to compel the defendants to answer under oath questions, the answer to which may subject the defendants to a fine, forfeiture, or penalty. Bryan v. State, 40 Ga. 688 (1870) (decided under former Code 1868, § 3798).

Right applied during pendency of new trial motion. — In the trial of a codefendant, it was not error for the court to refuse to require a defendant who had been previously tried and convicted, and whose motion for new trial was then pending, to answer a question tending to incriminate that defendant. Stallings v. State, 136 Ga. 131, 70 S.E. 1015 (1911) (decided under former Penal Code 1910, §§ 1036 and 1037).

Fact defendant had a pending motion for new trial which, if granted by the trial court or required by the appellate court, would have subjected the defendant to the self-incrimination choice once again, did not preclude compelled testimony via immunity in the codefendant's trial. Lee v. State, 191 Ga. App. 882, 383 S.E.2d 366 (1989) (decided under former O.C.G.A. § 24-9-20).

Use of incriminating statement on second trial. — When a witness was informed that the witness would not be required to give any answer that would tend to incriminate the witness in reference to a given transaction, and the circumstances were such as to indicate that the witness appreciated the prejudicial effect that might result from an answer to a given question, the statement in the answer was admissible against the witness in a subsequent trial, although it tended to connect the witness with the transaction which was the foundation of the indictment upon which the witness was being tried. Davis v. State, 122 Ga. 564, 50 S.E. 376 (1905) (decided under former Penal Code 1895, §§ 1010 and 1011).

Witness decided whether question was incriminating. — When the witness was otherwise competent, the witness may decline to answer questions which tend to incriminate the witness; and in this event the witness, and not the judge, was to determine whether the answer to the question propounded to the witness will have the effect of subjecting the witness to punishment for crime. Empire Life Ins. Co. v. Einstein, 12 Ga. App. 380, 77 S.E. 209 (1913) (decided under former Penal Code 1910, §§ 1036 and 1037). See also Wilburn v. State, 141 Ga. 510, 81 S.E. 444 (1914) (decided under former Penal Code 1910, §§ 1036 and 1037).

Defendant compelled to reenact crime. — It was erroneous to admit testimony that the accused, while in the custody of the sheriff under arrest made without a warrant, was carried by the sheriff to the house alleged to have been burglarized, and there placed by the sheriff in a position at a window through which the house had been entered, and in which position an occupant of the house claimed to be able to identify the accused as the burglar, although the occupant was unable to do so before the accused was

placed in this position, and that the sheriff placed the accused there at the occupant's request, for the purpose of enabling the occupant to identify the accused as the burglar. Aiken v. State, 16 Ga. App. 848, 86 S.E. 1076 (1913), later appeal, 17 Ga. App. 721, 88 S.E. 210 (1916) (decided under former Penal Code 1910, §§ 1036 and 1037).

To compel handwriting exemplar was to impermissibly compel the defendant to do an act, not to submit to an act. State v. Armstead, 152 Ga. App. 56, 262 S.E.2d 233 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

When defendant was asked to submit to a handwriting exemplar act, which defendant readily agreed to do and was not compelled to do so, there was no violation of the Georgia constitutional right nor of subsection (a) of former O.C.G.A. § 24-9-20. Hambrick v. State, 204 Ga. App. 668, 420 S.E.2d 308, cert. denied, 204 Ga. App. 921, 420 S.E.2d 308 (1992) (decided under former O.C.G.A. § 24-9-20).

Removal of bullet from defendant. — Constitutional rights of defendant were not violated by the state in requiring removal of a bullet from the defendant's body. Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972), cert. dismissed, 410 U.S. 975, 93 S. Ct. 1454, 35 L. Ed. 2d 709 (1973) (decided under former Code 1933, §§ 38-415 and 38-416).

Compulsion by threat of force. — When a police officer compelled the defendant to produce, against the will of the defendant, illegal lottery tickets by threat and by placing the officer's hand on a pistol, the method of forcing defendant to produce this evidence violated defendant's constitutional rights in that it compelled the defendant to produce evidence to incriminate oneself. Grant v. State, 85 Ga. App. 610, 69 S.E.2d 889 (1952) (decided under former Code 1933, §§ 38-415 and 38-416).

Drug testing provision of probationary sentence. — Defendant's probation officer was authorized to request defendant to produce a blood specimen for analysis under the terms of a drug testing provision of defendant's probationary sentence. Toth v. State, 213 Ga. App. 247, 444 S.E.2d 159 (1994) (decided under former O.C.G.A. § 24-9-20).

Submitting to blood-alcohol tests. — Since, under the Constitution of Georgia, the state may constitutionally take a blood sample from a defendant without the defendant's consent, O.C.G.A. §§ 40-5-55 and 40-6-392 grant, rather than deny, a right to a defendant by providing for refusal to take such a test. Allen v. State, 254 Ga. 433, 330 S.E.2d 588 (1985) (decided under former O.C.G.A. § 24-9-20).

Choice provided to a DUI defendant under Georgia law—submitting to a blood-alcohol test or refusing to submit, with resultant sanctions—was not so painful, dangerous, or severe, or so violative of religious beliefs, that no choice actually existed, and did not amount to compulsion on behalf of the state or a violation of due process. Allen v. State, 254 Ga. 433, 330 S.E.2d 588 (1985) (decided under former O.C.G.A. § 24-9-20).

Field sobriety tests may be asked of noncustodial defendant. — There was no violation of defendant's right against self-incrimination since the defendant was not formally arrested until after the field sobriety test. Lankford v. State, 204 Ga. App. 405, 419 S.E.2d 498 (1992), cert. denied, 506 U.S. 1051, 113 S. Ct. 972, 122 L. Ed. 2d 127 (1993) (decided under former O.C.G.A. § 24-9-20); State v. Sumlin, 224 Ga. App. 205, 480 S.E.2d 260 (1997) (decided under former O.C.G.A. § 24-9-20).

Driver could not assert right against self-incrimination to suppress results of field sobriety test, since the driver was not a person "charged in a criminal proceeding" at the time the test was given, the driver was not in police custody at that time, and no force or threat of penalty was used against the driver. Montgomery v. State, 174 Ga. App. 95, 329 S.E.2d 166 (1985) (decided under former O.C.G.A. § 24-9-20); Keenan v. State, 263 Ga. 569, 436 S.E.2d 475 (1993) (decided under former O.C.G.A. § 24-9-20); Bravo v. State, 249 Ga. App. 433, 548 S.E.2d 129 (2001) (decided under former O.C.G.A. § 24-9-20).

Alco-sensor screening. — Defendant's refusal to submit to the alco-sensor

Self-Incrimination (Cont'd)
2. Compelling Evidence (Cont'd)

screening could be admitted without proof that the device had been approved by the Georgia Bureau of Investigation. Johnson v. State, 268 Ga. App. 426, 602 S.E.2d 177 (2004) (decided under former O.C.G.A. § 24-9-20).

Alphabet test and physical dexterity tests were not inadmissible under the fifth amendment of the United States Constitution because those tests were not evidence of a testimonial or communicative nature. Smith v. State, 202 Ga. App. 701, 415 S.E.2d 495 (1992) (decided under former O.C.G.A. § 24-9-20); Lankford v. State, 204 Ga. App. 405, 419 S.E.2d 498 (1992), cert. denied, 506 U.S. 1051, 113 S. Ct. 972, 122 L. Ed. 2d 127 (1993) (decided under former O.C.G.A. § 24-9-20).

Blood and urine analysis admissible. — Admitting the results of blood and urine analysis into evidence in the defendant's felony murder trial did not violate U.S. Const., amend. V, Ga. Const. 1983, Art. I, Sec. I, Para. XVI, or former O.C.G.A. § 24-9-20(a) because the removal of a substance from the body through a minor intrusion did not cause the defendant to be a witness against oneself within the meaning of the Fifth Amendment and similar provisions of Georgia law. Bowling v. State, 289 Ga. 881, 717 S.E.2d 190 (2011) (decided under former O.C.G.A. § 24-9-20).

Defendant who entered plea of nolo contendre could not be forced to testify in the sentencing hearing. Fuller v. State, 244 Ga. App. 618, 536 S.E.2d 296 (2000) (decided under former O.C.G.A. § 24-9-20).

Nontestifying defendant need not be advised of right. — Since defendant did not testify and was not cross-examined, there was no harm in the trial court's failure to advise defendant of the defendant's right not to be compelled to testify under oath. Coonce v. State, 171 Ga. App. 20, 318 S.E.2d 763 (1984) (decided under former O.C.G.A. § 24-9-20).

Grand jury testimony. — Trial court committed reversible error by granting defendant's plea in abatement to an indictment charging defendant with reckless conduct, based on the ground that defendant was forced by the grand jury to give testimony against oneself, where the only proposed indictment before the grand jury at the time defendant was called as a witness was for the offense of feticide, allegedly committed by defendant's spouse, and the defendant did not claim defendant's privilege against self-incrimination. State v. Butler, 177 Ga. App. 594, 340 S.E.2d 214 (1986) (decided under former O.C.G.A. § 24-9-20).

Burden on defendant to show self-incrimination. — When three defendants, one of whom was plaintiff in error, were charged in the indictment with arson, and that defendant's name along with six other names appeared on the back of the indictment, there was no presumption that the defendant was examined against oneself, and the burden was on the defendant to show that the defendant gave evidence to incriminate oneself. Cowart v. State, 51 Ga. App. 199, 179 S.E. 823 (1935) (decided under former Code 1933, §§ 38-415 and 38-416).

Jury instructions. — It was proper for the court to give a charge on defendant's failure to testify without a request and it was not reversible error to fail to give the charge if defendant did not request the charge. Stapleton v. State, 235 Ga. 513, 220 S.E.2d 269 (1975) (decided under former Code 1933, §§ 38-415 and 38-416).

Waiver. — If a defendant is fully apprised of the defendant's fifth amendment rights by the trial judge and by the defendant's attorney prior to the defendant's taking the stand for cross-examination, any objection to the procedure must be considered as waived at trial. Everett v. State, 238 Ga. 80, 230 S.E.2d 882 (1976) (decided under former Code 1933, §§ 38-415 and 38-416).

3. Comments

It was error for a prosecutor to comment to the jury on defendant's exercise of the defendant's constitutional right to remain silent. Marlow v. State, 152 Ga. App. 218, 262 S.E.2d 460 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Rigid adherence to rule. — Rule that defendant's failure to make a statement

cannot be commented upon has been rigidly adhered to since it was laid down in Bennet v. State, 86 Ga. 401, 12 S.E. 806, 22 Am. St. R. 465, 12 L.R.A. 449 (1890); Moore v. State, 10 Ga. App. 805, 74 S.E. 315 (1912) (decided under former Penal Code 1910, §§ 1036 and 1037).

Rule applied to judge as well as prosecutor. — Law prohibited any comment on the failure of defendant to testify in a criminal case; this inhibition applied to both the prosecutor and judge. Thomas v. State, 234 Ga. 615, 216 S.E.2d 859, answer conformed to, 136 Ga. App. 165, 220 S.E.2d 736 (1975) (decided under former Code 1933, §§ 38-415 and 38-416).

Comment by prosecutor cuts down on privilege against self-incrimination by making its assertion costly. Gosha v. State, 239 Ga. 37, 235 S.E.2d 527 (1977) (decided under former Code 1933, §§ 38-415 and 38-416).

Rule applies only if defendant fails to testify. — Statutory prohibitions upon comment on defendant's failure to testify are applicable only when defendant fails to testify. Gosha v. State, 239 Ga. 37, 235 S.E.2d 527 (1977) (decided under former Code 1933, §§ 38-415 and 38-416).

Former statute plainly prohibited any attempt to discredit defendant in the eyes of the jury by the making of any comment upon the exercise of defendant's right not to be sworn. Ward v. State, 123 Ga. App. 216, 180 S.E.2d 280 (1971) (decided under former Code 1933, §§ 38-415 and 38-416).

What was prohibited was a comment on the failure to testify. Roberts v. State, 231 Ga. 395, 202 S.E.2d 43 (1973) (decided under former Code 1933, §§ 38-415 and 38-416).

What was prohibited was a comment that the defendant could have denied, explained, or otherwise disputed the state's case against the defendant. Woodard v. State, 234 Ga. 901, 218 S.E.2d 629 (1975) (decided under former Code 1933, §§ 38-415 and 38-416); Graham v. State, 156 Ga. App. 538, 275 S.E.2d 114 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Remarks made by the court to defendant in presence of jury which serve to invite attention and emphasize the defendant's failure to defend oneself under oath were precisely what the statute prohibited, even if the remarks were intended to insure that defendant understood defendant's rights. Roberts v. State, 231 Ga. 395, 202 S.E.2d 43 (1973) (decided under former Code 1933, §§ 38-415 and 38-416).

Indirect reference to defendant's silence. — When the district attorney directly referred to silence as an indication of guilt, error had obviously been committed; when an indirect reference to this fact was made a more marginal question was involved. Redding v. State, 151 Ga. App. 140, 259 S.E.2d 146 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Prosecutor's comments were not on defendant's silence. — Counsel's failure to object to the prosecutor's comments on the ground that the prosecutor improperly commented on the defendant's exercise of the defendant's right to remain silent by remarking on the defendant's failure to testify at trial did not amount to deficient performance because the challenged remarks were not improper; the prosecutor made the comments while seeking to persuade the jury that the defendant's statements and behavior shortly after the crimes were inconsistent with the defendant's theory of self-defense, and the remarks were not intended to comment on the defendant's failure to testify or would have been received as such by the jury. Lacey v. State, 288 Ga. 341, 703 S.E.2d 617 (2010) (decided under former O.C.G.A. § 24-9-20).

Reference to defendant's contentions through counsel or by defendant's plea was not a comment on defendant's failure to testify. Bailey v. State, 142 Ga. App. 202, 235 S.E.2d 650 (1977) (decided under former Code 1933, §§ 38-415 and 38-416).

Comment on failure to rebut incriminating evidence. — Prosecution was not permitted to refer to the fact that defendant had not made a statement, but may properly comment upon the fact that defendant had failed to adduce testimony in rebuttal of evidence introduced by the state, tending to show defendant's guilt. Saffold v. State, 11 Ga. App. 329, 75 S.E. 338 (1912) (decided under former Penal

Self-Incrimination (Cont'd)
3. Comments (Cont'd)

Code 1910, §§ 1036 and 1037). See also Caesar v. State, 125 Ga. 6, 53 S.E. 815 (1906) (decided under former Penal Code 1895, §§ 1010 and 1011); Battle v. State, 155 Ga. App. 541, 271 S.E.2d 679 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

It was not error for the prosecutor to reflect upon failure of the defense to present any evidence to rebut the proof adduced by the state. Brown v. State, 157 Ga. App. 473, 278 S.E.2d 31 (1981) (decided under former Code 1933, §§ 38-415 and 38-416).

Trial judge did not violate former O.C.G.A. § 24-9-20 when the court's instruction given prior to the closing statements by either side merely informed the jury of the general procedure to be followed and did not amount to a comment on the defendant's failure to testify and defendant raised no objection. Fletcher v. State, 157 Ga. App. 707, 278 S.E.2d 444 (1981) (decided under former Code 1933, §§ 38-415 and 38-416).

Comment on failure of defendant as witness to rebut evidence. — When defendant testifies in defendant's own behalf, there is no violation of U.S. Const., amend. 5 when the district attorney comments upon defendant's failure, when the defendant testified, to explain or deny the testimony of particular witnesses. Gosha v. State, 239 Ga. 37, 235 S.E.2d 527 (1977).

Prosecutor's statement that defendant had no excuse constituted an impermissible comment upon defendant's failure to testify. Spann v. State, 126 Ga. App. 370, 190 S.E.2d 924 (1972) (decided under former Code 1933, §§ 38-415 and 38-416).

Prosecutor's statement that only two people knew what went on in the room where an assault occurred, the victim and the defendant, did not violate defendant's rights against self-incrimination. Neal v. State, 198 Ga. App. 518, 402 S.E.2d 114 (1991) (decided under former O.C.G.A. § 24-9-20).

Prosecutor's comment that defendant "didn't take the stand" was an improper comment on defendant's failure to testify under former O.C.G.A., § 24-9-20(b). Raheem v. State, 275 Ga. 87, 560 S.E.2d 680 (2002), cert. denied, 537 U.S. 1021, 123 S. Ct. 541, 154 L. Ed. 2d 429 (2002); overruled on other grounds, Patel v. State, 282 Ga. 412, 651 S.E.2d 55 (2007) (decided under former O.C.G.A. § 24-9-20).

Impermissible comment mitigated by ample alternative evidence. — Since defendant offered no evidence on a robbery trial and the statement of the district attorney in closing argument was that the testimony of the victim stood unrefuted, this language did not constitute reversible error if other evidence was ample to support a guilty verdict. Redding v. State, 151 Ga. App. 140, 259 S.E.2d 146 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Comment that defendant's testimony would exculpate codefendant. — Statement by counsel for codefendant when counsel sought to call defendant as a witness after objection was sustained was not a prohibited comment since counsel said that nothing would come from counsel's questions that would do anything other than exculpate the codefendant. Graham v. State, 156 Ga. App. 538, 275 S.E.2d 114 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Prosecutor's acknowledgement that defendant had the right to present evidence and subpoena witnesses was not a comment upon defendant's failure to testify. Hutchinson v. State, 179 Ga. App. 485, 347 S.E.2d 315 (1986) (decided under former O.C.G.A. § 24-9-20).

Prosecutor's questions constituted an improper comment upon the criminal defendant's failure to produce evidence. Creamer v. State, 168 Ga. App. 790, 310 S.E.2d 560 (1983) (decided under former O.C.G.A. § 24-9-20); Brewster v. State, 205 Ga. App. 770, 424 S.E.2d 8 (1992) (decided under former O.C.G.A. § 24-9-20).

Comment on failure to take test proper. — Prosecutor's comment on the defendant's failure to take a chemical test at the time of defendant's arrest was not an impermissible reference to the defendant's right to remain silent under the

Fifth Amendment and was a proper subject for comment in closing argument. Givens v. State, 199 Ga. App. 709, 405 S.E.2d 898 (1991) (decided under former O.C.G.A. § 24-9-20).

Proper instructions. — Charge that the jury was to make no assumption or draw any conclusions from defendant's failure to testify would not have been error. Woodard v. State, 234 Ga. 901, 218 S.E.2d 629 (1975) (decided under former Code 1933, §§ 38-415 and 38-416).

It was permissible for the trial court to charge that the jury was to make no assumption or draw any conclusions from defendant's failure to testify. Also permissible would be a charge that defendant's failure to testify created no presumption against the defendant and the burden of proving defendant's guilt beyond a reasonable doubt cannot be presumed to be carried because of the defendant's failure to testify. Marlow v. State, 152 Ga. App. 218, 262 S.E.2d 460 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

It was error for court to deny defendant's request for a charge that the defendant's failure to testify created no presumption against the defendant. Marlow v. State, 152 Ga. App. 218, 262 S.E.2d 460 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Impermissible comment cured by instructions. — While counsel for the state should not argue to the jury from the omission of defendant to make a statement, the effect of such impropriety may be obviated by an appropriate charge from the court. Robinson v. State, 82 Ga. 535, 9 S.E. 528 (1889) (decided under former Code 1882, §§ 3854 and 4637). See also Minor v. State, 120 Ga. 490, 48 S.E. 198 (1904) (decided under former Penal Code 1895, §§ 1010 and 1011).

After one of the state's counsel remarked that defendant did not even make a statement in the defendant's own behalf, and the court immediately rebuked counsel and thereafter during the charge instructed the jury that it should not take into consideration the fact that the defendant did or did not make a statement, the refusal of the trial court to grant a mistrial would not be reversed. Parks v. State, 208 Ga. 508, 67 S.E.2d 716 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

Evidence of Character or Other Crimes

1. In General

Nature of good character defense. — Defense of good character, which the law designated as a substantive fact, and which may itself alone be sufficient to generate a reasonable doubt, was that reputation for good character which surrounded the defendant previous to the transaction under consideration; it was the reputation for previous good character. Eidson v. State, 66 Ga. App. 765, 19 S.E.2d 373 (1942) (decided under former Code 1933, §§ 38-415 and 38-416).

Probative connection required. — Evidence of prior difficulties between the defendant and the alleged victim was not admissible because the evidence did not have a probative connection with the incident giving rise to the case being tried. Carr v. State, 267 Ga. 701, 482 S.E.2d 314 (1997) (decided under former O.C.G.A. § 24-9-20). But see Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (1999) (decided under former O.C.G.A. § 24-9-20).

Character evidence generally inadmissible. — Evidence regarding the character of a defendant was generally inadmissible unless the defendant put the defendant's character in issue, and evidence of independent offenses committed by a defendant was generally inadmissible due to its inherently prejudicial nature and minimal probative value. Henderson v. State, 204 Ga. App. 884, 420 S.E.2d 813 (1992) (decided under former O.C.G.A. § 24-9-20).

In criminal trials, state cannot introduce evidence of defendant's character unless the defendant had personally first put it in issue; the state may then disprove or rebut, by competent evidence, that which the defendant had seen cause to assert. Clarke v. State, 52 Ga. App. 254, 183 S.E. 92 (1935) (decided under former Code 1933, §§ 38-415 and 38-416); Robinson v. State, 62 Ga. App. 355, 7 S.E.2d 758 (1940) (decided under former Code 1933, §§ 38-415 and 38-416); Posey v. State, 152 Ga. App. 216, 262 S.E.2d 541 (1979) (de-

Evidence of Character or Other Crimes (Cont'd)
1. In General (Cont'd)

cided under former Code 1933, §§ 38-415 and 38-416).

In a criminal case, the state cannot rebut or question the presumption of the defendant's good character unless the defendant discards the presumption thus afforded and elects to put the defendant's actual character in issue by evidence or by the defendant's statement to the jury. Murray v. State, 157 Ga. App. 596, 278 S.E.2d 2 (1981) (decided under former Code 1933, §§ 38-415 and 38-416).

State cannot rebut or question the presumption of a defendant's good character unless the defendant first chose to place the defendant's character in issue. Arnold v. State, 193 Ga. App. 206, 387 S.E.2d 417 (1989) (decided under former O.C.G.A. § 24-9-20).

Unless and until the accused introduced evidence of the accused's own character or reputation, the state could not show that the accused's general reputation for peaceableness and violence was bad, and evidence of the accused's general reputation for violence was legally irrelevant and the testimony was inadmissible. Ledford v. State, 202 Ga. App. 694, 415 S.E.2d 693 (1992) (decided under former O.C.G.A. § 24-9-20).

Impeachment by cross-examination. — Use of cross-examination in a good faith attempt to impeach a defendant, who on direct examination had voluntarily given testimony on direct examination obviously calculated to impress the jury as to certain traits of defendant's character, was not prohibited. Butts v. State, 193 Ga. App. 824, 389 S.E.2d 395 (1989) (decided under former O.C.G.A. § 24-9-20).

Even though defendant did not, merely by volunteering that defendant had been incarcerated, put defendant's character "in issue" within the meaning of subsection (b) of former O.C.G.A. § 24-9-20 so as to permit rebuttal by the state, defendant nevertheless raised an issue which could be fully explored by the state on cross-examination. Wilkey v. State, 215 Ga. App. 354, 450 S.E.2d 846 (1994) (decided under former O.C.G.A. § 24-9-20); Roman v. State, 245 Ga. App. 225, 537 S.E.2d 684 (2000) (decided under former O.C.G.A. § 24-9-20).

Testimony of defendant on direct examination regarding prior criminal conduct did not place defendant's character in issue, but did raise issues which could be fully explored by the state on cross-examination. Franklin v. State, 224 Ga. App. 578, 481 S.E.2d 852 (1997) (decided under former O.C.G.A. § 24-9-20).

Evidence that defendant knew that defendant would be incarcerated for 90 days beginning one week after the offense charged contradicted defendant's testimony that defendant expected to be steadily employed in the weeks following the offense; accordingly, the trial court did not abuse the court's discretion in allowing the evidence to impeach defendant's testimony. Cooper v. State, 272 Ga. App. 209, 612 S.E.2d 42 (2005) (decided under former O.C.G.A. § 24-9-20).

Proof of other crimes to show bad character generally. — Proof of other crimes was never admissible (except in cases when defendant has personally put one's character in issue) when its chief or only probative value consisted in showing that defendant was, by reason of defendant's bad character (demonstrated through a criminal career), more likely to have committed the crime than defendant otherwise would have been; to admit such evidence, it must have relevancy and probative value from some other point of view. Chambers v. State, 76 Ga. App. 269, 45 S.E.2d 724 (1947) (decided under former Code 1933, §§ 38-415 and 38-416); Carroll v. State, 155 Ga. App. 514, 271 S.E.2d 650 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Good character was a substantive fact, like any other fact tending to establish defendant's innocence, and ought to be so regarded by the court and jury; like all other facts proved in the case, it should be weighed and estimated by the jury, for it may render that doubtful which otherwise would be clear. Sims v. State, 84 Ga. App. 753, 67 S.E.2d 254 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

Good character may of itself generate reasonable doubt in the minds of

the jury as to defendant's guilt, and for this reason defendant was allowed when defendant saw fit to offer defendant's good character in issue. Clarke v. State, 52 Ga. App. 254, 183 S.E. 92 (1935) (decided under former Code 1933, §§ 38-415 and 38-416); Walker v. State, 199 Ga. 418, 34 S.E.2d 446 (1945) (decided under former Code 1933, §§ 38-415 and 38-416); Sims v. State, 84 Ga. App. 753, 67 S.E.2d 254 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

Evidence admissible despite tendency to introduce character. — Evidence showing intent, motive, plan, scheme, and bent of mind was admissible although such evidence may also place in issue the character of the defendant. Causey v. State, 154 Ga. App. 76, 267 S.E.2d 475 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Evidence admissible to show motive was not rendered inadmissible because it incidentally placed the defendant's character in issue. Brock v. State, 179 Ga. App. 519, 347 S.E.2d 230 (1986) (decided under former O.C.G.A. § 24-9-20).

Defendant's response about whether it took a long time to make a drug transaction did not place defendant's character in issue since the defendant only hypothetically referred to a criminal act; such testimony was relevant to the alibi defense maintained by the defendant at the hearing and was not evidence of general bad character admitted in violation of subsection (b) of former O.C.G.A. § 24-9-20. Johnson v. State, 204 Ga. App. 277, 419 S.E.2d 118 (1992) (decided under former O.C.G.A. § 24-9-20).

Evidence that was material in explaining the conduct of the witness did not become inadmissible simply because defendant's character was incidentally put in issue. Hall v. State, 264 Ga. 85, 441 S.E.2d 245 (1994) (decided under former O.C.G.A. § 24-9-20).

In a prosecution for simple assault, rape and battery, although defendant did not place defendant's character in question when defendant testified on cross-examination that "it wasn't in my nature to hurt [the victim]," testimony of a police officer that the officer had dealt with defendant two or three times, and that one time it took four officers to control defendant without their getting hurt, was admissible to prove the falsity of defendant's specific testimony. Height v. State, 214 Ga. App. 570, 448 S.E.2d 726 (1994) (decided under former O.C.G.A. § 24-9-20).

Testimony of the only witness who could identify defendant that the witness had spent time in jail with defendant was admissible. Kellibrew v. State, 239 Ga. App. 783, 521 S.E.2d 921 (1999) (decided under former O.C.G.A. § 24-9-20).

Testimony of victim that, before shooting the victim, defendant stated that defendant "can't go back to jail" was clearly admissible as part of the res gestae even if such evidence incidentally placed defendant's character in evidence. Kellibrew v. State, 239 Ga. App. 783, 521 S.E.2d 921 (1999) (decided under former O.C.G.A. § 24-9-20).

Evidence of defendant's financial problems and money mismanagement was admissible to show defendant's alleged financial motive for the murders of defendant's children by burning down defendant's trailer, and evidence about defendant's marital problems and romantic relationships was admissible to show that defendant viewed the children as a source of friction between defendant and a girlfriend and to establish how defendant's wife and previous live-in girlfriend were able to see the relationship with the girlfriend, hear defendant's threats towards the children, and see how defendant treated the children; testimony as to prior difficulties between defendant and defendant's children, such as threats to kill the children made to other people and defendant's indifference to the children's welfare, was admissible to show motive and intent. Riley v. State, 278 Ga. 677, 604 S.E.2d 488 (2004) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in denying defendant's motion in limine to exclude evidence of defendant's prior incarceration in a criminal trial on new charges, although evidence of prior conviction or general bad character was generally inadmissible under former O.C.G.A. § 24-9-20(b), as the criminal history record was redacted, and the evidence was submitted for the rele-

Evidence of Character or Other Crimes (Cont'd)
1. In General (Cont'd)

vant purpose of establishing a timeline in order to refute defendant's alibi that defendant was in another state at the time of the new incident, and further, to show that defendant was called by an alias name, which was used during the incident as well. Copprue v. State, 279 Ga. 771, 621 S.E.2d 457 (2005) (decided under former O.C.G.A. § 24-9-20).

Evidence of specific acts to show bad character. — When defendant puts defendant's general good character in issue, the state may rebut it by evidence as to defendant's general bad character but not by specific acts apart from proof of prior convictions. Folds v. State, 90 Ga. App. 849, 84 S.E.2d 584 (1954) (decided under former Code 1933, §§ 38-415 and 38-416); Smith v. State, 91 Ga. App. 360, 85 S.E.2d 623 (1955) (giving certain exceptions) (decided under former Code 1933, §§ 38-415 and 38-416).

When defendant puts defendant's character in issue in defendant's statement regarding a specific transaction and place, the state can then rebut a statement regarding such transaction and place referred to. Folds v. State, 90 Ga. App. 849, 84 S.E.2d 584 (1954) (decided under former Code 1933, §§ 38-415 and 38-416).

While the impeachment of a defendant's general credibility by proof of general bad character and of prior convictions was prohibited, impeachment of the specific testimony of a criminal defendant (e.g., "I never hurt nobody") may be accomplished by testimony that defendant did, in fact, hurt another, or by a certified copy of a conviction for a crime of physical violence. Williams v. State, 257 Ga. 761, 363 S.E.2d 535 (1988) (decided under former O.C.G.A. § 24-9-20).

Evidence showing intent, bent of mind, and disposition. — Evidence of defendant's lawful consensual sexual relationship with a minor could be used as similar transaction evidence to establish defendant's intent, bent of mind, and lustful disposition. Phagan v. State, 268 Ga. 272, 486 S.E.2d 876 (1997), cert. denied, 522 U.S. 1128, 118 S. Ct. 1079, 140 L. Ed. 2d 136 (1998) (decided under former O.C.G.A. § 24-9-20).

General reputation of one held by community in which one lives is of the best evidence going to show general character. Clarke v. State, 52 Ga. App. 254, 183 S.E. 92 (1935) (decided under former Code 1933, §§ 38-415 and 38-416).

Good character may be proved only by testimony of a witness as to the reputation of the person whose character was in issue; subject to minor exceptions, the opinion of a witness as to character based on personal observation was not an approved way of introducing evidence of character. Taylor v. State, 176 Ga. App. 567, 336 S.E.2d 832 (1985) (decided under former O.C.G.A. § 24-9-20).

Voluntary statement by defendant. — Regardless of whether a statement by the defendant about defendant's sexual relationship with someone not connected with the case was voluntarily given, since the evidence was not relevant nor admissible for impeachment or for any other proper purpose (e.g., to show motive, scheme, or plan), its only purpose was to attempt to show bad character, and, in the absence of interjection of the issue of character by the defendant, this evidence was inadmissible and the admission required reversal. Duke v. State, 256 Ga. 671, 352 S.E.2d 561 (1987) (decided under former O.C.G.A. § 24-9-20).

Defendant's testimony regarding never being in trouble. — It was not error to admit evidence of defendant's prior assault conviction because the conviction was offered as impeachment evidence rather than as evidence of bad character after defendant testified, and defendant's counsel emphasized, that defendant had "never been in trouble." Walker v. State, 260 Ga. App. 241, 581 S.E.2d 295 (2003) (decided under former O.C.G.A. § 24-9-20).

When the defendant testified that the defendant had previously been convicted of theft by receiving because the defendant was an innocent victim of circumstance, the defendant opened the door to the prosecution's cross examination concerning the defendant's other convictions for giving a false name and entering an auto. Cobb v. State, 251

Ga. App. 697, 555 S.E.2d 79 (2001) (decided under former O.C.G.A. § 24-9-20).

Statement by ex-wife/victim's mother inadmissible. — In a child molestation prosecution, testimony by defendant's ex-wife, who was also the victim's mother, regarding her fear of defendant was not evidence of similar transactions as provided in former O.C.G.A. § 24-9-20. Keanum v. State, 212 Ga. App. 662, 442 S.E.2d 790 (1994) (decided under former O.C.G.A. § 24-9-20).

Conduct of family members. — Trial court erred in allowing the state's attorney to cross-examine the defendant, who was accused of possession of marijuana, as to whether other members of the defendant's family had "been in trouble for marijuana." Hill v. State, 176 Ga. App. 509, 336 S.E.2d 276 (1985) (decided under former O.C.G.A. § 24-9-20).

State's reference in the opening statement to defendant's wife's employment as an exotic dancer was followed with testimony about that employment, which was relevant to the question of the couple's need for money, and therefore, the apparent motive for the crimes, which the state was authorized to present even if the evidence directly involved the defendant's wife's participation in an unsavory activity. Thomas v. State, 274 Ga. 156, 549 S.E.2d 359 (2001) (decided under former O.C.G.A. § 24-9-20).

Testimony concerning marital status. — Trial court did not abuse the court's discretion by allowing testimony concerning defendant's marital status, the number of times the defendant was divorced, and the fact that the defendant did not maintain a checking account. Grady v. State, 212 Ga. App. 118, 441 S.E.2d 253 (1994) (decided under former O.C.G.A. § 24-9-20).

Statement in defendant's pretrial statement that defendant had a "drinking problem" and that defendant had been "busted for burglary" did not violate the prohibition in subsection (b) of former O.C.G.A. § 24-9-20 against admission of evidence of a defendant's general bad character unless the defendant puts defendant's character in issue. Stitt v. State, 256 Ga. 156, 345 S.E.2d 578 (1986).

District attorney's reference to an indictment was an inappropriate means of impeaching, by contradictory evidence, defendant's statement that defendant had never hurt anyone. Williams v. State, 257 Ga. 761, 363 S.E.2d 535 (1988) (decided under former O.C.G.A. § 24-9-20).

Gang membership. — Prosecutor's questions to an officer regarding defendant's gang affiliation and attire worn in committing the crime was properly allowed as such was relevant to the issue of identity and defendant's gang membership was admissible to show motive. Johnson v. State, 261 Ga. App. 98, 581 S.E.2d 715 (2003) (decided under former O.C.G.A. § 24-9-20).

Duty to instruct when character evidence wrongly admitted. — It was error in a criminal case for the state to place the defendant's character in issue when the defendant had not voluntarily chosen to do so. If the prosecutor solicited excluded testimony, the trial court was, upon objection and if it chose not to declare a mistrial, required to direct the jury to disregard such testimony. Harris v. State, 251 Ga. App. 879, 555 S.E.2d 485 (2001) (decided under former O.C.G.A. § 24-9-20).

Proper instruction should be given in every case when the defendant puts the defendant's character in issue; but in the absence of a timely request, an omission to give a specific charge on the subject would not require a new trial. It was only in exceptional cases where the court failed to charge relatively to the good character of defendant that a new trial should be granted. Widner v. State, 197 Ga. 542, 30 S.E.2d 97 (1944) (decided under former Code 1933, §§ 38-415 and 38-416); Mangrum v. State, 155 Ga. App. 334, 270 S.E.2d 874 (1980) (further holding that if defendant asserted another defense, denial of the instruction on character was not error) (decided under former Code 1933, §§ 38-415 and 38-416).

Written request to charge. — Barring exceptional circumstances, there must be a written request to charge on principles of law regarding good character; otherwise, the failure to do so will not require a new trial. Taylor v. State, 176 Ga. App. 567, 336 S.E.2d 832 (1985) (decided under former O.C.G.A. § 24-9-20).

Evidence of Character or Other Crimes (Cont'd)

1. In General (Cont'd)

Trial court did not err in denying defendant's motion for mistrial after witness made statements about defendant dealing in drugs on previous occasions as the statements were unsolicited, the trial court gave immediate instructions to disregard the testimony, the witness did not tell the jury anything it did not already know about defendant, and defendant did not show the harm necessary to require the reviewing court to reverse based on the failure to grant the motion for mistrial. McCollum v. State, 258 Ga. App. 574, 574 S.E.2d 561 (2002) (decided under former O.C.G.A. § 24-9-20).

Instructions when defendant's character evidence was uncontradicted. — When defendant puts the defendant's character in issue and offered testimony in support thereof, and the state offered no evidence in contradiction, and no contradiction had arisen from within defendant's testimony, it was error for the court to charge the jury that "the state has introduced evidence to the contrary." Eidson v. State, 66 Ga. App. 765, 19 S.E.2d 373 (1942) (decided under former Code 1933, §§ 38-415 and 38-416).

Even if the denial of mistrial was error, it was highly probable that the complained-of character evidence did not contribute to the verdict because the evidence against defendant was overwhelming; the state presented two police officer witnesses who identified defendant as the gunman shown in the videotape of the armed robbery and the state introduced defendant's statement, wherein defendant admitted that defendant robbed the store. Torres v. State, 258 Ga. App. 393, 574 S.E.2d 438 (2002) (decided under former O.C.G.A. § 24-9-20).

2. Putting Character in Issue

In general. — Only when the defendant makes an election to place defendant's good character in issue may the state offer evidence of the defendant's general bad character or defendant's prior convictions. Jones v. State, 257 Ga. 753, 363 S.E.2d 529 (1988) (decided under former O.C.G.A. § 24-9-20).

When the defendant offers testimony of a witness as to defendant's general good reputation in the community, the state may prove the defendant's general bad reputation in the community and may additionally offer evidence that the defendant has been convicted of prior offenses. Jones v. State, 257 Ga. 753, 363 S.E.2d 529 (1988) (decided under former O.C.G.A. § 24-9-20).

When the defendant testifies in the defendant's own behalf and "falsely denies past criminal conduct or past misdeeds," the state may introduce evidence reflecting negatively on the defendant's character only insofar as that evidence proves the falsity of specific testimony of the defendant. Jones v. State, 257 Ga. 753, 363 S.E.2d 529 (1988) (decided under former O.C.G.A. § 24-9-20).

When the defendant elected to place defendant's character in evidence within the meaning of subsection (b) of former O.C.G.A. § 24-9-20, the state could offer evidence of the defendant's prior convictions. Strong v. State, 263 Ga. 587, 436 S.E.2d 213 (1993) (decided under former O.C.G.A. § 24-9-20).

Character not "put in issue" by inadvertent statements. — It was not necessary to determine whether defendant's testimony on direct examination had "opened the character door," since it was defendant who introduced the defendant's character into evidence by discussing the defendant's criminal record in the response defendant chose to give to the prosecutor's proper cross-examination as to defendant's direct examination testimony. Mitchell v. State, 193 Ga. App. 214, 387 S.E.2d 425 (1989) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in failing to give a jury charge on the defendant's good character. Character was not "put in issue," within the meaning of subsection (b) of former O.C.G.A. § 24-9-20 (see O.C.G.A. § 24-5-506) by inadvertent statements regarding the defendant's good conduct. Character, in order to be charged, should have been placed in evidence as an affirmative defense. Johnson v. State, 261 Ga. 419, 405 S.E.2d 686 (1991) (decided under

former O.C.G.A. § 24-9-20); Keef v. State, 220 Ga. App. 134, 469 S.E.2d 318 (1996) (decided under former O.C.G.A. § 24-9-20).

Trial court correctly refused to allow defendant to impeach codefendants by proof of the codefendants' prior convictions since the codefendants had not placed the codefendants' own character into evidence. Morris v. State, 204 Ga. App. 437, 419 S.E.2d 733 (1992) (decided under former O.C.G.A. § 24-9-20).

When reference to defendant's criminal history was fleeting and incomplete, and the trial court immediately instructed the jurors to disregard the reference, the court did not abuse the court's discretion in electing to give curative instructions rather than granting a mistrial. Smith v. State, 244 Ga. App. 165, 534 S.E.2d 903 (2000) (decided under former O.C.G.A. § 24-9-20).

It was error under earlier provisions of former O.C.G.A. § 24-9-20(b) to question the defendant about the defendant's history of misdemeanor arrests as the defendant's remark that the defendant was not a violent person was at best an inadvertent statement of the defendant's good character, not an election to place the defendant's character in evidence; furthermore, the defendant had not testified untruthfully about the defendant's criminal record and had not testified that the defendant had no prior arrests. Lindsey v. State, 282 Ga. 447, 651 S.E.2d 66 (2007) (decided under former O.C.G.A. § 24-9-20).

Defendant was not entitled to a mistrial simply because a state's witness, in a nonresponsive answer, mentioned that defendant did not want to go back to jail. The mere mention that the defendant had been in jail did not place defendant's character at issue, and a nonresponsive answer to a question impacting negatively on the defendant's character did not place the defendant's character in issue under former O.C.G.A. § 24-9-20(b). Mathis v. State, 299 Ga. App. 831, 684 S.E.2d 6 (2009) (decided under former O.C.G.A. § 24-9-20).

Testimony of previous "trouble" did not place character in issue. — Defendant's testimony on direct examination that defendant had previously been in "some trouble" did not place defendant's character in issue. Richardson v. State, 173 Ga. App. 695, 327 S.E.2d 813 (1985) (decided under former O.C.G.A. § 24-9-20).

Subsequent conduct did not place character in issue. — Trial court erred in admitting detective's testimony that, when the detective questioned defendant seven weeks after the shooting, defendant appeared "to be high" and told the detective that the defendant had been smoking marijuana-laced cigars. Weems v. State, 269 Ga. 577, 501 S.E.2d 806 (1998) (decided under former O.C.G.A. § 24-9-20).

Evidence used to impeach specific testimony. — There were numerous instances when the state may offer evidence of prior crimes or bad acts committed by a defendant for a purpose other than to show that the defendant was a person of bad character, including instances when such evidence was necessary and relevant to impeach the defendant's specific testimony. Crane v. State, 263 Ga. 518, 436 S.E.2d 216 (1993) (decided under former O.C.G.A. § 24-9-20).

Trial court properly allowed a prosecutor to question defendant about any prior positive drug screens as the purpose was to impeach defendant's unsolicited assertion that the drug screen that was the basis of defendant's prosecution was defendant's only positive drug screen; accordingly, although character and conduct in other transactions was generally irrelevant unless defendant first puts defendant's character in issue, pursuant to former O.C.G.A. §§ 24-2-2 and 24-9-20(b) (see now O.C.G.A. §§ 24-4-405 and 24-5-506), evidence may be used for impeachment purposes in order to disprove facts testified to by defendant pursuant to former O.C.G.A. § 24-9-82 (see now O.C.G.A. § 24-6-621). Lockaby v. State, 265 Ga. App. 527, 594 S.E.2d 729 (2004) (decided under former O.C.G.A. § 24-9-20).

Since, in cross-examining a friend of the defendant, defense counsel engaged in questioning about the defendant's church attendance, and since the only purpose of these questions was to elicit testimony about the defendant's character, the trial

Evidence of Character or Other Crimes (Cont'd)
2. Putting Character in Issue (Cont'd)

court properly allowed evidence of defendant's previous license suspensions and insurance cancellations as rebuttal evidence on the same subject. Donaldson v. State, 279 Ga. App. 407, 631 S.E.2d 443 (2006) (decided under former O.C.G.A. § 24-9-20).

Negative impact of nonresponsive answer. — Even when a witness's nonresponsive answer impacted negatively on the defendant's character, it did not place the defendant's character in issue under subsection (b) of former O.C.G.A. § 24-9-20. Williams v. State, 214 Ga. App. 834, 449 S.E.2d 532 (1994) (decided under former O.C.G.A. § 24-9-20); Williams v. State, 269 Ga. 827, 504 S.E.2d 441 (1998) (decided under former O.C.G.A. § 24-9-20); Watkins v. State, 241 Ga. App. 251, 526 S.E.2d 155 (1999) (decided under former O.C.G.A. § 24-9-20).

Evidence of prior difficulties between defendant and victim was admissible to show the relationship between the defendant and the victim, and did not place the defendant's character in evidence within the meaning of former O.C.G.A. § 24-9-20. McKissick v. State, 263 Ga. 188, 429 S.E.2d 655 (1993) (decided under former O.C.G.A. § 24-9-20). But see Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (1999) (decided under former O.C.G.A. § 24-9-20).

Eliciting evidence on direct examination that defendant had been "ripped off" by the victim in previous drug dealings was not an improper introduction of bad character evidence, but was evidence of motive for the crimes committed. Holcomb v. State, 268 Ga. 100, 485 S.E.2d 192 (1997) (decided under former O.C.G.A. § 24-9-20).

Testimony that a photograph was a "mug shot" from the files of the police department did not put the defendant's character in issue. Seals v. State, 176 Ga. App. 67, 335 S.E.2d 306 (1985) (decided under former O.C.G.A. § 24-9-20).

Admission of photograph from website. — In a defendant's trial for vehicular homicide, for which the defendant was convicted, the trial court did not abuse the court's discretion in permitting the state to introduce photographs of the defendant in jail clothing, playfully posing for the camera from a website created by the defendant as the defendant testified how remorseful the defendant was for killing the victim and referenced the specific date that the website photographs were taken; therefore, the defendant opened the door for the state to admit the photographs of the defendant. Merritt v. State, 288 Ga. App. 89, 653 S.E.2d 368 (2007) (decided under former O.C.G.A. § 24-9-20).

Evidence that an accused was presently confined or was in jail did not place the accused's character in evidence. Fields v. State, 176 Ga. App. 122, 335 S.E.2d 466 (1985) (decided under former O.C.G.A. § 24-9-20).

Copies of sexually oriented magazines were not inadmissible at defendant's trial for child molestation and sodomy on grounds the magazines placed defendant's character in issue since the evidence was admitted to show defendant's motive generally and defendant's state of mind and lustful disposition. Stamey v. State, 194 Ga. App. 305, 390 S.E.2d 409 (1990), cert. denied, 194 Ga. App. 912, 390 S.E.2d 409 (1990), 498 U.S. 843, 111 S. Ct. 123, 112 L. Ed. 2d 91 (1990) (decided under former O.C.G.A. § 24-9-20).

Defendant's character incidentally put in issue. — When testimony of a witness for the state of what defendant stated to the witness shortly after the homicide was admissible to show the state of mind and intentions of defendant toward the deceased, the fact that such testimony incidentally put defendant's character in issue did not render the testimony inadmissible. Tiller v. State, 196 Ga. 508, 26 S.E.2d 883 (1943) (decided under former Code 1933, §§ 38-415 and 38-416).

In prosecution of defendant for the shooting death of his wife, testimony of defendant's sister-in-law to effect that she had seen defendant strike victim on two separate occasions was relevant to issue of defendant's motive in killing his wife, and was not rendered inadmissible because it incidentally placed defendant's character

in issue. Hales v. State, 250 Ga. 112, 296 S.E.2d 577 (1982) (decided under former O.C.G.A. § 24-9-20).

Defendant, in prosecution for armed robbery, injected defendant's character into issue after defendant stated defendant did not commit "wrong" which, viewed in the totality of defendant's testimony, was a general declaration of defendant's own good character. Johnson v. State, 169 Ga. App. 102, 311 S.E.2d 537 (1983) (decided under former O.C.G.A. § 24-9-20).

Armed robbery defendant's statement that the reason defendant took a car was because defendant thought there was a warrant for defendant and defendant would "disappear for a while" was relevant to motive, intent, and course of conduct and was not rendered inadmissible because the statement incidentally placed the defendant's character in issue. Millis v. State, 196 Ga. App. 799, 397 S.E.2d 71 (1990) (decided under former O.C.G.A. § 24-9-20).

In prosecution for armed robbery and related crimes, evidence of defendant's prior negotiations about the sale of a machine gun only incidentally placed defendant's character in evidence. Samuels v. State, 223 Ga. App. 275, 477 S.E.2d 414 (1996) (decided under former O.C.G.A. § 24-9-20).

Trial court did not violate former O.C.G.A. § 24-9-20 by admitting evidence which suggested that defendant had lied to friends about age and background and that defendant failed to grieve for the victim because the evidence was relevant to the case and was not rendered inadmissible by the fact that the evidence incidentally placed defendant's character in issue. Mullinax v. State, 273 Ga. 756, 545 S.E.2d 891 (2001) (decided under former O.C.G.A. § 24-9-20).

Trial court properly admitted evidence of defendant's conversations with a police officer, wherein the defendant related that the defendant was carjacked, in an attempt to retrieve the defendant's car that had been involved in a high speed chase with police after robbery and other crimes had been committed, as the conversations were relevant to show that the defendant had given a false account to police; although character evidence that reflected poorly on the defendant was also admitted with those statements, such as the defendant's admission to police that the defendant spent a night with a female who was not defendant's wife, such admission was proper despite the fact that the defendant had not first put the defendant's character in issue, pursuant to former O.C.G.A. § 24-9-20(b). Nashid v. State, 271 Ga. App. 202, 609 S.E.2d 106 (2004) (decided under former O.C.G.A. § 24-9-20).

Evidence admissible as part of res gestae. — Rape victim's statement, in response to a prosecutor's question regarding whether the defendant had threatened to kill the victim during the attack, that "He told me that he was going to kill me. He told me that he'd done it before and that he had no problem doing it," was admissible as part of the res gestae. Even if it placed the defendant's character in issue, the defendant's counsel agreed to a curative instruction, and it was highly probable that the statement did not contribute to the verdict. Dixon v. State, 303 Ga. App. 517, 693 S.E.2d 900 (2010) (decided under former O.C.G.A. § 24-9-20).

Character questioned by drug evidence. — Improper admission of witness's character evidence indicating that defendant was a "source" of cocaine was harmless error in light of evidence that defendant was observed giving the witness a package containing cocaine. Baptiste v. State, 190 Ga. App. 451, 379 S.E.2d 165, cert. denied, 190 Ga. App. 897, 379 S.E.2d 165 (1989) (decided under former O.C.G.A. § 24-9-20).

Although defendant did not put defendant's character into issue within the meaning of former O.C.G.A. § 24-9-20, it was proper to allow evidence of defendant's prior drug possession charge to disprove statements that the defendant did not use drugs. King v. State, 203 Ga. App. 287, 416 S.E.2d 842 (1992) (decided under former O.C.G.A. § 24-9-20).

While it was error to allow reference by a witness to defendant's purported need for cocaine after committing a crime, in view of the unintentional nature of the statement and overwhelming evidence of defendant's guilt, the motion for mistrial

Evidence of Character or Other Crimes (Cont'd)
2. Putting Character in Issue (Cont'd)

was properly denied. White v. State, 268 Ga. 28, 486 S.E.2d 338 (1997) (decided under former O.C.G.A. § 24-9-20).

Fact that the defendant possessed a bag of marijuana at the time of defendant's arrest was admissible in defendant's prosecution for robbery and kidnapping, even though this evidence incidentally put the defendant's character in evidence. Reynolds v. State, 234 Ga. App. 884, 508 S.E.2d 674 (1998) (decided under former O.C.G.A. § 24-9-20).

Defendant's testimony that "I don't carry no drugs" clearly implied that defendant was neither in possession of drugs at the time in question nor on other occasions and, thus, defendant's prior convictions involving possession of cocaine were properly admitted as impeachment evidence. Porter v. State, 240 Ga. App. 554, 524 S.E.2d 259 (1999) (decided under former O.C.G.A. § 24-9-20).

Admission of evidence relevant to every aspect of crime charged. — Custodial statement in which the defendant admitted having turned over an electric meter used in the manufacture of drugs was properly admitted at the defendant's trial and did not improperly introduce character evidence against the defendant since even though a defendant is not charged with every crime committed during a criminal transaction, every aspect relevant to the crime charged may be presented at trial. Ward v. State, 285 Ga. App. 574, 646 S.E.2d 745 (2007) (decided under former O.C.G.A. § 24-9-20).

Defense counsel opening door. — When defense counsel first opened door pertaining to circumstances surrounding appellant's purchase of vehicle from witness by first asking the latter whether or not the vehicle had been stolen, the state's inquiry on rebuttal as to whether appellant knew that the vehicle had been stolen simply informed jury of true nature of that transaction, and the fact that this testimony may have incidentally placed appellant's character in issue did not render the testimony inadmissible. Mulkey v. State, 250 Ga. 444, 298 S.E.2d 487 (1983) (decided under former O.C.G.A. § 24-9-20).

When defense counsel initiated the issue of defendant's propensity for violence during cross-examination of a witness, the prosecution was authorized to further explore that area. Jordan v. State, 267 Ga. 442, 480 S.E.2d 18 (1997) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err when the court allowed the admission of evidence of the defendant's bad character since the defendant opened the door to such evidence when, during cross-examination of the witness, defense counsel introduced three letters from the witness to the defendant and one of those letters referred to the defendant having stolen a car. Thomas v. State, 247 Ga. App. 798, 545 S.E.2d 354 (2001) (decided under former O.C.G.A. § 24-9-20).

Defense counsel opened the door to the prosecution exploring defendant's criminal history at trial based on the cross-examination of an investigating officer in which counsel asked the officer if defendant had ever been convicted of child molestation previous to the allegations of child molestation that were then pending against defendant; the exploration was not limited to defendant's criminal history with respect to sex crimes. Kimmons v. State, 267 Ga. App. 790, 600 S.E.2d 783 (2004) (decided under former O.C.G.A. § 24-9-20).

While a criminal defendant was not subject to impeachment by proof of general bad character or prior convictions, when defense counsel opened the door to asking about the defendant's being in trouble before, the prosecutor could then impeach the defendant with other convictions that the defendant neglected to mention. Scruggs v. State, 309 Ga. App. 569, 711 S.E.2d 86 (2011) (decided under former O.C.G.A. § 24-9-20).

Defense of entrapment. — Defendant's assertion of defense of entrapment, in and of itself, did not have the effect of placing the defendant's character in issue. Johns v. State, 164 Ga. App. 133, 296 S.E.2d 638 (1982) (decided under former O.C.G.A. § 24-9-20).

Character put in issue. — Defendant in prosecution for illegal possession of

alcohol in defendant's statement injected defendant's character into issue after defendant stated: "I work for a living and I don't now fool with the liquor business." Dukes v. State, 90 Ga. App. 50, 81 S.E.2d 864 (1954) (decided under former Code 1933, §§ 38-415 and 38-416).

After a witness testified that the witness had identified appellant to police from the witness's picture in "some mug books," and after the prosecutor thereafter asked the police officer to explain what "mug books" were, defendant's character was placed in evidence. Stanley v. State, 250 Ga. 3, 295 S.E.2d 315 (1982) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err by allowing the state to introduce evidence of two prior convictions of defendant after defendant testified that defendant was in Tallahassee, Florida, purchasing drugs to sell, at the time the offenses charged were committed, although defendant argued that this was alibi evidence, not character evidence, and was not offered to show that defendant was of such good character that defendant could not have committed the offense charged. Laidler v. State, 180 Ga. App. 213, 348 S.E.2d 739 (1986) (decided under former O.C.G.A. § 24-9-20).

When a defendant admitted any prior criminal conduct less than all defendant's criminal offenses, defendant had put defendant's character in issue within the meaning of former O.C.G.A. § 24-9-20, with the result that the prosecutor could cross-examine the defendant as to such conduct and may prove other prior convictions. Spencer v. State, 180 Ga. App. 498, 349 S.E.2d 513 (1986) (decided under former O.C.G.A. § 24-9-20).

When during counsel's cross-examination of the victim, defense counsel elicited testimony from the victim that when the victim was two years old the victim's family's house caught on fire because the victim's father had been sniffing gas, and the victim and the victim's mother then left him, and where, in cross-examining defendant, the prosecuting attorney began asking him about the victim's testimony in regard to his sniffing gas, defendant opened the door to such evidence through defense counsel's cross-examination of the victim and the testimony given by the defendant on direct. Atwell v. State, 204 Ga. App. 187, 419 S.E.2d 77 (1992) (decided under former O.C.G.A. § 24-9-20).

When prior to the state's questioning of defendant about defendant's demotion, defendant's trial counsel, upon inquiry by the trial court, told the court that counsel anticipated putting defendant's character into evidence, the facts demonstrated that defendant, by way of counsel's statements voluntarily elected to place defendant's character in issue prior to any introduction of character evidence on the part of the state. Canup v. State, 216 Ga. App. 828, 456 S.E.2d 215 (1995) (decided under former O.C.G.A. § 24-9-20).

Defendant cannot intentionally testify regarding defendant's community volunteer work with the youth and the elderly in the community and then argue that defendant did not intentionally put defendant's character in issue. Campbell v. State, 221 Ga. App. 105, 470 S.E.2d 503 (1996) (decided under former O.C.G.A. § 24-9-20).

With numerous questions to the state's and defendant's own witnesses, defendant opened the door to defendant's character; thus, the state was permitted to respond with evidence of the prior conviction. Hill v. State, 243 Ga. App. 124, 532 S.E.2d 491 (2000) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in permitting the admission of evidence during cross-examination of the defendant about a prior conviction based on a nolo contendere plea to the offense of giving false information to an officer since, on direct examination, the defendant stated that the defendant had the "most respect for police officers" and that the defendant used to be a corrections officer. Payne v. State, 248 Ga. App. 158, 545 S.E.2d 336 (2001) (decided under former O.C.G.A. § 24-9-20).

When defendant testified that defendant never confronted anyone, always walked away from violent confrontations, and was known in the community as a nonviolent person, defendant placed defendant's character in issue, allowing the admission of defendant's prior convictions for violent crimes under former O.C.G.A.

Evidence of Character or Other Crimes (Cont'd)
2. Putting Character in Issue (Cont'd)

§ 24-9-20(b). Carswell v. State, 263 Ga. App. 833, 589 S.E.2d 605 (2003) (decided under former O.C.G.A. § 24-9-20).

By stating that the defendant was a person who tried not to hurt anyone, the defendant put the defendant's character into issue under former O.C.G.A. § 24-9-20(b). Accordingly, it was not error to allow the state to introduce evidence of the defendant's armed robbery convictions. Allen v. State, 292 Ga. App. 133, 663 S.E.2d 370 (2008), aff'd, 286 Ga. 273, 687 S.E.2d 417 (2009) (decided under former O.C.G.A. § 24-9-20).

Mistrial required. — Trial court erred in denying a mistrial for the injection of character after a state's witness was allowed to state that defendant told the witness that the defendant had been in court "too many times before." Ochle v. State, 218 Ga. App. 69, 459 S.E.2d 560 (1995) (decided under former O.C.G.A. § 24-9-20).

Jury instruction on good character. — While testimony as to specific acts may not always be used to raise the character issue, after a defendant personally provides such testimony and is available to the state for cross-examination as to the defendant's own actions and disposition, the defendant's testimony is admissible to show the defendant's good character. As the testimony was admissible and sufficient to raise the character issue, a substantive issue in the case, the trial court should have given a jury charge, following the defendant's request, to consider evidence of the defendant's good character in reaching the jury's decision. State v. Braddy, 254 Ga. 366, 330 S.E.2d 338 (1985) (decided under former O.C.G.A. § 24-9-20).

Character not put in issue. — Testimony by one of the officers who had a search warrant that the officer was there because complaints had been made against defendant was not harmful to defendant, and did not tend to put defendant's character in issue. Lester v. State, 90 Ga. App. 43, 81 S.E.2d 894 (1954) (decided under former Code 1933, §§ 38-415 and 38-416).

Defendant's statement that defendant lived in a certain county all defendant's life and had not had any whisky trouble there, that defendant had never been arrested for whisky, never been searched, and defendant's house had never been searched, did not put defendant's general character in issue. Folds v. State, 90 Ga. App. 849, 84 S.E.2d 584 (1954) (decided under former Code 1933, §§ 38-415 and 38-416).

Since defendant did not by defendant's statement put defendant's character in issue but merely denied guilt of the crime with which defendant was charged, the introduction into evidence of defendant's prior guilty pleas was error. Smith v. State, 141 Ga. App. 64, 232 S.E.2d 401 (1977) (decided under former Code 1933, §§ 38-415 and 38-416).

Defendant's character was not impermissibly placed in issue when a police officer testified at trial that the officer found an available photograph of the subject to show to certain potential witnesses for purposes of identifying defendant, on grounds that such testimony indicated that defendant's photograph was already in police records, implying that defendant had been previously arrested or convicted of another crime. Woodard v. State, 155 Ga. App. 533, 271 S.E.2d 671 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Detective's testimony that the police identified defendant's fingerprint by comparing the fingerprint to a print that the police already had on file did not inject defendant's character into evidence. Lewis v. State, 255 Ga. 681, 341 S.E.2d 434 (1986) (decided under former O.C.G.A. § 24-9-20).

During a trial for possession of cocaine, the state offered the defendant's prior conviction for forgery into evidence, arguing that defendant's admission of possessing a gun was illegal by a convicted felon, which was prior criminal conduct and defendant had thus placed defendant's character in issue, but no criminal conduct could be shown until after the prior conviction was admitted into evidence over the objection of the defense counsel, because possession of a gun is presumptively lawful, allowing the prior conviction

into evidence in order to place the defendant's character in issue demanded circular logic and defied even the broad parameters of the "simple rule" that when a defendant admits any prior criminal conduct, the prosecutor may cross-examine the defendant as to such conduct and may prove other prior convictions. Hall v. State, 180 Ga. App. 210, 348 S.E.2d 736 (1986) (decided under former O.C.G.A. § 24-9-20).

Prosecution did not place a rape defendant's character in issue by questioning the defendant about information in a police accident report on which defendant relied and based defendant's alibi but merely exercised the prosecution's right to cross-examine and attempt to impeach defendant as any other witness could be impeached. Middlebrooks v. State, 184 Ga. App. 791, 363 S.E.2d 39 (1987) (decided under former O.C.G.A. § 24-9-20).

When the defendant testified and admitted prior criminal conduct, defendant had not placed defendant's character "in issue" within the meaning of subsection (b) of former O.C.G.A. § 24-9-20. Rather, the defendant raised an issue which may be fully explored by the state on cross-examination. Jones v. State, 257 Ga. 753, 363 S.E.2d 529 (1988) (decided under former O.C.G.A. § 24-9-20); Weston v. State, 216 Ga. App. 806, 456 S.E.2d 214 (1995) (decided under former O.C.G.A. § 24-9-20); Warren v. State, 232 Ga. App. 488, 502 S.E.2d 336 (1998) (decided under former O.C.G.A. § 24-9-20).

It was only when a defendant had "put his character in issue," as that term was defined in the context of O.C.G.A. §§ 24-2-2 and 24-9-20(b) (see now O.C.G.A. §§ 24-4-404 and 24-5-506), that the court is required to give a charge on good character, and when, in a trial for aggravated battery, the defendant's statement that defendant never shot anybody was not responsive to the direct question relating to defendant's defenses of accident and self-defense, which the court did fully charge, the volunteered additional statement, merely repeated on redirect, was not legally sufficient to put defendant's character in issue. Williams v. State, 187 Ga. App. 355, 370 S.E.2d 210 (1988) (decided under former O.C.G.A. § 24-9-20).

Defendant's statement that defendant was "not that kind of person" did not operate to place defendant's character in issue so as to open the door to proof of defendant's past criminal record at defendant's trial for rape and aggravated sodomy. McGuire v. State, 188 Ga. App. 891, 374 S.E.2d 816 (1988) (decided under former O.C.G.A. § 24-9-20).

When, on direct examination, defendant attempted to explain that defendant possessed marijuana for medicinal purposes, and that defendant smoked marijuana on occasion to relieve headaches and eye problems, this testimony did not place defendant's character in issue within the meaning of subsection (b) of former O.C.G.A. § 24-9-20. Houston v. State, 192 Ga. App. 73, 383 S.E.2d 571 (1989) (decided under former O.C.G.A. § 24-9-20).

Defendant's testimony that defendant had smoked marijuana and that "I ain't done no burglary. I never have." did not put defendant's character in issue at defendant's trial for burglary so as to permit the introduction of convictions for shoplifting and marijuana-related violations. Hurston v. State, 189 Ga. App. 748, 377 S.E.2d 519 (1989) (decided under former O.C.G.A. § 24-9-20).

When defendant appeals convictions of possession of cocaine, possession of less than one ounce of marijuana, and driving under the influence of alcohol, the trial court erred in allowing the state to introduce evidence that the defendant had been convicted, some three years previously, of the offense of possession of marijuana with intent to distribute, since the state asserted that the prior conviction was admissible to impeach the defendant's testimony, elicited both on direct and on cross-examination, that defendant did not smoke marijuana, despite defendant's objection. Moses v. State, 190 Ga. App. 699, 379 S.E.2d 819 (1989) (decided under former O.C.G.A. § 24-9-20).

Witnesses' testimony of prior difficulties between defendant and the victim may have reflected negatively on defendant, but did not place defendant's character in evidence within the meaning of former O.C.G.A. § 24-9-20. Rotino v. State, 259 Ga. 295, 380 S.E.2d 261 (1989) (decided under former O.C.G.A. § 24-9-20).

Evidence of Character or Other Crimes (Cont'd)

2. Putting Character in Issue (Cont'd)

In prosecution for armed robbery, questioning directed at defendant's reasons for defendant's "flight" was not rendered improper by the defendant's disclosure that defendant was on parole. Jones v. State, 205 Ga. App. 711, 423 S.E.2d 393 (1992) (decided under former O.C.G.A. § 24-9-20).

Because defendant had not placed defendant's character "in issue" within the meaning of former O.C.G.A. § 24-9-20, the state properly introduced evidence of a prior drug conviction to negate defendant's specific testimony that defendant had never been in the drug business. Howard v. State, 206 Ga. App. 610, 426 S.E.2d 181 (1992) (decided under former O.C.G.A. § 24-9-20).

In a trial for sex offenses, denial of the defendant's motion for a mistrial was proper since the motion was based upon the improper placement of defendant's character in issue when a detective testified about one victim's speculation that the defendant devised defendant's plan to molest the victim while the defendant was in jail. Shropshire v. State, 210 Ga. App. 241, 435 S.E.2d 700 (1993) (decided under former O.C.G.A. § 24-9-20).

When defendant did not testify either on direct- or cross-examination in such a way as to admit prior criminal conduct and did not testify in a manner implying that the defendant had no criminal record, the defendant did not place the defendant's character in issue and the trial court erred in admitting the records of defendant's previous convictions. Hancock v. State, 210 Ga. App. 528, 437 S.E.2d 610 (1993) (decided under former O.C.G.A. § 24-9-20).

When the apparent intent of the questioning was not to impugn defendant's character but rather to cast doubt on the witness's credibility, including the witness's denial that any money bag was brought into the witness's apartment, by showing the witness's bias in favor of the witness's brother and the witness's history of coming to the brother's aid, the defendant's character was not put in issue; moreover, even if the jury could infer from the colloquy that defendant had a prior brush with the law, it did not improperly place defendant's character in evidence. Norman v. State, 212 Ga. App. 105, 441 S.E.2d 94 (1994) (decided under former O.C.G.A. § 24-9-20).

Defendant did not open the door to evidence of prior convictions when, in a rambling, somewhat unresponsive answer to a question about the defendant having enough money to live on defendant's own, defendant said defendant didn't "convert himself to a criminal life." Stinson v. State, 221 Ga. App. 758, 472 S.E.2d 538 (1996) (decided under former O.C.G.A. § 24-9-20).

In a prosecution for trafficking in cocaine, defendant's character was not placed in issue when a police officer was asked if it would have been unusual to find a razor blade in defendant's pocket and the officer replied "No, not in this particular incident." Menefee v. State, 226 Ga. App. 725, 487 S.E.2d 489 (1997) (decided under former O.C.G.A. § 24-9-20).

When the defendant testified and admitted prior criminal conduct, the defendant had not placed defendant's character in issue within the meaning of subsection (b) of former O.C.G.A. § 24-9-20; rather, defendant raised an issue which may be fully explored by the state on cross-examination. Davidson v. State, 231 Ga. App. 605, 499 S.E.2d 697 (1998) (decided under former O.C.G.A. § 24-9-20).

In a prosecution for Medicaid fraud, testimony of defendant's employee that defendant put too much pressure on the employee and didn't respect the employee as a person did not rise to the level of general bad character evidence. Bullard v. State, 242 Ga. App. 843, 530 S.E.2d 265 (2000) (decided under former O.C.G.A. § 24-9-20).

Police officer's testimony that the officer understood an informant's reference to defendant as "Man" to be the use of defendant's street name did not place defendant's character in evidence as there was no evidence indicating how the officer knew defendant's nickname or that defendant had any history with the officer's drug task force, and, thus, did not require the mistrial defendant requested. Carter

v. State, 261 Ga. App. 204, 583 S.E.2d 126 (2003) (decided under former O.C.G.A. § 24-9-20).

Defendant claimed that another person agreed to pay defendant to take that person to an informant's home, and denied that drugs found in the defendant's cell phone cover belonged to the defendant or that the defendant went to the informant's home to sell drugs; these responses at trial did not raise the question of the defendant's character, and the trial court improperly admitted defendant's prior convictions. King v. State, 270 Ga. App. 399, 606 S.E.2d 616 (2004) (decided under former O.C.G.A. § 24-9-20).

Jury was improperly charged that a witness could be impeached by proof that the witness had been convicted of a crime involving moral turpitude since the defendant was the only witness for whom a certified copy of a previous conviction was introduced into evidence and the defendant's conviction should not have been admitted as the defendant had not placed the defendant's character into issue. However, there was not reversible error as the defendant requested the charge on impeachment that included the language the defendant challenged. Miller v. State, 281 Ga. App. 354, 636 S.E.2d 60 (2006), cert. denied, No. S07C0087, 2007 Ga. LEXIS 106 (Ga. 2007) (decided under former O.C.G.A. § 24-9-20).

Child molestation defendant did not put the defendant's good character into issue so as to require a jury charge; the defendant's testimony regarding the defendant's attempts to help the victim was more reasonably construed as an explanation for the inordinate amount of time the defendant spent with the victim than as evidence of good character, and the defendant's testimony regarding the defendant's two part-time jobs only inadvertently placed the defendant's good character into issue. Kurtz v. State, 287 Ga. App. 823, 652 S.E.2d 858 (2007), cert. denied, No. S08C0321, 2008 Ga. LEXIS 184 (Ga. 2008) (decided under former O.C.G.A. § 24-9-20).

In a joint trial wherein a defendant and two codefendants were convicted of armed robbery, the trial court did not err by denying the defendant's motion for a new trial based on the trial court allegedly erroneously admitting character evidence of the defendant as the mere mention that the defendant had been in jail fell short of placing the defendant's character at issue, and a witness's nonresponsive answer to a question did not impact negatively on the defendant's character nor placed defendant's character in issue. Mathis v. State, No. A09A0215; No. A09A0308; No. A09A0358, 2009 Ga. App. LEXIS 586 (May 20, 2009) (decided under former O.C.G.A. § 24-9-20).

Character not in issue but allowed admission of prior conviction. — Defendant's statement that defendant did not sell drugs did not place defendant's character in issue, but did provide a basis for the admission of evidence of defendant's prior conviction for possession of cocaine with intent to distribute. Jester v. State, 229 Ga. App. 490, 494 S.E.2d 284 (1997) (decided under former O.C.G.A. § 24-9-20).

Defendant's character put in issue by prosecution witness. — Rule which permitted the prosecution to rebut evidence adduced for the purpose of proving defendant's good character was not affected by the fact that the witness used for the purpose of showing good character was called to the stand by the state. Johnson v. State, 84 Ga. App. 745, 67 S.E.2d 246 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

Defendant placing character in issue. — When, during cross-examination, defendant described defendant's characteristics and testified to the lack of past misdeeds, the state was entitled to explore the truth of the statements regardless of whether defendant placed defendant's character in issue within the meaning of subsection (b) of former O.C.G.A. § 24-9-20. Bryant v. State, 226 Ga. App. 135, 486 S.E.2d 374 (1997) (decided under former O.C.G.A. § 24-9-20).

Defendant's statement on cross-examination that defendant "didn't rob nobody" opened the door to defendant's character and inquiries about defendant's prior armed robbery convictions. Morrison v. State, 232 Ga. App. 846, 502 S.E.2d 470 (1998) (decided under former O.C.G.A. § 24-9-20).

Evidence of Character or Other Crimes (Cont'd)

2. Putting Character in Issue (Cont'd)

Because defendant admitted to using drugs on direct examination, the state was entitled to fully explore this issue on cross-examination and was entitled to explore the possibility of defendant's desire for drugs as a motive for robbery, even if it incidentally put defendant's character in issue. Maddox v. State, 238 Ga. App. 598, 521 S.E.2d 581 (1999) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in allowing evidence of defendant's prior conviction into evidence because the fact that defendant was on probation was brought out on direct examination by defendant's own attorney and the defense informed the court that they would call the probation officer as a witness. Williams v. State, 246 Ga. App. 347, 540 S.E.2d 305 (2000) (decided under former O.C.G.A. § 24-9-20).

Questions and responses alluding to prior arrests impermissibly placed defendant's character in issue, and when the trial court failed to take any corrective action in fulfillment of the court's duty, the defendant was denied a fair trial. Richardson v. State, 199 Ga. App. 10, 403 S.E.2d 877 (1991) (decided under former O.C.G.A. § 24-9-20).

Trial court erred in allowing the state's attorney to question the defendant regarding several previous occasions on which defendant had been arrested on the theory that defendant's character had been placed in issue during an exchange between the state's attorney and the defendant's grandfather. Parker v. State, 198 Ga. App. 838, 403 S.E.2d 897 (1991) (decided under former O.C.G.A. § 24-9-20).

Instructions. — It was reversible error for the court to charge the jury that the defendant had "undertaken" to put the defendant's character in issue, when as a matter of fact the defendant in the defendant's statement did put the defendant's character in issue. Spikes v. State, 72 Ga. App. 537, 34 S.E.2d 561 (1945) (decided under former Code 1933, §§ 38-415 and 38-416).

Charge on impeachment by proof of conviction was not reversible error even though defendant had not placed defendant's character in issue because of the overwhelming evidence of the appellant's guilt. Peterson v. State, 212 Ga. App. 147, 441 S.E.2d 481 (1994) (decided under former O.C.G.A. § 24-9-20).

Whenever there is evidence to support a charge on good character and defendant requests that such a charge be given, the jury must be instructed that the jury may consider good character evidence in the jury's deliberations. Sapp v. State, 271 Ga. 446, 520 S.E.2d 462 (1999) (decided under former O.C.G.A. § 24-9-20).

Tendency to put character in issue mitigated by instructions. — Upon the trial of one accused of murder, it was not error to admit signatures to pleas of guilty on two indictments admittedly signed by the defendant as a standard for comparison with handwriting on an envelope and letter also introduced in evidence by the state and contended by the state to be in the handwriting of the defendant, but denied by the defendant, over the objection that this evidence would put the defendant's character in issue, even though the indictments themselves also went out to the jury, since the jury was instructed that the jury was not to consider anything in the two indictments other than signatures of the defendant appearing thereon, and only for the purpose of comparison, and that the indictments and pleas of guilty should not be considered by the jury as affecting the character or reputation of the defendant. Hyde v. State, 196 Ga. 475, 26 S.E.2d 744 (1943) (decided under former Code 1933, §§ 38-415 and 38-416).

It was not erroneous for the trial judge to overrule a motion for a mistrial, when, in answer to a question propounded by the prosecution, evidence was elicited from a witness (regarding a prior shooting by the accused) which tended to put the character of the accused in issue, when, upon objection by counsel for the accused, such evidence was excluded and the jury was instructed to disregard the question and the responsive answer. Joyner v. State, 208 Ga. 435, 67 S.E.2d 221 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

When during cross-examination counsel for defendant asked a question, the answer to which was complained of as tending to put defendant's character in evidence, and the trial judge, acting immediately, ruled out the evidence, thereby removing the evidence from consideration of the jury, court would not say, under the circumstances, that this action by the trial judge did not afford defendant all the protection to which defendant was entitled under law. Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

Evidence of victim's character. — In a homicide prosecution, defendant could introduce proof that deceased was a person of violent and turbulent character only when it was shown prima facie that defendant had been assailed by deceased and was honestly seeking to defend oneself. Robertson v. State, 124 Ga. App. 119, 183 S.E.2d 47 (1971) (decided under former Code 1933, §§ 38-415 and 38-416).

Victim's violent character and general reputation for violence were admissible after the codefendant arguably made a showing that the defendant was honestly seeking to defend oneself rather than to act as the aggressor. Smith v. State, 267 Ga. 372, 477 S.E.2d 827 (1996), overruled on other grounds, 287 Ga. 646, 697 S.E.2d 757 (2010) (decided under former O.C.G.A. § 24-9-20).

Harmless error. — Evidence showing that defendant was willing to be a "bigtime" cocaine dealer was erroneously admitted, but, when the evidence of defendant's guilt was ample and it was highly probable that the placing of defendant's character in issue did not contribute to the jury's verdict, the error was not harmful. Hargrove v. State, 188 Ga. App. 336, 373 S.E.2d 44 (1988) (decided under former O.C.G.A. § 24-9-20).

Failure to give defendant's requested charge on good character was harmless error since it was likely that the jury would not have relied upon defendant's good character to acquit defendant since the state presented evidence of defendant's prior convictions and the evidence of defendant's guilt was overwhelming. Duvall v. State, 259 Ga. 801, 387 S.E.2d 880 (1990) (decided under former O.C.G.A. § 24-9-20).

Improper admission of testimony placing defendant's character in evidence was not reversible error since the trial judge gave adequate curative instructions, and the evidence against defendant was overwhelming. Ayers v. State, 194 Ga. App. 301, 390 S.E.2d 432 (1990) (decided under former O.C.G.A. § 24-9-20).

When a defendant did not voluntarily place defendant's character in issue, the particular facts and circumstances of this case made it highly probable that testimony regarding the defendant's violent character when drinking did not contribute to the verdict. The erroneously-admitted evidence was cumulative of a fact which had already been established beyond a reasonable doubt. Washington v. State, 194 Ga. App. 756, 391 S.E.2d 718 (1990) (decided under former O.C.G.A. § 24-9-20).

Although the defendant's prior burglary conviction, admitted by stipulation of counsel for the purpose of establishing modus operandi, could not be considered by the jury for purposes of impeaching the defendant's testimony, the error did not require reversal due to the overwhelming evidence of the defendant's guilt. Howard v. State, 202 Ga. App. 574, 415 S.E.2d 45 (1992) (decided under former O.C.G.A. § 24-9-20).

Any error in instructing the jury that a witness could be impeached upon proof of general bad character was harmless as the only person possibly impeached was defendant, who testified that defendant had been admitted to a club although defendant was underage because defendant knew the bouncer; the testimony was so innocuous as to not amount to evidence of bad character as defendant did not state that defendant lied to get in, cheated to get in, or broke any laws. Young v. State, 272 Ga. App. 304, 612 S.E.2d 118 (2005) (decided under former O.C.G.A. § 24-9-20).

In the absence of evidence connecting the defendant to the injuries depicted in a photograph of the defendant's love interest, the photo was not appropriate impeachment evidence, and the trial court erred in admitting it; however, the error

Evidence of Character or Other Crimes (Cont'd)

2. Putting Character in Issue (Cont'd)

was harmless because eyewitness testimony identified the defendant as the person who shot the victim multiple times while the victim lay on the ground partially paralyzed, and it was highly probable that the erroneous admission of the photograph into evidence did not contribute to the jury's verdict and the judgment of conviction entered against the defendant. Coleman v. State, 286 Ga. 291, 687 S.E.2d 427 (2009) (decided under former O.C.G.A. § 24-9-20).

It was error for the trial court to refuse to charge the jury on impeachment by prior conviction for a crime of moral turpitude because the inmate who testified to the defendant's jailhouse confession was a convicted felon; however, the error was harmless because even disregarding the inmate's testimony, the evidence of defendant's guilt was overwhelming, and the trial court gave the pattern jury instruction on credibility. Brown v. State, 289 Ga. 259, 710 S.E.2d 751 (2011), cert. denied, U.S. , 132 S. Ct. 524, 181 L. Ed. 2d 368 (2011) (decided under former O.C.G.A. § 24-9-20).

3. Use of Evidence of Other Crimes

Evidence of codefendant's transactions admissible. — There was no call for a mistrial based on evidence of similar transactions since the state never suggested, nor would it be inferable from any of the evidence, that defendant was implicated in any way in the second count in which defendant's codefendant was charged. Ealy v. State, 203 Ga. App. 219, 416 S.E.2d 559 (1992) (decided under former O.C.G.A. § 24-9-20).

Prior conviction admissible to rebut specific testimony. — Although the defendant did not put the defendant's "character into issue" within the meaning of subsection (b) of former O.C.G.A. § 24-9-20, it was proper to allow evidence of a prior drug possession charge to disprove defendant's statement that the defendant did not use drugs. The introduction of the prior conviction was permissible since the state was rebutting specific testimony. Sanders v. State, 199 Ga. App. 671, 405 S.E.2d 727 (1991) (decided under former O.C.G.A. § 24-9-20); Thrasher v. State, 243 Ga. App. 702, 534 S.E.2d 439 (2000) (decided under former O.C.G.A. § 24-9-20).

Evidence of independent crimes was admissible for limited purposes if two conditions were met: first, there must be evidence that the defendant was in fact the perpetrator of the independent crime. Second, there must be sufficient similarity or connection between the independent crime and the offense charged, that proof of the former tended to prove the latter. If these conditions were satisfied, evidence concerning the independent crimes could be admitted for the purposes of showing, among other things, identity, motive, plan, scheme, bent of mind, intent, and course of conduct. Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82 (1983) (decided under former O.C.G.A. § 24-9-20); Lord v. State, 199 Ga. App. 814, 406 S.E.2d 137 (1991) (decided under former O.C.G.A. § 24-9-20).

Evidence of independent offenses may be admitted if the state introduces the evidence for a proper purpose, if there is sufficient evidence to establish that the defendant actually committed the independent offenses, and if there is sufficient similarity between the charged offense and the independent offenses. Henderson v. State, 204 Ga. App. 884, 420 S.E.2d 813 (1992) (decided under former O.C.G.A. § 24-9-20).

Conviction improperly admitted for impeachment. — Defendant's prior conviction was improperly admitted as the timing of defendant's prior conviction was not inconsistent with defendant's trial testimony that defendant was "in the Persian Gulf" at the time of the codefendant's prior drug offense; the error was not harmless as the evidence of defendant's cocaine trafficking conviction, while sufficient, was not overwhelming. Patten v. State, 275 Ga. App. 574, 621 S.E.2d 550 (2005) (decided under former O.C.G.A. § 24-9-20).

Use of evidence of other crimes held proper. — Question to one of defendant's witnesses who had testified as to defendant's good character, on

cross-examination by counsel for the state, as to whether it would affect the witness's opinion of defendant's reputation if the witness knew that the defendant carried a pistol in defendant's bosom since there was evidence by at least one witness that defendant was carrying a pistol around in the bosom of the defendant's dress prior to the homicide, was a proper one under the circumstances in which it was asked. Jones v. State, 88 Ga. App. 330, 76 S.E.2d 810 (1953) (decided under former Code 1933, §§ 38-415 and 38-416).

When defendant was on trial for the offense of murder, and there was evidence tending to show that the defendant killed the deceased in the commission of a robbery, and also that on the occasion in question the defendant came to the home of the deceased in an automobile and left by the same conveyance, evidence that the defendant later admitted stealing the automobile in a different county tended to illustrate defendant's state of mind at the time of the homicide, and to corroborate the other evidence tending to show robbery as the motive, and was not subject to objection on the grounds that it was irrelevant and prejudicial, and placed defendant's character in issue. Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 2d 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, §§ 38-415 and 38-416).

In the defendant's prosecution for the murder of his present wife, evidence that the defendant had shot his former wife in the shoulder with a pistol was admissible to show malice, intent, motive, and bent of mind and did not impermissibly place the defendant's character in issue. Clark v. State, 255 Ga. 370, 338 S.E.2d 269 (1986) (decided under former O.C.G.A. § 24-9-20).

Evidence of similar crimes held to be properly admitted. — See Anderson v. State, 184 Ga. App. 293, 361 S.E.2d 270 (1987) (decided under former O.C.G.A. § 24-9-20); Flowers v. State, 191 Ga. App. 396, 381 S.E.2d 768 (1989) (decided under former O.C.G.A. § 24-9-20).

When a defendant, on trial for trafficking in cocaine, volunteered that the defendant tried to flee in a prior similar transaction case because the defendant was on parole, the trial court did not err in permitting the state to ask what crime the defendant had been paroled from, once the defendant had interjected the fact. Head v. State, 195 Ga. App. 445, 393 S.E.2d 730 (1990) (decided under former O.C.G.A. § 24-9-20).

When defendant was prosecuted for a drug offense arising out of defendant's attempt to deliver cocaine concealed in a box of toothpaste to a jail inmate, evidence of a similar transaction involving the defendant's codefendant at the jail five months later was admissible. Riley v. State, 196 Ga. App. 148, 395 S.E.2d 394 (1990) (decided under former O.C.G.A. § 24-9-20).

In a prosecution for driving under the influence, failure to stop at a stop sign, violating the open container law, and improper lane usage, evidence that defendant previously drove while under the influence of alcohol, and with an open container in the car, was admissible as circumstantial evidence of the defendant's bent of mind and course of conduct on the night in question. McCullough v. State, 230 Ga. App. 98, 495 S.E.2d 338 (1998) (decided under former O.C.G.A. § 24-9-20).

Mistrial was not required in a prosecution for selling and trafficking in cocaine since the defendant testified at length on direct examination that the defendant arranged numerous drug buys for the police and that the defendant was threatened and attacked by individuals who were arrested as a result of the defendant's aid and such testimony opened the door to the prosecutor's questions about how the defendant was able to arrange those drug buys and whether any danger the defendant faced could have come from the defendant's involvement in other drug transactions. Satterfield v. State, 248 Ga. App. 479, 546 S.E.2d 859 (2001) (decided under former O.C.G.A. § 24-9-20).

Because defendant's prior guilty pleas were made with assistance of counsel and were voluntary, the trial court did not err in admitting the pleas to show aggravating circumstances during sentencing.

Evidence of Character or Other Crimes (Cont'd)
3. Use of Evidence of Other Crimes (Cont'd)

Sampson v. State, 271 Ga. App. 206, 609 S.E.2d 110 (2004) (decided under former O.C.G.A. § 24-9-20).

Evidence of more convictions than defendant testified to. — When defendant testified to three prior convictions, the court properly allowed evidence of a fourth conviction as impeachment. Bounds v. State, 207 Ga. App. 665, 428 S.E.2d 673 (1993) (decided under former O.C.G.A. § 24-9-20). But see Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999) (decided under former O.C.G.A. § 24-9-20).

Evidence of incarceration admissible. — Evidence introduced regarding defendant's incarceration under another name was relevant to the charge of giving a false name and was not objectionable based upon former O.C.G.A. § 24-9-20. Agony v. State, 226 Ga. App. 330, 486 S.E.2d 625 (1997) (decided under former O.C.G.A. § 24-9-20).

Under former O.C.G.A. § 24-9-20(b), state did not elicit improper character evidence from the defendant regarding the defendant's prior incarceration during cross-examination because the defendant mentioned the prior incarceration during the defendant's testimony. Baker v. State, 307 Ga. App. 884, 706 S.E.2d 214 (2011), cert. denied, No. S11C0940, 2011 Ga. LEXIS 517 (Ga. 2011) (decided under former O.C.G.A. § 24-9-20).

Evidence of parole status. — Assuming that the defendant did not, merely by volunteering that the defendant was on parole, place the defendant's character "in issue" within the meaning of subsection (b) of former O.C.G.A. § 24-9-20 so as to permit rebuttal by the state, the defendant nevertheless subjected oneself to a through and sifting cross-examination by the state on that point. Wilson v. State, 231 Ga. App. 525, 499 S.E.2d 911 (1998) (decided under former O.C.G.A. § 24-9-20).

Similarity to previous offenses. — There was no requirement that a previous offense be absolutely identical to the one being prosecuted so as to make the offense admissible. Blige v. State, 205 Ga. App. 133, 421 S.E.2d 547 (1992), aff'd, 263 Ga. 244, 430 S.E.2d 761 (1993) (decided under former O.C.G.A. § 24-9-20).

Similarity to other conduct. — Showing excerpt of a videotape found in defendant's possession which depicted the conduct with which defendant was charged was not error since it was relevant to defendant's bent of mind and modus operandi. Rushin v. State, 269 Ga. 599, 502 S.E.2d 454 (1998) (decided under former O.C.G.A. § 24-9-20).

Trial court did not err in admitting the similar transaction evidence as the evidence described acts remarkably similar to those with which defendant was charged; the victims' older sister testified that defendant had forced her to have intercourse with him in a manner similar to that testified to by the victims, and defendant's wife testified that he performed the same deviant sexual act upon her that the victims testified he performed upon them, thus, the evidence was admissible to show defendant's bent of mind, course of conduct, and lustful disposition with respect to the offenses alleged against him. Beck v. State, 263 Ga. App. 256, 587 S.E.2d 316 (2003) (decided under former O.C.G.A. § 24-9-20).

Remoteness in time. — Testimony concerning a prior shooting incident (six years before the killing) involving the defendant and the defendant's subsequent murder victim was not too remote in time to have been admissible. Thurman v. State, 255 Ga. 286, 336 S.E.2d 746 (1985) (decided under former O.C.G.A. § 24-9-20).

Permitting the prosecutor to ask defendant if the defendant had been arrested on a sex charge subsequent to the incident in question at defendant's trial for child molestation and enticing a child for indecent purposes was reversible error since the sole issue in the case was the credibility of the defendant and the alleged victim. Thomas v. State, 178 Ga. App. 674, 344 S.E.2d 496 (1986) (decided under former O.C.G.A. § 24-9-20).

Proof of forgery conviction prejudicial. — When evidence of defendant's

prior conviction of forgery was admitted during defendant's trial for possession of a controlled substance, since forgery was a crime of moral turpitude which went directly to the defendant's truthfulness and veracity, the Court of Appeals could not say with certainty that the defendant's conviction for possession of a controlled substance was not unduly influenced by inadmissible evidence of defendant's prior criminal record, and the judgment was reversed. Hall v. State, 180 Ga. App. 210, 348 S.E.2d 736 (1986) (decided under former O.C.G.A. § 24-9-20).

Relevance of evidence concerning a previous altercation between defendant and defendant's subsequent murder victim wherein defendant cut the victim with a knife many times on the face and arm (for which defendant was convicted of simple battery) outweighed the possible prejudicial effect of such evidence since it shed light on the defendant's conduct toward the victim. Cooper v. State, 256 Ga. 234, 347 S.E.2d 553 (1986) (decided under former O.C.G.A. § 24-9-20).

Possession of firearm by convicted felon. — It was proper under former O.C.G.A. § 24-9-20 to try a firearms possession charge, which required evidence of a prior felony conviction, together with a marijuana and a burglary charge. State v. Santerfeit, 163 Ga. App. 627, 295 S.E.2d 756 (1982) (decided under former O.C.G.A. § 24-9-20).

In a prosecution for assault and possession of a pistol by a convicted felon, the testimony of an officer to show defendant's possession of the pistol prior to the date of the assault was admissible. Fulton v. State, 232 Ga. App. 898, 503 S.E.2d 54 (1998) (decided under former O.C.G.A. § 24-9-20).

Evidence of defendant's narcotic use admissible to show motive for burglaries. — When a defendant was charged with the robbery or burglary of a pharmacy or drug store, evidence that the defendant used narcotics was admissible since that evidence was relevant to the defendant's motive for committing the crime. Brock v. State, 179 Ga. App. 519, 347 S.E.2d 230 (1986) (decided under former O.C.G.A. § 24-9-20).

Court's admission of evidence of prior sexual contact was not error since both the prior incident and the charged crime involved nonconsensual sexual conduct related to younger females in defendant's household, and the prior incident occurred in the same time frame as the onset of the charged crimes. Yelverton v. State, 199 Ga. App. 41, 403 S.E.2d 816 (1991) (decided under former O.C.G.A. § 24-9-20).

Proof of crimes involving moral turpitude was admissible to impeach witness who placed the witness's character in issue through testimony given by the witness on direct examination. Emmett v. State, 199 Ga. App. 650, 405 S.E.2d 707, cert. denied, 199 Ga. App. 905, 405 S.E.2d 707 (1991) (decided under former O.C.G.A. § 24-9-20).

Admission of fingerprint card was error. — In a prosecution for possession of marijuana, it was reversible error to introduce a fingerprint card of defendant that showed the date of a prior arrest and listed charges against the defendant. Jinks v. State, 229 Ga. App. 18, 493 S.E.2d 214 (1997) (decided under former O.C.G.A. § 24-9-20).

Parole records admissible. — It was not error to allow the state to introduce into evidence defendant's parole documents after these were taken from defendant's person upon arrest. Dowdy v. State, 209 Ga. App. 95, 432 S.E.2d 827 (1993) (decided under former O.C.G.A. § 24-9-20).

Evidence of probation violation. — Record did not support defendant's claim that the state violated former O.C.G.A. § 24-9-20 by introducing the issue of defendant's probation violation during cross-examination to show that the defendant had prior convictions, and the appellate court found that the trial court did not abuse the court's discretion by denying the defendant's motion for a mistrial. Fernandez v. State, 263 Ga. App. 750, 589 S.E.2d 309 (2003) (decided under former O.C.G.A. § 24-9-20).

Admissible in cross-examination when defendant raised probation status on direct. — When defendant admitted that defendant was on probation for prior criminal conduct during defendant's

Evidence of Character or Other Crimes (Cont'd)
3. Use of Evidence of Other Crimes (Cont'd)

direct testimony, it was admissible for the trial court to allow the state, on cross-examination, to explore the nature of defendant's prior probation, including the fact that the defendant was on probation for having previously fled from the police, which was what the present trial was about; accordingly, there was no error in this admission of evidence pursuant to former O.C.G.A. § 24-9-20(b). Dyer v. State, 261 Ga. App. 289, 585 S.E.2d 81 (2003) (decided under former O.C.G.A. § 24-9-20).

No cross-examination on unproved crimes, violent acts. — When the state cross-examines a character witness, the prosecutor may not ask questions as to unproved crimes or acts of violence which are inflammatory, prejudicial, and suggestive of facts not in evidence. Chisholm v. State, 199 Ga. App. 746, 406 S.E.2d 112 (1991) (decided under former O.C.G.A. § 24-9-20).

Evidence of specific acts to rebut defendant's character evidence held harmless error. — When defendant's character had been put in issue, it was not permissible in rebuttal to prove specific acts of bad character, except on cross-examination for the purpose of testing the witness's knowledge or to impeach defendant's statement; nevertheless, admission of evidence that the police officer had received reports concerning liquor violations by defendant in rebuttal of evidence that defendant had never been previously arrested for liquor violations, the defendant conceding that the defendant had placed defendant's character in issue as to liquor violations, was not such error as to require reversal. Johnson v. State, 84 Ga. App. 745, 67 S.E.2d 246 (1951) (decided under former Code 1933, §§ 38-415 and 38-416).

Because the trial court did not commit reversible error when the court erroneously allowed the state to introduce evidence of defendant's prior misdemeanor convictions under former O.C.G.A. §§ 24-2-2 and 24-9-20(b) (see now O.C.G.A. §§ 24-4-404 and 24-5-506), defendant failed to show that counsel's trial strategies constituted ineffective assistance. Harris v. State, 279 Ga. 522, 615 S.E.2d 532 (2005) (decided under former O.C.G.A. § 24-9-20).

Argument to Jury

Rules generally applicable. — Defendant in a criminal case has the right to make, without interruption, such statement to the jury in the defendant's defense as the defendant sees fit and proper to make. Defendant was not circumscribed, governed, or restricted by the rules controlling admissibility of evidence. It was error to interrupt the defendant and exclude from consideration of the jury a portion of defendant's statement, so long as the defendant confines oneself to the transaction under investigation. The court may, however, prevent the defendant from making wholly irrelevant statements entirely inapplicable to the case. Bradford v. State, 67 Ga. App. 462, 21 S.E.2d 108 (1942), later appeal, 69 Ga. App. 856, 26 S.E.2d 848 (1943) (decided under former Code 1933, §§ 38-415 and 38-416).

Right to make a statement in the defendant's behalf was a personal right granted to defendant by law, and extended no further than to permit defendant personally to make to the court and jury such statement as defendant deemed proper in the defendant's defense. Defendant's counsel had no right to ask the defendant questions while defendant was making defendant's statement. The trial judge, however, in the judge's discretion can permit the defendant's counsel to ask the defendant questions or make suggestions to defendant relating to the defendant's statement, while defendant was making it or when the defendant had concluded it. Williams v. State, 220 Ga. 766, 141 S.E.2d 436, answer conformed to, 111 Ga. App. 588, 142 S.E.2d 409 (1965) (decided under former Code 1933, §§ 38-415 and 38-416).

Failure of a defendant's wife to testify was not a legitimate subject matter of argument for counsel for the state; although such a comment did not constitute reversible error when the trial court rebuked the prosecuting attorney immedi-

ately in the presence of the jury, instructs the jury that it was not necessary for any defendant or the defendant's spouse ever to take the stand, and that the burden was always upon the state to prove a defendant's guilt beyond a reasonable doubt. Casey v. State, 167 Ga. App. 437, 306 S.E.2d 683 (1983) (decided under former O.C.G.A. § 24-9-20).

Denial of right was reversible error. — Making of a statement by defendant, when the defendant introduced no other evidence, entitled the defendant to conclude the argument in the case. This is an important right, and the right's denial would generally cause a reversal of the decision of the lower court. The presumption arising from denial of the right was that the party thus deprived was injured. Kelly v. State, 149 Ga. App. 388, 254 S.E.2d 737 (1979) (decided under former Code 1933, §§ 38-415 and 38-416).

Denying defendant the right to make the closing argument was not error since a codefendant had tendered an exhibit into evidence that was admitted without objection during cross-examination of a police officer. Boston v. State, 185 Ga. App. 740, 365 S.E.2d 885 (1988) (decided under former O.C.G.A. § 24-9-20).

Defendants may not suggest in argument what defendants saw fit not to put on stand, that there was other witness testimony favorable to their defense, and to nevertheless have benefit of privilege to open and conclude argument to jury. Sanders v. State, 156 Ga. App. 44, 274 S.E.2d 88 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Suggestion that defendants sacrificed testimony to preserve argument. — It would not be proper to intimate to jury that defendants had sacrificed valuable defense witness testimony to preserve procedural right to open and conclude argument to jury. Sanders v. State, 156 Ga. App. 44, 274 S.E.2d 88 (1980) (decided under former Code 1933, §§ 38-415 and 38-416).

Comment on lack of remorse. — Because there was sufficient evidence for a rational trier of fact to find defendant guilty and a prosecutor's closing argument simply made a reasonable inference based on defendant's lack of remorse, there was no prosecutorial misconduct under former O.C.G.A. § 24-9-20(b). Smith v. State, 279 Ga. 48, 610 S.E.2d 26 (2005) (decided under former Code 1933, §§ 38-415 and 38-416).

In charging jury upon defendant's right to make statement, it was preferable to confine the instruction to the language of the former statute. Garrett v. State, 203 Ga. 756, 48 S.E.2d 377 (1948) (decided under former Code 1933, §§ 38-415 and 38-416).

Treatment of Defendant as Witness

Defendants' testimony should be given the same weight and credit and be considered on the same basis and under the same rules as any other witness in the case. Burgan v. State, 59 Ga. App. 524, 1 S.E.2d 603 (1939) (decided under former Code 1933, §§ 38-415 and 38-416).

Sworn testimony of defendant has same evidentiary value as testimony of any other witness. Robertson v. State, 124 Ga. App. 119, 183 S.E.2d 47 (1971) (decided under former Code 1933, §§ 38-415 and 38-416); Black v. State, 230 Ga. 614, 198 S.E.2d 314 (1973) (decided under former Code 1933, §§ 38-415 and 38-416); Jester v. State, 131 Ga. App. 269, 205 S.E.2d 444 (1974) (further holding that instruction on weight to be given defendant's testimony was unnecessary) (decided under former Code 1933, §§ 38-415 and 38-416).

Jury was authorized to believe part of defendant's statement, though the whole statement was not credible to the jury; and the same thing was true as to the testimony of each and every witness who appeared before the jury. Gray v. State, 77 Ga. App. 747, 49 S.E.2d 829 (1948) (decided under former Code 1933, §§ 38-415 and 38-416); Stembridge v. State, 82 Ga. App. 214, 60 S.E.2d 491 (1950) (decided under former O.C.G.A. § 24-9-20); King v. State, 151 Ga. App. 762, 261 S.E.2d 485 (1979) (decided under former O.C.G.A. § 24-9-20).

Cross-examination generally. — Former Statute specifically permitted a defendant to be cross-examined as any other witness except as to general bad character or prior convictions. Such

Treatment of Defendant as Witness (Cont'd)

cross-examination may be thorough and sifting. Leonard v. State, 146 Ga. App. 439, 246 S.E.2d 450 (1978) (decided under former Code 1933, §§ 38-415 and 38-416).

Permissible questions. — In a shoplifting prosecution, the trial court did not err in permitting the state's attorney, over an objection that the state shifted the burden of proof, to ask defendant whether the defendant attempted to contact anyone at the store who could corroborate the defendant's testimony that the defendant entered the store with a stolen CD player in order to return the CD player. Singleton v. State, 240 Ga. App. 240, 522 S.E.2d 734 (1999) (decided under former O.C.G.A. § 24-9-20).

Permitting cross-examination of defendant before defendant testified was not necessarily error. Everett v. State, 238 Ga. 80, 230 S.E.2d 882 (1976) (decided under former Code 1933, §§ 38-415 and 38-416).

Defendant may offer to subject oneself to cross-examination. — While the prosecution may refuse to cross-examine defendant and defendant had the right to refuse to answer any questions asked of the defendant, defendant, nevertheless, had the right to offer to subject oneself to cross-examination. Smith v. State, 215 Ga. 51, 108 S.E.2d 688 (1959) (decided under former Code 1933, §§ 38-415 and 38-416).

Impeachment generally. — While a criminal defendant was not subject to impeachment by proof of general bad character or prior convictions until the defendant puts the defendant's general good character in evidence, defendant was subject to impeachment the same as any other witness. Favors v. State, 145 Ga. App. 864, 244 S.E.2d 902 (1978) (decided under former Code 1933, §§ 38-415 and 38-416).

Trial court did not err by allowing the state to question the defendant regarding a prior domestic dispute with the defendant's wife because under former O.C.G.A. § 24-9-20(b), the trial court properly allowed the state to confront the defendant with evidence that the defendant beat the wife after an argument in order to impeach the defendant's testimony on direct that the defendant did not beat women with whom the defendant argued. Ridley v. State, 290 Ga. 798, 725 S.E.2d 223 (2012) (decided under former O.C.G.A. § 24-9-20).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 715.

Am. Jur. Proof of Facts. — Involuntary Confession — Psychological Coercion, 22 POF2d 539.

Custodial Interrogation Under Miranda v. Arizona, 23 POF2d 713.

Invalidity of Suspect's Waiver of Miranda Rights, 42 POF2d 617.

Invalidity of Confession or Waiver of Miranda Rights by Mentally Retarded Person, 42 POF3d 147.

ALR. — Constitutional immunity against giving incriminating testimony as affecting contractual stipulation to submit to examination, 18 ALR 749.

Admissibility of evidence of refusal of accused to comply with order or request to do an act which might aid in establishing his guilt, 35 ALR 1236.

Plea of privilege by the woman concerned in violation of White Slave Act, 48 ALR 991.

Privilege against self-incrimination as applicable to answer to pleadings, 52 ALR 143.

What amounts to violation of statute forbidding comment by prosecuting attorney on failure of accused to testify, 68 ALR 1108.

Constitutional provision against self-incrimination as applicable to questions asked or testimony given in proceeding before nonjudicial officer or body, 68 ALR 1503.

Waiver of immunity from testifying and constitutional provision against self-incrimination, by accomplice testifying for prosecution, 87 ALR 882.

Burden of proof as to outlawry by limitation or otherwise of criminal prosecution when relied upon to defeat claim of

privilege against self-incrimination, 101 ALR 389.

Constitutionality, construction, and effect of statutes in relation to conduct of driver of automobile after happening of accident, 101 ALR 911.

Right to cross-examine accused as to previous prosecution for or conviction of crime as affecting his credibility, 103 ALR 350; 161 ALR 233.

Admissibility of plea of guilty at preliminary hearing, 141 ALR 1335.

Disclosure by witness of fact or transaction as waiver of his privilege against self-incrimination in respect of details and particulars which will elucidate it, 147 ALR 255.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books or papers, 152 ALR 1208.

Testimony of incriminating character which witness was compelled to give, by virtue of immunity statute or otherwise, as admissible in a prosecution of the witness for an offense subsequently committed, 157 ALR 428.

Constitutional or statutory provision permitting comment on failure of defendant in criminal case to explain or deny by his testimony, evidence or facts against him, 171 ALR 1267.

Suppression before indictment or trial of confession unlawfully obtained, 1 ALR2d 1012.

Waiver of privilege against self-incrimination in exchange for immunity from prosecution as barring reassertion of privilege on account of prosecution in another jurisdiction, 2 ALR2d 631.

Use in subsequent prosecution of self-incriminating testimony given without invoking privilege, 5 ALR2d 1404.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 ALR2d 1438.

Right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society, or similar organization or group, 19 ALR2d 388.

Right of witness to claim privilege against self-incrimination on subsequent criminal trial after testifying to same matter before grand jury, 36 ALR2d 1403.

Privilege against self-incrimination as to testimony before grand jury, 38 ALR2d 225.

Cross-examination of character witness for accused with reference to particular acts or crimes, 47 ALR2d 1258.

Party's waiver of privilege as to communications with counsel by taking stand and testifying, 51 ALR2d 521.

Sufficiency of witness's claim of privilege against self-incrimination, 51 ALR2d 1178.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 53 ALR2d 1030; 29 ALR5th 1.

Right of state in criminal contempt case to obtain data from defendant by interrogatories or pretrial discovery as permitted in civil actions, 72 ALR2d 431.

Admissibility of inculpatory statements made in presence of accused to which he refuses to reply on advice of counsel, 77 ALR2d 463.

Duty of court to inform accused who is not represented by counsel of his right not to testify, 79 ALR2d 643.

Comment on accused's failure to testify by counsel for codefendant, 1 ALR3d 989.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question, 9 ALR3d 990.

Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation, 10 ALR3d 1054.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify, 14 ALR3d 723.

Permissibility of impeaching credibility of witness by showing former conviction, as affected by pendency of appeal from conviction or motion for new trial, 16 ALR3d 726.

Violation of federal constitutional rule (Griffin v. California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error, 24 ALR3d 1093; 32 ALR4th 774.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification, 24 ALR3d 1261.

Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under Miranda v. Arizona, 25 ALR3d 1076.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege, but owned by another, 37 ALR3d 1373.

Propriety of requiring accused to give handwriting exemplar, 43 ALR3d 653.

Witness's refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 ALR3d 1413.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 ALR3d 548.

Refusal to answer questions before state grand jury as direct contempt of court, 69 ALR3d 501.

Admissibility in criminal case of blood alcohol test where blood was taken from unconscious driver, 72 ALR3d 325.

Admissibility, in state probation revocation proceedings, of incriminating statement obtained in violation of Miranda rule, 77 ALR3d 669.

Nonverbal reaction to accusation, other than silence alone, as constituting adoptive admission under hearsay rule, 87 ALR3d 706.

Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination, 89 ALR3d 230.

Requiring defendant in criminal case to exhibit self, or perform physical acts, during trial and in presence of jury, 3 ALR4th 374.

Cross-examination of character witness for accused with reference to particular acts or crimes — modern state rules, 13 ALR4th 796.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense, 25 ALR4th 934.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error — modern cases, 32 ALR4th 774.

Admissibility of evidence of accused's membership in gang, 39 ALR4th 775.

Requirement that defendant in state court testify in order to preserve alleged trial error in rulings on admissibility of prior conviction impeachment evidence under Uniform Rule of Evidence 609, or similar provision or holding — post-Luce cases, 80 ALR4th 1028.

Admissibility of evidence of prior physical acts of spousal abuse committed by defendant accused of murdering spouse or former spouse, 24 ALR5th 465.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial, 37 ALR5th 319.

Admissibility, under Rule 404(b) of Federal Rules of Evidence (28 USC Appx.) of evidence of accused's prior use of illegal drugs in prosecution for conspiracy to distribute such drugs, 114 ALR Fed. 511.

24-5-507. Grant of immunity; contempt.

(a) Whenever in the judgment of the Attorney General or any district attorney the testimony of any person or the production of evidence of any kind by any person in any criminal proceeding before a court or grand jury is necessary to the public interest, the Attorney General or the district attorney may request in writing the superior court to order such person to testify or produce the evidence. Upon order of the court, such person shall not be excused on the basis of the privilege against self-incrimination from testifying or producing any evidence required, but no testimony or other evidence required under the order or any information directly or indirectly derived from such testimony or evidence shall be used against the person in any proceeding or prosecution for a crime or offense concerning which he or she testified or

produced evidence under court order. However, such person may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing, or contempt committed in testifying or failing to testify or in producing or failing to produce evidence in accordance with the order but shall not be required to produce evidence that can be used in any other court of this state, the United States, or any other state. Any order entered under this Code section shall be entered of record in the minutes of the court so as to afford a permanent record thereof, and any testimony given by a person pursuant to such order shall be transcribed and filed for permanent record in the office of the clerk of the court.

(b) If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify as set forth in this Code section, such person may be adjudged in contempt and committed to the county jail until such time as such person purges himself or herself of contempt by testifying as ordered without regard to the expiration of the grand jury. If the grand jury before which such person was ordered to testify has been dissolved, such person may purge himself or herself by testifying before the court. (Code 1981, § 24-5-507, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, "Georgia's Witness Immunity Statute: Explication for Judicial Development," see 32 Mercer L. Rev. 341 (1980).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1975, p. 727, §§ 1 and 2, and former O.C.G.A. § 24-9-28 are included in the annotations for this Code section.

Disclosures used in other county. — County prosecutor's agreement not to make derivative use of defendant's disclosures of criminal conduct did not prevent prosecutor in another county from making use of those disclosures. Bryant v. State, 164 Ga. App. 555, 296 S.E.2d 792 (1982) (decided under former O.C.G.A. § 24-9-28).

Discretion of court. — It was within the discretion of the trial court to order that a codefendant testify; however, the court abused the court's discretion in refusing such order based upon the court's own determination of the credibility of the witness since that issue was reserved for jury determination. State v. Mosher, 265 Ga. 666, 461 S.E.2d 219 (1995) (decided under former O.C.G.A. § 24-9-28).

Grant of Immunity

Effect. — Trial court's grant of an order of immunity pursuant to subsection (a) of former O.C.G.A. § 24-9-28 removed any right of the witness to invoke the privilege against self-incrimination. Willard v. State, 244 Ga. App. 469, 535 S.E.2d 820 (2000) (decided under former O.C.G.A. § 24-9-28).

State's interest outweighs defense's need. — When the state was planning to

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proceed with the prosecution of defendant if defendant decided not to plead guilty, the state's interest in denying use immunity to defendant outweighed the codefendant's need for defendant's testimony in a separate trial. House v. State, 203 Ga. App. 55, 416 S.E.2d 108, cert. denied, 203 Ga. App. 906, 416 S.E.2d 108 (1992) (decided under former O.C.G.A. § 24-9-28).

No denial of due process shown. — There was no denial of due process since the record showed defendant exercised the opportunity to cross-examine a witness and expressly waived defendant's right for further cross-examination after use immunity was offered to the witness. Eschena v. State, 203 Ga. App. 621, 417 S.E.2d 214, cert. denied, 203 Ga. App. 906, 417 S.E.2d 214 (1992) (decided under former O.C.G.A. § 24-9-28).

Former statute was limited to proceedings in which the right against self-incrimination can legitimately be raised. Smith v. State, 138 Ga. App. 683, 227 S.E.2d 84, aff'd, 237 Ga. 647, 229 S.E.2d 433 (1976) (decided under Ga. L. 1975, p. 727, §§ 1 and 2).

Fact defendant had a pending motion for new trial which, if granted by the trial court or required by the appellate court, would have subjected defendant to the self-incrimination choice once again, did not preclude compelled testimony via immunity in a codefendant's trial. Lee v. State, 191 Ga. App. 882, 383 S.E.2d 366 (1989) (decided under former O.C.G.A. § 24-9-28).

Prosecutor had the power to forego prosecution as long as the promise contained a "description of the crimes or transaction's" for which an individual was excused from prosecution and the promise was approved by the court. State v. Dean, 212 Ga. App. 724, 442 S.E.2d 830 (1994) (decided under former O.C.G.A. § 24-9-28).

District attorney, not the trial court, had the discretion to grant immunity to witnesses for the state and there was no provision under which the trial court could have granted immunity to a jail inmate so the inmate could testify as a defense witness in a defendant's attempted armed robbery trial. Dennard v. State, 313 Ga. App. 419, 721 S.E.2d 610 (2011) (decided under former O.C.G.A. § 24-9-28).

Former statute did not authorize conditional grants of immunity. Corson v. Hames, 239 Ga. 534, 238 S.E.2d 75 (1977) (decided under Ga. L. 1975, p. 727, §§ 1 and 2).

Former statute authorized only a grant of use and derivative use immunity. Corson v. Hames, 239 Ga. 534, 238 S.E.2d 75 (1977) (decided under Ga. L. 1975, p. 727, §§ 1 and 2).

"Use and derivative use" immunity. — It was the intention of the General Assembly to grant "use and derivative use" immunity. Brooks v. State, 238 Ga. 435, 233 S.E.2d 208 (1977) (decided under Ga. L. 1975, p. 727, §§ 1 and 2).

Former statute did not authorize a grant of transactional immunity, i.e., immunity from prosecution. Corson v. Hames, 239 Ga. 534, 238 S.E.2d 75 (1977) (decided under Ga. L. 1975, p. 727, §§ 1 and 2).

State was not required to grant immunity to codefendant in return for testimony. In re J.S.S., 168 Ga. App. 340, 308 S.E.2d 855 (1983) (decided under former O.C.G.A. § 24-9-28).

Former statute applied only if witness forfeits a right. — Although the language of former O.C.G.A. § 24-9-28 was theoretically broad enough to encompass all promises to forgo prosecution in exchange for evidence, there was no indication that the legislature intended the statute to apply except to the extraction of information in a situation in which the witness gave up a valuable right; the statute was intended to extend the requisite constitutional protection in such a case. State v. Hanson, 249 Ga. 739, 295 S.E.2d 297 (1982) (decided under former O.C.G.A. § 24-9-28).

No common-law transactional immunity existed in Georgia in the sense of the protection of a witness who gave up a valuable right. State v. Hanson, 249 Ga. 739, 295 S.E.2d 297 (1982) (decided under former O.C.G.A. § 24-9-28).

Transactional immunity flowing from full disclosure of crime was not a matter of right but rested in the dis-

cretion of the court, which could determine whether the defendant lived up to defendant's end of the bargain. Hanson v. State, 161 Ga. App. 536, 287 S.E.2d 764, aff'd, 249 Ga. 739, 295 S.E.2d 297 (1982) (decided under former O.C.G.A. § 24-9-28).

Irrelevant that no conviction results. — State may contract with a criminal for the criminal's exemption from prosecution whether the party testified against was convicted or not. Hanson v. State, 161 Ga. App. 536, 287 S.E.2d 764, aff'd, 249 Ga. 739, 295 S.E.2d 297 (1982) (decided under former O.C.G.A. § 24-9-28).

Conditions under which city may order employees to take polygraph test. — City may, without violating the employees' privilege against self-incrimination, order fire fighters or police officers to take a polygraph test and may discipline those who do not pass, as long as the employees are not coerced into taking the test, are not required to waive any constitutional rights, and the results are not to serve as a sole ground for any action against the employees, since the privilege against self-incrimination does not prevent a governmental unit from taking non-criminal disciplinary action against an employee on the basis of compelled testimony. Hester v. City of Milledgeville, 777 F.2d 1492 (11th Cir. 1985) (decided under former O.C.G.A. § 24-9-28).

Rule that indictments returned by grand jury were not amendable by district attorney was not violated by grant of immunity. Kesler v. State, 249 Ga. 462, 291 S.E.2d 497 (1982) (decided under former O.C.G.A. § 24-9-28).

Curative instruction removed prejudice of testimony about immunity. — When defendant testified in the trial of defendant's co-conspirators under a grant of immunity and a witness mentioned that fact in defendant's trial, even if such mention violated former O.C.G.A. § 24-9-28, a curative instruction was sufficient to remove any potential prejudice. Robertson v. State, 268 Ga. 772, 493 S.E.2d 697 (1997), cert. denied, 523 U.S. 1140, 118 S. Ct. 1845, 140 L. Ed. 2d 1095 (1998) (decided under former O.C.G.A. § 24-9-28).

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No violation of immunity order occurred when, in trial for murder and hindering apprehension of a criminal, an officer was asked by a prosecutor whether the defendant had testified at a previous trial of another to everything the defendant had told the officer, to which the officer stated no, since the prosecutor was attempting to ensure that the testimony from the previous trial not be used in defendant's trial, and to clarify officer's response to an earlier inquiry by defense counsel. Highfield v. State, 246 Ga. 478, 272 S.E.2d 62 (1980) (decided under Ga. L. 1975, p. 727, §§ 1 and 2).

Appearance of immunized witness. — Defendants were not deprived of their right to effective cross-examination on the basis of the state's creation of an "unfavorable inference" through the appearance on the witness stand of a witness who had been granted immunity pursuant to subsection (a) of former O.C.G.A. § 24-9-28 and who refused to testify. Willard v. State, 244 Ga. App. 469, 535 S.E.2d 820 (2000) (decided under former O.C.G.A. § 24-9-28).

Violation of immunity order found. — Trial court properly found defendant in contempt for refusing to testify against a codefendant after being granted testimonial immunity pursuant to former O.C.G.A. § 24-9-28(a); an evidentiary hearing was not required prior to the grant of immunity, and the immunity removed any Fifth Amendment privilege against self-incrimination. In the Interest of S.U., 269 Ga. App. 306, 603 S.E.2d 790 (2004) (decided under former O.C.G.A. § 24-9-28).

Criminal contempt conviction reversed. — Defendant's criminal contempt conviction was reversed as the trial court relied on another court's ex parte immunity grant in ordering defendant to testify and neither court made a finding that defendant's testimony was "necessary to the public interest" as required by former O.C.G.A. § 24-9-28; the state had to grant a valid immunity as broad in scope as the privilege it replaced and to show the ap-

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plicability of that state immunity to the witness. In re Long, 276 Ga. App. 306, 623 S.E.2d 181 (2005) (decided under former O.C.G.A. § 24-9-28).

RESEARCH REFERENCES

ALR. — Privilege against self-incrimination as extending to danger of prosecution in other state or country, 59 ALR 895; 82 ALR 1380.

Calling upon accused in the presence of jury to produce document in his possession as violation of privilege against self-incrimination, 110 ALR 101.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 118 ALR 602; 53 ALR2d 1030; 29 ALR5th 1.

Promise of immunity or leniency as affecting one's competency as witness in criminal case, 120 ALR 751.

Necessity and sufficiency of assertion of privilege against self-incrimination as condition of statutory immunity of witness from prosecution, 145 ALR 1416.

Testimony of incriminating character which witness was compelled to give, by virtue of immunity statute or otherwise, as admissible in a prosecution of the witness for an offense subsequently committed, 157 ALR 428.

Waiver of privilege against self-incrimination in exchange for immunity from prosecution as barring reassertion of privilege on account of prosecution in another jurisdiction, 2 ALR2d 631.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 ALR2d 1438.

Immunity from service of process of nonresident witness appearing in other than strictly judicial proceedings, 35 ALR2d 1353.

Sufficiency of witness's claim of privilege against self-incrimination, 51 ALR2d 1178.

Enforceability of plea agreement, or plea entered pursuant thereto, with prosecuting attorney involving immunity from prosecution for other crimes, 43 ALR3d 281.

Use in disbarment proceeding of testimony given by attorney in criminal proceeding under grant of immunity, 62 ALR3d 1145.

Right of defendant in criminal proceeding to have immunity from prosecution granted to defense witness, 4 ALR4th 617.

Prosecutor's power to grant prosecution witness immunity from prosecution, 4 ALR4th 1221.

Propriety, under state constitutional provisions, of granting use or transactional immunity for compelled incriminating testimony—post-Kastigar cases, 29 ALR5th 1.

24-5-508. Qualified privilege for news gathering or dissemination.

Any person, company, or other entity engaged in the gathering and dissemination of news for the public through any newspaper, book, magazine, radio or television broadcast, or electronic means shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

(1) Is material and relevant;

(2) Cannot be reasonably obtained by alternative means; and

(3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item. (Code 1981, § 24-5-508, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, "Eleventh Circuit Survey: January 1, 2008 — December 31, 2008: Comment: 2009: A Blawg Odyssey: Exploring How the Legal Community Is Using Blogs and How Blogs are Changing the Legal Community," see 60 Mercer L. Rev. 1353 (2009).

For comment, "The Reporter's Privilege in Georgia: 'Qualified' to Do the Job?," see 9 Ga. St. U.L. Rev. 495 (1993).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-30 are included in the annotations for this Code section.

Availability of information by alternative means. — State sought information state could reasonably have obtained by alternative means when several questions sought the identity of law enforcement officers and jailers who may have had public contact with the reporter or served as a confidential source. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (1999) (decided under former O.C.G.A. § 24-9-30).

Materiality and relevance. — State sought information that was not material or relevant when the state propounded interrogatories which inquired when and how the reporter found out that an attorney represented the defendant, whether the reporter advised the defendant of defendant's rights under Miranda or made promises to the defendant in exchange for the interview, whether the defendant referred to defendant's attorney during the interview, and why the reporter did not call the defendant's attorney to notify the attorney about the interview before the interview occurred and to inform the attorney about the interview after the interview took place. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (1999) (decided under former O.C.G.A. § 24-9-30).

Necessity of information for prosecution. — State failed to show that the reporter's testimony was necessary for the state to prosecute the defendant for murder when, although the state contended that the state needed the reporter's testimony to prove the defendant's mental state at the time the defendant made the incriminating admissions to the reporter, the state had already presented evidence at pre-trial hearings of the defendant's mental capacity and demeanor when the defendant confessed to police; not only did the state have at least two confessions on videotape, where the jury could observe the defendant, but the state also presented expert testimony of a forensic psychiatrist at the Jackson-Denno hearing concerning the defendant's competency to stand trial and whether defendant was suffering from any mental illness or delusion. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (1999) (decided under former O.C.G.A. § 24-9-30).

Courtroom gossip or speculation. — Former O.C.G.A. § 24-9-30 was not meant to be used to uncover the source of mere courtroom gossip or speculation. Nobles v. State, 201 Ga. App. 483, 411 S.E.2d 294, cert. denied, 201 Ga. App. 904, 411 S.E.2d 294 (1991) (decided under former O.C.G.A. § 24-9-30).

Privilege properly invoked. — Trial court did not err by allowing a reporter who declined to reveal "confidential sources" in the sheriff's department to invoke the privilege created by former O.C.G.A. § 24-9-30 since the evidence showed that there were fewer than a dozen former employees of the sheriff's office in the relevant time period, and that the defense team made no effort to contact any of the employees. Stripling v. State, 261 Ga. 1, 401 S.E.2d 500 (1991), cert. denied, 502 U.S. 985, 112 S. Ct. 593, 116 L. Ed. 2d 617 (1991) (decided under former O.C.G.A. § 24-9-30).

Privilege not waived by partial disclosure. — Reporter did not waive reporter's qualified privilege against disclosure

of reporter's confidential sources and unpublished information by writing a news article based on the reporter's interview with the defendant; publication of part of the information gathered did not waive the privilege as to all of the information gathered on the same subject matter because it would chill the free flow of information to the public. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (1999) (decided under former O.C.G.A. § 24-9-30).

Appeal. — Non-parties engaged in news gathering may file a direct appeal of an order denying the parties the statutory reporter's privilege under the collateral order exception to the final judgment rule. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (1999) (decided under former O.C.G.A. § 24-9-30).

24-5-509. Communications between victim of family violence or sexual assault and agents providing services to such victim; termination of privilege.

(a) As used in this Code section, the term:

(1) "Agent" means a current or former employee or volunteer of a program who has successfully completed a minimum of 20 hours of training in family violence and sexual assault intervention and prevention at a Criminal Justice Coordinating Council certified victim assistance program.

(2) "Family violence" shall have the same meaning as provided in Code Section 19-13-1.

(3) "Family violence shelter" means a program whose primary purpose is to provide services to family violence victims and their families that is not under the direct supervision of a law enforcement agency, prosecuting attorney's office, or a government agency.

(4) "Family violence victim" means a person who consults a family violence shelter for the purpose of securing advice or other services concerning an act of family violence, an alleged act of family violence, or an attempted act of family violence.

(5) "Government agency" means any agency of the executive, legislative, or judicial branch of government or political subdivision or authority thereof of this state, any other state, the District of Columbia, the United States and its territories and possessions, or any foreign government or international governmental or quasi-governmental agency recognized by the United States or by any of the several states.

(6) "Negative effect of the disclosure of the evidence on the victim" shall include the impact of the disclosure on the relationship between the victim and the agent and the delivery and accessibility of services.

(7) "Program" means a family violence shelter or rape crisis center.

(8) "Rape crisis center" means a program whose primary purpose is to provide services to sexual assault victims and their families that

is not under the direct supervision of a law enforcement agency, prosecuting attorney's office, or a government agency.

(9) "Services" means any services provided to a victim by a program including but not limited to crisis hot lines, safe homes and shelters, assessment and intake, counseling, services for children who are victims of family violence or sexual assault, support in medical, administrative, and judicial systems, transportation, relocation, and crisis intervention. Such term shall not include mandatory reporting as required by Code Section 19-7-5 or 30-5-4.

(10) "Sexual assault" shall have the same meaning as provided in Code Section 17-5-70.

(11) "Sexual assault victim" means a person who consults a rape crisis center for the purpose of securing advice or other services concerning a sexual assault, an alleged sexual assault, or an attempted sexual assault.

(12) "Victim" means a family violence victim or sexual assault victim.

(b) No agent of a program shall be compelled to disclose any evidence in a judicial proceeding that the agent acquired while providing services to a victim, provided that such evidence was necessary to enable the agent to render services, unless the privilege has been waived by the victim or, upon motion by a party, the court finds by a preponderance of the evidence at a pretrial hearing or hearing outside the presence of the jury that:

(1) In a civil proceeding:

(A) The evidence sought is material and relevant to factual issues to be determined;

(B) The evidence is not sought solely for the purpose of referring to the victim's character for truthfulness or untruthfulness; provided, however, that this subparagraph shall not apply to evidence of the victim's prior inconsistent statements;

(C) The evidence sought is not available or already obtained by the party seeking disclosure; and

(D) The probative value of the evidence sought substantially outweighs the negative effect of the disclosure of the evidence on the victim; or

(2) In a criminal proceeding:

(A) The evidence sought is material and relevant to the issue of guilt, degree of guilt, or sentencing for the offense charged or a lesser included offense;

(B) The evidence is not sought solely for the purpose of referring to the victim's character for truthfulness or untruthfulness; provided, however, that this subparagraph shall not apply to evidence of the victim's prior inconsistent statements;

(C) The evidence sought is not available or already obtained by the party seeking disclosure; and

(D) The probative value of the evidence sought substantially outweighs the negative effect of the disclosure of the evidence on the victim.

(c) If the court finds that the evidence sought may be subject to disclosure pursuant to subsection (b) of this Code section, the court shall order that such evidence be produced for the court under seal, shall examine the evidence in camera, and may allow disclosure of those portions of the evidence that the court finds are subject to disclosure under this Code section.

(d) The privilege afforded under this Code section shall terminate upon the death of the victim.

(e) The privilege granted by this Code section shall not apply if the agent was a witness or party to the family violence or sexual assault or other crime that occurred in the agent's presence.

(f) The mere presence of a third person during communications between an agent and a victim shall not void the privilege granted by this Code section, provided that the communication occurred in a setting when or where the victim had a reasonable expectation of privacy.

(g) If the victim is or has been judicially determined to be incompetent, the victim's guardian may waive the victim's privilege.

(h) In criminal proceedings, if either party intends to compel evidence based on this Code section, the party shall file and serve notice of his or her intention on the opposing party at least ten days prior to trial, or as otherwise directed by the court. The court shall hold a pretrial hearing in accordance with subsection (b) of this Code section and determine the issue prior to trial. (Code 1981, § 24-5-509, enacted by Ga. L. 2012, p. 105, § 2/HB 711.)

Effective date. — This Code section becomes effective January 1, 2013.

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 204 (2012).

CHAPTER 6

WITNESSES

Article 1

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24-6-652. Appointment of interpreters for hearing impaired persons interested in or witness at agency proceedings.
24-6-653. Procedure for interrogation and taking of statements from hearing impaired persons arrested for violation of criminal laws.
24-6-654. Indigent hearing impaired defendants to be provided with interpreters.
24-6-655. Waiver of right to interpreter.
24-6-656. Replacement of interpreters unable to communicate accurately with hearing impaired persons; appointment of intermediary interpreters.
24-6-657. Oath of interpreters; privileged communications; taping and filming of hearing impaired persons' testimony.
24-6-658. Compensation of interpreters.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011).

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Televising of testimony of child who is victim of certain offenses, § 17-8-55.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former O.C.G.A. T. 24, C. 9, A. 3 are included in the annotations for this article.

Discretion of court. — Examination of witnesses is a matter largely within the discretion of the court. National Land & Coal Co. v. Zugar, 171 Ga. 228, 155 S.E. 7 (1930) (decided under former Code 1933, § 33-1701 et seq.).

Examination by more than one counsel. — Although a defendant has both a state and federal right to self-representation, when the defendant has counsel to represent the defendant, the trial court can require the examination and cross-examination of witnesses to be conducted by one counsel only. Johnson v. State, 246 Ga. 126, 269 S.E.2d 18 (1980) (decided under former Code 1933, § 33-1701 et seq.).

Examination by judge. — Trial judge has the right to propound a question or series of questions to any witness for the purpose of developing fully the truth of the case; and the extent to which the examination conducted by the court shall go is a matter within the judge's discretion. Daniels v. State, 154 Ga. App. 323, 268 S.E.2d 376 (1980) (decided under former Code 1933, § 33-1701 et seq.).

Lengthy examination of a witness by the court will not be cause for a new trial unless the court during the examination of the witness expresses an opinion on the facts of the case or the examination becomes argumentative. Daniels v. State, 154 Ga. App. 323, 268 S.E.2d 376 (1980) (decided under former Code 1933, § 33-1701 et seq.).

Recall of witnesses. — Trial judge's discretion extends to allowing the state to reopen the case and recall a witness for the purpose of amplifying testimony previously given, and to allowing a witness to be recalled after the close of evidence to correct the witness's former testimony, which the witness contends was mistaken. Flynt v. State, 153 Ga. App. 232, 264 S.E.2d 669, cert. denied, 449 U.S. 888, 101 S. Ct. 245, 66 L. Ed. 2d 114 (1980) (decided under former Code 1933, § 33-1701 et seq.).

It is within the discretionary power of the court to allow a witness to be sworn after the evidence on both sides has been announced closed and the argument has been commenced; and a liberal practice in this respect is most favorable to the ends of justice. Robinson v. State, 154 Ga. App. 591, 269 S.E.2d 86 (1980) (decided under former Code 1933, § 33-1701 et seq.).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 688.

Am. Jur. Proof of Facts. — Impeachment of Expert Witness — Financial Interest, 21 POF2d 73.

Expert Testimony at Sentencing, 21 POF2d 645.

Contradiction of Expert Witness Through Use of Authoritative Treatise, 31 POF2d 443.

Qualification of Medical Expert Witness, 33 POF2d 179.

Qualification of Chiropractor as Expert Witness, 45 POF2d 137.

Establishing an Adequate Foundation for Proof of Medical Expenses, 23 POF3d 243.

Corroboration of a Child's Sexual Abuse Allegation with Behavioral Evidence, 25 POF3d 189.

Challenge to Eyewitness Testimony Through Expert Testimony, 35 POF3d 1.

Proof of Contamination in Toxic Tort Cases Through Expert Testimony, 39 POF3d 539.

Damages for Loss of Enjoyment of Life, 49 POF3d 339.

Firearms Forensics — Firearms Identification at Trial, 60 POF3d 1.

Proof of Identity of Fiber, Fabric, or Textile, 61 POF3d 501.

Proof of Incompetency, 62 POF3d 197.

ALR. — Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal injury or death action carries liability insurance, 56

ALR 1418; 74 ALR 849; 95 ALR 388; 105 ALR 1319; 4 ALR2d 761.

Propriety of conduct of trial judge in propounding questions to witnesses in criminal case, 84 ALR 1172.

Offering improper evidence, or asking improper question, as ground for new trial or reversal, 109 ALR 1089.

Constitutionality, construction, and effect of statute or regulation relating specifically to divulgence of information acquired by public officers or employees, 165 ALR 1302.

Claim of privilege by a witness as justifying the use in criminal case of his testimony given on a former trial or preliminary examination, 45 ALR2d 1354.

Coaching of witness by spectator at trial as prejudicial error, 81 ALR2d 1142.

Closed-circuit television witness examination, 61 ALR4th 1155.

State statutes or regulations expressly governing disclosure of fact that person has tested positive for human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS), 12 ALR5th 149.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 ALR5th 628.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed. 541.

24-6-601. General rule of competency.

Except as otherwise provided in this chapter, every person is competent to be a witness. (Code 1981, § 24-6-601, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Adultery generally, § 16-6-19. Child abandonment generally, § 19-10-1. Testimony as to child's description of sexual contact or physical abuse, § 24-8-820. Competency to testify in general, Fed. R. Evid. 601.

Law reviews. — For article, "The Evidence Code and Cases Instituted in Consequence of Adultery," see 15 Ga. St. B.J. 176 (1979). For article, "The Need for a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984). For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For note discussing the admissibility of husband and wife's testimony concerning nonaccess in determining the legitimacy of a child, see 6 Ga. St. B.J. 448 (1970). For note, "The Georgia Child Hearsay Statute, and the Sixth Amendment: Is There a Confrontation?," see 10 Ga. St. U.L. Rev. 367 (1994).

For comment discussing the effect of mental unsoundness on the competency of witnesses, in light of O'Shea v. Jewel Tea Co., 233 F.2d 530 (9th Cir. 1956), see 19 Ga. B.J. 533 (1957). For comment on Western & A.R.R. v. Hart, 95 Ga. App. 810, 99 S.E.2d 302 (1957), holding that the accuracy of the opinion of a 12 year old as to the speed of a train is a matter for the jury to decide and its admission into evidence was not error, see 20 Ga. B.J. 395 (1958). For comment on Bacon v. State, 222 Ga. 151, 149 S.E.2d 111 (1966), see 18 Mercer L. Rev. 506 (1967).

JUDICIAL DECISIONS

Analysis

General Consideration
Role of Court
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Children
Insane Persons

RETARDED PERSONS
APPLICATION IN OTHER CIRCUMSTANCES

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, §§ 3796, 3800, 3803, 3804, 3805, former Code 1873, §§ 3852, 3856, 3859, 3860, 3861, former Code 1882, §§ 3852, 3856, 3859, 3860, 3861, former Civil Code 1895, §§ 5267, 5273, 5276, 5277, 5278, former Penal Code 1895, § 1012, former Civil Code 1910, §§ 5856, 5858, 5859, 5862, 5865, 5866, 5867, former Penal Code 1910, § 1038, former Code 1933, §§ 38-1601, 38-1603, 38-1607, 38-1608, 38-1610, 38-1611, 38-1612, and former O.C.G.A. §§ 24-9-1, 24-9-2, 24-9-5, 24-9-6, and 24-9-7 are included in the annotations for this Code section.

Everyone is presumed competent to testify, and even if a person is shown to have been insane, or to have been adjudged insane previously and is presently in a state mental hospital, this does not necessarily render the person incompetent to testify. Redfield v. State, 240 Ga. 460, 241 S.E.2d 217 (1978) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

There is no presumption that a witness is incompetent; and a witness offered may be permitted to testify, unless there is an objection or exception distinctly raising the question of the witness's competency. Dowdy v. Watson & Lewis, 115 Ga. 42, 41 S.E. 266 (1902) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278).

Admissibility not equated with competency. — An objection on the ground of admissibility of the evidence does not raise the issue as to the competency of the witness. Sumter County v. Pritchett, 125 Ga. App. 222, 186 S.E.2d 798 (1971) (decided under former Code 1933, § 38-1603).

Lex fori regulates competency. Bowers v. Southern Ry., 10 Ga. App. 367, 73 S.E. 677 (1912) (decided under former Civil Code 1910, §§ 5858 and 5859).

Competent claimant's testimony not to be ignored. — There was competent evidence to support an award based on claimant's testimony, considering its interpretation and credibility; the superior court's denial of the award solely because of the claimant's statements was reversed. Gasses v. Professional Plumbing Co., 204 Ga. App. 69, 418 S.E.2d 424 (1992) (decided under former O.C.G.A. § 24-9-1).

Former Georgia witness competency statutes presented a reasonable requirement regarding the minimal level of understanding for people participating in one of the most important functions of government and did not violate the equal protection clause. Ambles v. State, 259 Ga. 406, 383 S.E.2d 555 (1989) (decided under former O.C.G.A. § 24-9-5).

State had standing to challenge the former Georgia witness competency statutes. Ambles v. State, 259 Ga. 406, 383 S.E.2d 555 (1989) (decided under former O.C.G.A. § 24-9-5).

No hearing unless specific ground of incompetency alleged. — When, before the defendant's first trial, the defendant made the defendant's "motion to exclude the testimony of the victim on grounds of incompetency . . . pursuant to §§ 24-9-5 & 24-9-7 [now repealed]" in the broadest of terms without distinctly alleging what category of "persons who do not have the use of reason" the victim fit into, and at no point in the defendant's first or second trials did the defendant raise a distinct objection to the competency of the witness, but simply requested a hearing without specifying any valid ground of incompetency as applied to the facts and circumstances of the case, the court did not err in refusing to conduct an examination. In addition to the court's observation of the victim and the victim's testimony during the course of the first trial, no applicable specific ground of incompetency was alleged. Webb v. State, 187 Ga. App. 348, 370 S.E.2d 204 (1988) (decided under former O.C.G.A. § 24-9-5).

Nothing in the record to indicate witness could not understand trial oath. — Ruling that a witness was incompetent to testify under former O.C.G.A.

§ 24-9-5(a) (see now O.C.G.A. §§ 24-6-601 and 24-6-603) failed since there was absolutely nothing in the record to demonstrate that the witness could not understand the nature of the trial oath simply because the witness was originally from Somalia and spoke in halting English. Trueblood v. State, 248 Ga. App. 78, 545 S.E.2d 628 (2001) (decided under former O.C.G.A. § 24-9-5).

Partly competent testimony. — If a witness was competent as to some matters and incompetent as to others, the objection could be taken under former statute at the time the witness offerred to testify as to the matters concerning which the witness was incompetent. Dowdy v. Watson & Lewis, 115 Ga. 42, 41 S.E. 266 (1902) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278).

Role of Court

Jurisdiction of court and jury generally. — Questions as to the relevancy and admissibility of the testimony are properly for the court. Its sufficiency and effect belong exclusively to the jury. Hotchkiss v. Newton, 10 Ga. 560 (1851) (decided under former law).

Trial court determines competency of a witness and jury decides credibility. Bearden v. State, 159 Ga. App. 892, 285 S.E.2d 606 (1981) (decided under former O.C.G.A. § 24-9-5).

Competency for court. — It is left to the sound discretion of the trial court to determine upon preliminary examination whether or not a child of tender years is a competent witness. Moore v. State, 79 Ga. 498, 5 S.E. 51 (1887) (decided under former Code 1882, §§ 3852, 3859, 3860, 3861); Beebee v. State, 124 Ga. 775, 53 S.E. 99 (1906) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278); Young v. State, 125 Ga. 584, 54 S.E. 82 (1906) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278); Richardson v. State, 141 Ga. 782, 82 S.E. 134 (1914) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867). See also; Peterson v. State, 47 Ga. 524, later appeal, 50 Ga. 142 (1873) (decided under former Code 1868, §§ 3796, 3803, 3804, 3805); Rogers v. State, 11 Ga. App. 814, 76 S.E. 366 (1912) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867); Frasier v. State, 143 Ga. 322, 85 S.E. 124 (1915) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867); Holden v. State, 144 Ga. 338, 87 S.E. 27 (1915) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867); Reece v. State, 155 Ga. 350, 116 S.E. 631 (1923) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867); Bell v. State, 164 Ga. 292, 138 S.E. 238 (1927) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867); Gordon v. State, 186 Ga. 615, 198 S.E. 678 (1938) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Carver v. State, 60 Ga. App. 593, 4 S.E.2d 474 (1939) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Ellison v. State, 197 Ga. 129, 28 S.E.2d 453 (1943) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321 (1945) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Russell v. State, 83 Ga. App. 841, 65 S.E.2d 264 (1951) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Askins v. State, 210 Ga. 532, 81 S.E.2d 471 (1954) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Allen v. State, 150 Ga. App. 605, 258 S.E.2d 285 (1979) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Wood v. State, 195 Ga. App. 424, 393 S.E.2d 720 (1990) (decided under former O.C.G.A. § 24-9-7).

Question of competency is one of law for the trial judge to determine in the judge's discretion. Cooper v. Simmons, 50 Ga. App. 130, 177 S.E. 263 (1934) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Ellison v. State, 197 Ga. 129, 28 S.E.2d 453 (1943) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Gilstrap v. State, 90 Ga. App. 12, 81 S.E.2d 872 (1954) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Porter v. State, 237 Ga. 580, 229 S.E.2d 384 (1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1603, 51 L. Ed. 2d 806 (1977) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Role of Court (Cont'd)

After an objection as to the competency of a witness, the duty to examine the witness and determine the witness's competency rests with the trial court. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275 (1981) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Once a child's competency has been thoroughly tested in court, it is within the sound discretion of the trial court whether or not to rule the child competent to testify as a witness. Pope v. State, 167 Ga. App. 328, 306 S.E.2d 326 (1983) (decided under former O.C.G.A. § 24-9-7).

Questions for court and jury. — Competency of a witness is a question generally to be determined by the court; the jury may consider such evidence only for the purpose of affecting the credibility of such witness. Bonner v. State, 59 Ga. App. 737, 1 S.E.2d 768 (1939) (decided under former Code 1933, § 38-1607).

No hearing unless specific ground of incompetency alleged. — When, before the defendant's first trial the defendant made his "motion to exclude the testimony of the victim on grounds of incompetency ... pursuant to §§ 24-9-5 & 24-9-7 [repealed]" in the broadest of terms without distinctly alleging what category of "persons who do not have the use of reason" the victim fit into, and at no point in the defendant's first or second trials did the defendant raise a distinct objection to the competency of the witness, but simply requested a hearing without specifying any valid ground of incompetency as applied to the facts and circumstances of the case, the court did not err in refusing to conduct an examination. In addition to the court's observation of the victim and the victim's testimony during the course of the first trial, no applicable specific ground of incompetency was alleged. Webb v. State, 187 Ga. App. 348, 370 S.E.2d 204 (1988) (decided under former O.C.G.A. § 24-9-7).

Court may allow attorneys to pose questions to determine competency of witnesses. — Fact that the court allowed the attorneys representing both sides to actually pose the questions in a proceeding to determine competency of witnesses did not diminish the function or abdicate responsibility for making the decision based on evidence produced before the court and the court's observations. Sprayberry v. State, 174 Ga. App. 574, 330 S.E.2d 731 (1985) (decided under former O.C.G.A. § 24-9-7); Vaughn v. State, 226 Ga. App. 318, 486 S.E.2d 607 (1997) (decided under former O.C.G.A. § 24-9-7).

Parameters of examination by counsel. — When counsel is permitted to examine witness as to issue of competency, parameters of such inquiry rest within broad discretion of trial court. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275 (1981) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Decision of court will not be overturned. — Decision of the trial court regarding competency will not be overturned in absence of abuse of discretion. Cooper v. Simmons, 50 Ga. App. 130, 177 S.E. 263 (1934) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Porter v. State, 237 Ga. 580, 229 S.E.2d 384 (1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1603, 51 L. Ed. 2d 806 (1977) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Whitehead v. State, 144 Ga. App. 836, 242 S.E.2d 754 (1978), overruled on other grounds, Miller v. State, 250 Ga. 436, 298 S.E.2d 509 (1983) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Herron v. State, 155 Ga. App. 791, 272 S.E.2d 756 (1980) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Examination may be unnecessary. — There may be situations when the trial judge would not have to examine the potential witness. Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Credibility for jury. — Although after a preliminary examination the court may hold a child competent to testify, the credibility of the witness is for the jury; and in determining whether or not the jury will credit the testimony of such witness, the age of the witness and the witness's understanding or lack of understanding as to the nature of an oath, as developed on the

examination before the jury, are matters for the consideration of the jury. Frasier v. State, 143 Ga. 322, 85 S.E. 124 (1915) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867).

Jury may not decide competency. — When the trial court without any examination whatever permits the jury to pass upon the competency of a witness who has been objected to as incompetent at the time the witness was offered, on the ground that the witness has been adjudged insane and not restored to sanity, a new trial will be granted. Gilstrap v. State, 90 Ga. App. 12, 81 S.E.2d 872 (1954) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Disputed facts. — If the determination of the question as to whether a witness is competent to testify depends upon the decision of disputed facts, the proper practice is for the judge, after a preliminary examination, to decide the questions of fact thus arising; but the judge may in the judge's discretion take the opinion of the jury thereon. Dowdy v. Watson & Lewis, 115 Ga. 42, 41 S.E. 266 (1902) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278).

Evidence during trial touching competency. — If a witness has been declared to be competent by the court, and during the progress of the trial evidence should be introduced which would make the witness's competency doubtful, the jury should be instructed to determine this question of fact, and, if the jury should find that the witness is incompetent, not to consider the witness's testimony on the points concerning which the witness was not competent to testify. Dowdy v. Watson & Lewis, 115 Ga. 42, 41 S.E. 266 (1902) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278).

Decision of court will not be disturbed. — When the court examines a child as to the child's understanding of the nature of an oath and decides that the child is competent to testify, the appellate court will not interfere, when it does not appear that such discretion has been manifestly abused. Moore v. State, 79 Ga. 498, 5 S.E. 51 (1887) (decided under former Code 1882, §§ 3852, 3859, 3860, 3861); see also Peterson v. State, 47 Ga. 524, later appeal, 50 Ga. 142 (1873) (decided under former Code 1882, §§ 3852, 3859, 3860, 3861); Beebee v. State, 124 Ga. 775, 53 S.E. 99 (1906) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278); Young v. State, 125 Ga. 584, 54 S.E. 82 (1906) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278); Richardson v. State, 141 Ga. 782, 82 S.E. 134 (1914) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Rogers v. State, 11 Ga. App. 814, 76 S.E. 366 (1912) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Frasier v. State, 143 Ga. 322, 85 S.E. 124 (1915) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Shields v. State, 16 Ga. App. 680, 85 S.E. 1057 (1915) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Holden v. State, 144 Ga. 338, 87 S.E. 27 (1915) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Reece v. State, 155 Ga. 350, 116 S.E. 631 (1923) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Bell v. State, 164 Ga. 292, 138 S.E. 238 (1927) (decided under former Civil Code 1910, §§ 5856, 5868, 5866, 5867); Gordon v. State, 186 Ga. 615, 198 S.E. 678 (1938) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Carver v. State, 60 Ga. App. 593, 4 S.E.2d 474 (1939) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321 (1945) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Russell v. State, 83 Ga. App. 841, 65 S.E.2d 264 (1951) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Askins v. State, 210 Ga. 532, 81 S.E.2d 471 (1954) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Lashley v. State, 132 Ga. App. 427, 208 S.E.2d 200 (1974) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Bradley v. State, 148 Ga. App. 727, 252 S.E.2d 648 (1979) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612); Allen v. State, 150 Ga. App. 605, 258 S.E.2d 285 (1979) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Role of Court (Cont'd)

Competency of seven-year-old as a witness is decided by the trial court, and an appellate court will overrule that determination only if there is an abuse of discretion. Lancaster v. State, 250 Ga. 871, 301 S.E.2d 882 (1983) (decided under former O.C.G.A. § 24-9-7).

Objection Requirement

Testimony received without objection. — Testimony of an incompetent witness, if it is material, when received without objection, is of probative value, and will be considered and given such weight as the jury deems the testimony entitled to in view of the witness's interest and other circumstances. Brittain Bros. Co. v. Davis, 174 Ga. 1, 161 S.E. 841 (1931) (decided under former Civil Code 1910, §§ 5858 and 5859).

Competency objection must be distinctly raised. — Witness offered may be permitted to testify, unless there is an objection or exception distinctly raising the question of the witness's competency. Sumter County v. Pritchett, 125 Ga. App. 222, 186 S.E.2d 798 (1971) (decided under former Code 1933, § 38-1603).

Waiver. — Even though a witness may be termed incompetent, unless a question of public policy is involved, the incompetency of the witness may be waived. Williams v. State, 69 Ga. App. 863, 27 S.E.2d 54 (1943) (decided under former Code 1933, § 38-1603).

Children

Constitutionality. — Former subsection (b) of O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) did not violate due process; it was not fundamentally unfair to require one accused of child molestation to face one's accuser, even if the accuser was unable to articulate the meaning of an oath, and the defendant had the opportunity to cross-examine the child witness, and test the child's credibility before the jury. Sims v. State, 260 Ga. 782, 399 S.E.2d 924 (1991) (decided under former O.C.G.A. § 24-9-5).

Subsection (b) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) applied equally to all those accused of child molestation, and therefore did not violate the equal protection clause of the federal constitution. Sims v. State, 260 Ga. 782, 399 S.E.2d 924 (1991) (decided under former O.C.G.A. § 24-9-5).

Child "available to testify" in former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) meant one competent to testify under former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). For offenses occurring before April 19, 1989, including child molestation, a child incompetent as a witness was not available to testify and any out-of-court statements were not rendered admissible by former § 24-3-16. Hunnicutt v. State, 194 Ga. App. 714, 391 S.E.2d 790 (1990) (decided under former O.C.G.A. § 24-9-5).

Former O.C.G.A. §§ 24-9-5 and 24-3-16 (see now O.C.G.A. §§ 24-6-601, 24-6-603, and 24-8-820) must be construed together. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18 (1990) (decided under former O.C.G.A. § 24-9-5); McGarity v. State, 212 Ga. App. 17, 440 S.E.2d 695 (1994) (decided under former O.C.G.A. § 24-9-5).

Child was considered "available to testify" under former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) only if the child was "competent" to testify within the meaning of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). Shaver v. State, 199 Ga. App. 428, 405 S.E.2d 281, cert. denied, 199 Ga. App. 907, 405 S.E.2d 281 (1991) (decided under former O.C.G.A. § 24-9-5).

Former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) did not expand the circumstances under which hearsay statements of a child could be admitted in evidence. Thornton v. State, 264 Ga. 563, 449 S.E.2d 98 (1994) (decided under former O.C.G.A. § 24-9-65).

Competency of children to testify in a divorce action could be established only by demonstrating that the children understood the nature of an oath as required by subsection (a) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). Woodruff v. Woodruff, 272 Ga. 485, 531 S.E.2d 714 (2000) (decided under former O.C.G.A. § 24-9-605).

No required showing child competent to testify. — For offenses involving child victims occurring after April 19, 1989, a determination that the child victim is competent to testify was not necessary; a child witness was "available" for purposes of the Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), as long as the child was physically available to appear at trial. Gibby v. State, 213 Ga. App. 20, 443 S.E.2d 852 (1994) (decided under former O.C.G.A. § 24-9-5).

Statement admissible regardless of child's age or degree of comprehension. — Out-of-court statements of a victim of child molestation are admissible whenever the victim is available to appear at trial, whether or not the child is capable of understanding the nature of an oath and thus regardless of age or degree of comprehension. Lang v. State, 201 Ga. App. 836, 412 S.E.2d 866 (1991) (decided under former O.C.G.A. § 24-9-5).

Oath not required when child did not comprehend oath's nature. — Under subsection (b) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603), which provided that in certain limited categories of cases a child was deemed legally competent to testify, the prerequisite administration of the oath otherwise called for by former O.C.G.A. § 24-9-60 (see now O.C.G.A. § 24-6-603) had been obviated when the child did not comprehend the oath's nature. The child simply became an unsworn witness, made so because incapable of taking an oath. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18 (1990) (decided under former O.C.G.A. §§ 24-9-5 and 24-9-60).

Children who did not understand nature of oath were incompetent. — Porter v. State, 237 Ga. 580, 229 S.E.2d 384 (1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1603, 51 L. Ed. 2d 806 (1977) (decided under former Code 1933, § 38-1607).

Mentally retarded children subject to competency challenge. — Former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) was construed as subjecting children to a competency challenge based on the allegation that children did not understand the nature of an oath. Children, like adults, were also subject to a competency challenge on the ground that the children do not have the use of reason because of mental retardation. Sizemore v. State, 262 Ga. 214, 416 S.E.2d 500 (1992) (decided under former O.C.G.A. § 24-9-5).

Determining factor in deciding competency of a witness to testify was not age but rather the ability to understand the nature of an oath. Horton v. State, 35 Ga. App. 493, 133 S.E. 647 (1926) (decided under former Penal Code 1910, § 1038); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321 (1945) (decided under former Code 1933, § 38-1607).

Standard of intelligence required to qualify child as a witness is not that the child be able to define the meaning of an oath, nor that the child understand the process under which the oath is administered, but rather that the child know and appreciate the fact that as a witness the child assumes a solemn and binding obligation to tell the truth relative to the case and concerning such matters as the child may be interrogated on, and that if the child violates the obligation the child is subject to be punished by the court. Jones v. State, 219 Ga. 245, 132 S.E.2d 648 (1963) (decided under former Code 1933, § 38-1607); Smith v. State, 247 Ga. 511, 277 S.E.2d 53 (1981) (decided under former Code 1933, § 38-1607); Alvin v. State, 253 Ga. 740, 325 S.E.2d 143 (1985), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530, 2006 Ga. LEXIS 840 (2006) (decided under former O.C.G.A. § 24-9-5).

Knowledge of nature of oath. — It is enough if children know the mere nature of an oath, regardless of knowledge of the oath's effects, and whether or not the children have such knowledge is to be determined by the court on a preliminary examination. Peterson v. State, 47 Ga. 524, later appeal, 50 Ga. 142 (1873) (decided under former Code 1868, § 3800); Moore v. State, 79 Ga. 498, 5 S.E. 51 (1887) (decided under former Code 1882, § 3856); Young v. State, 122 Ga. 725, 50 S.E. 996 (1905) (decided under former Penal Code 1895, § 1012); Beebee v. State, 124 Ga. 775, 53 S.E. 99 (1906) (decided under former Penal Code 1895,

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§ 1012); Young v. State, 125 Ga. 584, 54 S.E. 82 (1906) (decided under former Penal Code 1895, § 1012); Richardson v. State, 141 Ga. 782, 82 S.E. 134 (1914) (decided under former Penal Code 1910, § 1038); Reece v. State, 155 Ga. 350, 116 S.E. 631 (1923) (decided under former Penal Code 1910, § 1038).

Challenge for "understanding truth." — Understanding the truth was one element of understanding the nature of an oath, and as such, subsection (b) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) excepted a child from a competency challenge brought on such basis. Norton v. State, 263 Ga. 448, 435 S.E.2d 30 (1993) (decided under former O.C.G.A. § 24-9-5); Jeffries v. State, 272 Ga. 510, 530 S.E.2d 714 (2000), cert. denied, 531 U.S. 1116, 121 S. Ct. 864, 148 L. Ed. 2d 777 (2001) (decided under former O.C.G.A. § 24-9-5).

Child should not be held competent when the child does not understand nature of oath. — While questions of this character are to be left largely to the discretion of the trial judge, the judge should not hold a child-witness competent when it does not appear that such witness sufficiently understands the nature and obligation of an oath to testify in the case. Pace v. State, 157 Ga. App. 442, 278 S.E.2d 90 (1981) (decided under former Code 1933, § 38-1607).

It was not necessary for child to understand meaning of the word "oath." Pace v. State, 157 Ga. App. 442, 278 S.E.2d 90 (1981) (decided under former Code 1933, § 38-1607); Raborn v. State, 192 Ga. App. 99, 383 S.E.2d 650 (1989) (decided under former O.C.G.A. § 24-9-5).

It is not necessary that a child understand the penalties for perjury in order for the trial court to rule the child competent to testify. Hill v. State, 251 Ga. 430, 306 S.E.2d 653 (1983) (decided under former O.C.G.A. § 24-9-5).

Age not determinative of competency as a witness. Johnson v. State, 146 Ga. 190, 91 S.E. 42 (1916) (decided under former Penal Code 1910, § 1038).

Capacity to commit crime not determinative of competency as a witness. Johnson v. State, 61 Ga. 35 (1878) (decided under former Code 1873, § 3856).

Testimony of children sufficiently reliable. — Record contained sufficient evidence of indicia of reliability when the two girls, who were 12 and 10 years old, were interviewed separately on at least two different occasions, their statements were consistent with each other over time, the state's witnesses were all professionals trained in interviewing victims of child abuse without asking leading questions, and all three considered the girls credible. Gibby v. State, 213 Ga. App. 20, 443 S.E.2d 852 (1994) (decided under former O.C.G.A. § 24-9-5).

Failure of trial court to conduct examination on the issue of whether the witness understands the nature of an oath is reversible error if the witness is under 14 years of age. Young v. State, 122 Ga. 725, 50 S.E. 996 (1905) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278); Bennett v. State, 145 Ga. App. 56, 243 S.E.2d 265 (1978) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Examination during testimony. — When the competency of a child is questioned, the better practice is for the court to make, or cause to be made, a preliminary examination of the child, for the purpose of testing the child's competency; but the failure of the court to do so will not be reversible error since it appears that the witness was fully examined on this point in the presence of the jury during examination on the main issue. Webb v. State, 7 Ga. App. 35, 66 S.E. 27 (1909) (decided under former Civil Code 1895, §§ 5267, 5276, 5277, 5278).

When preliminary examination of a 12-year-old witness was made and showed that the witness knew what it was to swear to tell the truth, understood the object of testifying, and the consequences of telling the truth and of telling a lie, the court properly held that the witness was competent. Central of Ga. Ry. v. Skandamis, 40 Ga. App. 78, 149 S.E. 60 (1929) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867).

When each child testified that each child knew the meaning of an oath, the child's belief in God, that it was wrong to

lie, and the child would tell the truth, the fact-finder and the district attorney could decide such statements were sufficient to establish the child understood the nature of the child's oath. Bearden v. State, 159 Ga. App. 892, 285 S.E.2d 606 (1981) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Examination of child sufficient. — When the principal state's witness against a defendant is a child and on examination by the court to determine the child's competency to testify stated the child knew what it meant to tell a lie and that the child was supposed to tell the truth, such examination was sufficient to determine whether the child understood the nature of an oath as required by law. Turpin v. State, 121 Ga. App. 294, 173 S.E.2d 455 (1970) (decided under former Code 1933, § 38-1607); Decker v. State, 139 Ga. App. 707, 229 S.E.2d 520 (1976) (decided under former Code 1933, § 38-1607).

Since each child testified that the child knew the meaning of an oath, the child's belief in God, that it was wrong to lie, and that the child would tell the truth, the fact-finder and the district attorney could decide such statements were sufficient to establish the child understood the nature of the child's oath. Bearden v. State, 159 Ga. App. 892, 285 S.E.2d 606 (1981) (decided under former Code 1933, § 38-1607).

When the record revealed that, during the trial the prosecuting attorney asked the victim, nearly nine years old, a series of questions, the answers to which clearly demonstrated that the child understood both the difference between truth and falsehood and the importance of telling only the truth, and the record further revealed that the defendant's counsel failed to question the witness following the examination by the state, or to object at that time on competency grounds, counsel's conduct amounted to a waiver of the right to raise the issue of the witness's competency on appeal. Wood v. State, 195 Ga. App. 424, 393 S.E.2d 720 (1990) (decided under former O.C.G.A. § 24-9-5).

Since the trial court examined each of three juvenile witnesses at the beginning of his or her testimony to ascertain that the child knew the difference between telling the truth and telling a lie and understood why telling the truth was better than telling a falsehood, and obtained from each witness a promise to tell the truth in response to questions from counsel, it was not an abuse of discretion to allow the children to testify. Carter v. State, 195 Ga. App. 489, 393 S.E.2d 746 (1990) (decided under former O.C.G.A. § 24-9-5).

Since the 15-year-old victim of a sexual abuse testified at trial that the victim knew it was bad to tell a lie, that the victim would be punished if the victim did so and that the victim also understood the importance of telling the truth, the trial court did not abuse the court's discretion in refusing to strike the victim's testimony. Lott v. State, 206 Ga. App. 886, 426 S.E.2d 667 (1992) (decided under former O.C.G.A. § 24-9-5).

Defense counsel was not ineffective for falling to challenge the competency of child witnesses because both victims were asked to demonstrate their understanding of the difference between the truth and a lie and both stated that they would tell the truth; the defendant gave no basis upon which, had defense counsel challenged their competency, the trial court would have ruled the children incompetent to testify, and defense counsel was not required to make a meritless objection. Vaughn v. State, 307 Ga. App. 754, 706 S.E.2d 137 (2011) (decided under former O.C.G.A. § 24-9-5).

Presumption not conclusive. — Child over 14 is presumed competent to testify, but to hold that this presumption is so conclusive that the court is inhibited from examining the witness on this point unless objection has been specifically made on one of the grounds stated in the former statute would be to circumscribe the authority of the court to elicit the truth, and would seriously impede the administration of justice. Schamroth v. State, 84 Ga. App. 580, 66 S.E.2d 413 (1951) (decided under former Code 1933, § 38-1607).

Trial court determines if child competent. — It is left to sound discretion of trial court to determine whether or not a child of tender years is a competent witness; and when the court examines a child

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as to the child's understanding of the nature of an oath and decides that the child is competent to testify, this court will not interfere, if it does not appear that such discretion has been manifestly abused. Gordon v. State, 186 Ga. 615, 198 S.E. 678 (1938) (decided under former Code 1933, § 38-1607); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321 (1945) (decided under former Code 1933, § 38-1607); Russell v. State, 83 Ga. App. 841, 65 S.E.2d 264 (1951) (decided under former Code 1933, § 38-1607); Middleton v. State, 194 Ga. App. 815, 392 S.E.2d 293 (1990) (decided under former O.C.G.A. § 24-9-5).

Competency of a child as a witness is within the sound discretion of the court, and the court's ruling will not be disturbed unless there is a manifest abuse of discretion. Adams v. State, 166 Ga. App. 807, 305 S.E.2d 651 (1983) (decided under former O.C.G.A. § 24-9-5).

Trial court had sound discretion to determine whether a child was competent to testify. Hill v. State, 251 Ga. 430, 306 S.E.2d 653 (1983) (decided under former O.C.G.A. § 24-9-5).

Once a child's competency has been thoroughly tested in court, it is within the sound discretion of the trial court whether or not to rule the child competent to testify as a witness. Pope v. State, 167 Ga. App. 328, 306 S.E.2d 326 (1983) (decided under former O.C.G.A. § 24-9-5).

Testimony admitted erroneously. — When an examination by the court shows that the child has no knowledge of the nature of an oath, it is error to permit the child to testify over proper objection. Horton v. State, 35 Ga. App. 493, 133 S.E. 647 (1926) (decided under former Penal Code 1910, § 1038).

Infant's admission against interest. — While the decision of whether a child, or "infant," is competent to testify is one made in the sound discretion of the judge, based upon the capacity of the child to know the nature of the oath rather than upon the child's years, the admission in evidence of an infant's admission against interest must be very carefully scanned because of the child's immaturity and the deleterious effect such admissions would have. Howard v. Hall, 112 Ga. App. 247, 145 S.E.2d 70 (1965) (decided under former Code 1933, §§ 38-1601, 38-1607, 38-1610, 38-1611, 38-1612).

No error in refusing to give former statute in charge. — Since the question of the competency of a victim's ten-year-old brother was one of law for the trial court to determine, the court did not err in refusing to give in charge to the jury the requested language contained in former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) which was relevant only to that issue. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275 (1981) (decided under former Code 1933, § 38-1607).

Inconsistency in a child's testimony did not render the child incompetent to testify, but went to the child's credibility as a witness. Pendergrass v. State, 168 Ga. App. 190, 308 S.E.2d 585 (1983) (decided under former O.C.G.A. § 24-9-5).

When a four-year-old victim expressed the victim's understanding of the difference between the truth and a lie and of the importance of telling the truth, expressed a fear of punishment if the victim did not tell the truth, and stated that the victim would tell the truth, there was no abuse of the trial court's discretion in the court's determination that the child was competent to testify, even though there may have been some inconsistency in the child's responses. Hutton v. State, 192 Ga. App. 239, 384 S.E.2d 446 (1989) (decided under former O.C.G.A. § 24-9-5).

Child witness's unresponsiveness to a number of questions as put by the defendant did not constitute a deprivation of defendant's constitutional confrontation right so as to require that the witness's out-of-court statements be stricken since the defendant was not denied the right to a thorough and sifting cross-examination of a witness who appeared to answer as well as the witness was capable of answering. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18 (1990) (decided under former O.C.G.A. § 24-9-5).

Defendant's right to confront and cross-examine a child witness was protected in spite of the child's unresponsiveness on cross-examination as to the merits

of the case brought against the defendant; the child's unresponsiveness did not preclude the defendant from thoroughly cross-examining the child as to the veracity of hearsay statements made against the defendant's interests by the child's parents and the caseworker. Byrd v. State, 204 Ga. App. 252, 419 S.E.2d 111 (1992) (decided under former O.C.G.A. § 24-9-5).

Trial court did not err by allowing the victim, a five-year-old child, to testify since although the child was unable to define the meaning of an oath or of the truth, it was demonstrated that the child appreciated the difference between the truth and a lie and that the child knew the child was obligated to tell the truth on the witness stand. Akers v. State, 179 Ga. App. 529, 346 S.E.2d 861 (1986) (decided under former O.C.G.A. § 24-9-7).

Fact that five-year-old victim may have testified inconsistently did not render the victim incompetent to testify as a matter of law. Akers v. State, 179 Ga. App. 529, 346 S.E.2d 861 (1986) (decided under former O.C.G.A. § 24-9-7).

Court did not err in finding nine-year-old child competent to testify, since when the child testified as to the child's grade in school, the child's teacher's name, that it was good to tell the truth and bad to tell a lie, that the child would get a whipping if the child told a lie, and that the child was going to tell the truth in court. Hester v. State, 187 Ga. App. 873, 371 S.E.2d 684 (1988) (decided under former O.C.G.A. § 24-9-7).

Trial court did not abuse the court's discretion in ruling competent to testify children who witnessed a crime since the children testified that to tell the truth means "to tell what really happened" as opposed to "making something up," and also testified that the children understand the significance of their oath to tell the truth while testifying in court and that if the children lied they would "get in big trouble." Hill v. State, 251 Ga. 430, 306 S.E.2d 653 (1983) (decided under former O.C.G.A. § 24-9-5).

When a child was examined at length by the court and by counsel, and the court found that the child was inattentive and not responsive, and also found that there were inconsistencies in the testimony of the child, there was no abuse of discretion in the court refusing to allow the child to testify. Batton v. State, 260 Ga. 127, 391 S.E.2d 914 (1990) (decided under former O.C.G.A. § 24-9-5).

After two videotapes of interviews with a child were showed to a jury, the child was called as the court's witness and testified similarly, and the child was examined by all parties, there was no abuse of the court's discretion in finding the child qualified to testify, nor in admitting the videotapes. Frazier v. State, 195 Ga. App. 109, 393 S.E.2d 262 (1990) (Trial held prior to April 19, 1989). (decided under former O.C.G.A. § 24-9-5).

For illustrations of preliminary examination to test a child's competency, see Minton v. State, 99 Ga. 254, 25 S.E. 626 (1896) (decided under former Penal Code 1895, § 1012); Gaines v. State, 99 Ga. 703, 26 S.E. 760 (1896) (decided under former Penal Code 1895, § 1012); Miller v. State, 109 Ga. 512, 35 S.E. 152 (1900) (decided under former Penal Code 1895, § 1012).

Sufficient evidence to determine child met required standard of intelligence. — Although a child witness said the witness did not know the meaning of the worth "oath," there was sufficient evidence, including testimony on direct and cross-examination that the witness knew right from wrong and that the witness had to tell the truth when the witness was in court, to determine that the child met the standard of intelligence required to qualify the child as a witness. Maynard v. State, 171 Ga. App. 605, 320 S.E.2d 806 (1984) (decided under former O.C.G.A. § 24-9-7).

Trial court did not err by not conducting a preliminary hearing before determining that two minor witnesses were competent to testify since the record shows that one witness was seventeen years old and the other was fourteen. Johnson v. State, 195 Ga. App. 385, 393 S.E.2d 712 (1990) (decided under former O.C.G.A. § 24-9-7).

Insufficient intelligence. — When a child of five years was not shown to possess sufficient intelligence to understand the nature of an oath or the penalty for the oath's violation, it was held that the court erred in permitting the witness to

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testify. Edwards v. State, 162 Ga. 204, 132 S.E. 892 (1926) (decided under former Civil Code 1910, §§ 5856, 5865, 5866, 5867).

Mental illness of child. — Fourteen-year-old witness suffered from hyperactivity, seizures, and schizophrenia, but took medication for these problems; since the trial judge questioned this witness outside of the jury's presence about the witness's understanding of the difference between the truth and a lie, and there was no basis to inquire further into the witness's competency, allowing the witness to testify was not an abuse of discretion. Simmons v. State, 251 Ga. App. 682, 555 S.E.2d 59 (2001) (decided under former O.C.G.A. § 24-9-7).

Children held competent in the following cases. — See Johnson v. State, 76 Ga. 76 (1885) (child of six) (decided under former Code 1882, § 3856); Marshall v. State, 74 Ga. 26 (1884) (child of seven) (decided under former Code 1882, § 3856); Minton v. State, 99 Ga. 254, 25 S.E. 626 (1896) (child of eight) (decided under former Penal Code 1895, § 1012); Hicks v. State, 105 Ga. 627, 31 S.E. 579 (1898) (child of ten) (decided under former Penal Code 1895, § 1012); Central of Ga. Ry. v. Skandamis, 40 Ga. App. 78, 149 S.E. 60 (1929) (child of twelve) (decided under former Civil Code 1910, § 5862); Thurmond v. State, 220 Ga. 227, 138 S.E.2d 372 (1964) (child of eight) (decided under former Code 1933, § 38-1607); Perryman v. State, 244 Ga. 720, 261 S.E.2d 588 (1979) (victim's nine-year-old daughter) (decided under former Code 1933, § 38-1607); Brown v. State, 167 Ga. App. 245, 306 S.E.2d 361 (1983) (child of seven) (decided under former O.C.G.A. § 24-9-5); Aleywine v. State, 169 Ga. App. 805, 315 S.E.2d 35 (1984) (child of eight) (decided under former O.C.G.A. § 24-9-5); Westbrook v. State, 186 Ga. App. 493, 368 S.E.2d 131, cert. denied, 186 Ga. App. 919, 368 S.E.2d 131 (1988) (child of five) (decided under former O.C.G.A. § 24-9-5); Syfrett v. State, 210 Ga. App. 185, 435 S.E.2d 470 (1993) (child of nine) (decided under former O.C.G.A. § 24-9-5).

Testimony of competent child, not formerly sworn, admitted. — Testimony of a child witness who, in response to questioning by the state, demonstrated that the child was aware that the child was under an obligation to tell the truth and could have been punished for not doing so, and who was shown to be competent, was properly admitted although the child was not sworn, when, after the preliminary questioning by the state, the defendant failed to request that the child be formally sworn and did not object to the child's testifying. Hilson v. State, 204 Ga. App. 200, 418 S.E.2d 784 (1992) (decided under former O.C.G.A. § 24-9-5).

Parent's objection to competency of child rejected. — In an action wherein two parents were found to have deprived an adopted child due to one parent's sexual abuse of the child and the other parent's failure to protect the child from such abuse, the juvenile court did not abuse the court's discretion by allowing the testimony of a forensic interviewer regarding statements made by the child as the Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), permitted such testimony, despite the parents' challenges to the competency of the child. In the Interest of B.H., 295 Ga. App. 297, 671 S.E.2d 303 (2008) (decided under former O.C.G.A. § 24-9-5).

Any apparently inconsistent testimony presented by children does not render such children incompetent to testify as a matter of law, but is a matter for consideration by the trial court in making the court's determination of competency and by the jury in determining the credibility of the witnesses. Thomas v. State, 168 Ga. App. 587, 309 S.E.2d 881 (1983) (decided under former O.C.G.A. § 24-9-7).

Inconsistency in a child's testimony does not render the child incompetent to testify, nor is it necessary for a child to understand the meaning of the word "oath." Sprayberry v. State, 174 Ga. App. 574, 330 S.E.2d 731 (1985) (decided under former O.C.G.A. § 24-9-7).

When the trial court used suggested questions from the Criminal Benchbook for Georgia Superior Courts (p. 166) to examine a seven-year-old as to the child's understanding of the nature of an oath and the necessity for telling the truth and found

the child competent, there was no abuse of discretion. Lancaster v. State, 250 Ga. 871, 301 S.E.2d 882 (1983) (decided under former O.C.G.A. § 24-9-7).

No error in refusing to charge jury that child's testimony should be corroborated. — When competency of victim's ten-year-old brother has been determined as a matter of law by the trial court, there is no error in the trial court's refusal to charge the jury that testimony of a child of such tender age should be corroborated by other testimony. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275 (1981) (decided under former O.C.G.A. § 24-9-7).

Jury judges child's credibility. — Thrust of the child witness statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), was to allow the jury, which must be convinced of guilt beyond a reasonable doubt, to judge the credibility of a child's accusations. If a child, who had reported child molestation to an adult permitted to testify to the out-of-court statement at trial, was incapable of reiterating the accusation at trial or was unresponsive or evasive during cross-examination, the jury must decide the child's credibility. Jones v. State, 200 Ga. App. 103, 407 S.E.2d 85 (1991) (decided under former O.C.G.A. § 24-9-5).

Insane Persons

Former rules applicable to idiots and lunatics were analogous to those applicable to children. Langston v. State, 153 Ga. 127, 111 S.E. 561 (1922) (decided under former Penal Code 1910, § 1038).

No presumption of incompetency. — There was no presumption that the declarant was so bereft of reason as to forbid the reception of evidence concerning the declarant's declarations, although it was admitted that before the making thereof the declarant had been adjudged insane and committed to an asylum. Fountain v. McCallum, 194 Ga. 269, 21 S.E.2d 610 (1942) (decided under former Code 1933, § 38-1607).

Insane persons not always incompetent. — Person who has been adjudged insane is not, in all cases, incompetent as a witness. The person's testimony is admissible if the person has sufficient understanding to apprehend the obligations of an oath and to be capable of giving a correct account of the matters the person has seen or heard in reference to the questions at issue; and whether the person has that understanding is a question to be determined in each case, the weight to be given to the person's testimony being finally a question for the jury. Cuesta v. Goldsmith, 1 Ga. App. 48, 57 S.E. 983 (1907) (decided under former Civil Code 1895, § 5273); Watkins v. State, 19 Ga. App. 234, 91 S.E. 284 (1917) (decided under former Penal Code 1910, § 1038).

Effect of insanity. — One may be medically or metaphysically insane, yet be capable in law of making a contract, a will, or of giving competent testimony in the trial of a case; from a legal standpoint there can be no satisfactory definition of insanity, but each case must be determined from the case's own peculiar facts. The law adopts as a general standard: the ability of the witness to understand the obligation of an oath and the ability to give a correct account of the matters the witness has seen or heard in reference to the questions at issue; the fact that a person has previously been adjudged insane upon an inquisition is by no means conclusive that the person is incompetent to testify. Bonner v. State, 59 Ga. App. 737, 1 S.E.2d 768 (1939) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, 38-1612).

Effect of dissociative state. — Trial court did not abuse the court's discretion in admitting the testimony statements of a sexual abuse victim in a dissociative state because their nonvolitional nature rendered statements made while in such a state inherently more reliable than comparable statements made in a hypnotic trance. Moreover, the testimony indicated that the witness was sufficiently competent to understand the witness's obligation to tell the truth, and that in a dissociative state, the witness could remember what happened to the witness previously in a dissociative state and truthfully relate this material evidence to the jury. Dorsey v. State, 206 Ga. App. 709, 426 S.E.2d 224 (1992) (decided under former O.C.G.A. § 24-9-7).

Prior adjudication of insanity. — Mere fact that the declarant had been

Insane Persons (Cont'd)

adjudged insane and placed in a lunatic asylum previously to the time that the declarant is alleged to have been the declarant, the declarant at that time not being in the asylum, was not in itself a reason why the testimony should have been excluded. Fountain v. McCallum, 194 Ga. 269, 21 S.E.2d 610 (1942) (decided under former Code 1933, § 38-1607).

That the chief witness for the state had been adjudicated insane in another state prior to the commission of the offense charged and testified about does not have the effect of denying probative value to the testimony of such witness: such a person is not incompetent to testify and the proof of the commitment for insanity goes to the credit of the witness only. Saxe v. State, 112 Ga. App. 804, 146 S.E.2d 376 (1965) (decided under former Code 1933, § 38-1603).

Continuation of mental state. — Witness had been previously adjudged insane, and the jury was authorized to find that this mental state still existed, and to reject the witness's testimony for that reason. Harris v. Folsom, 17 Ga. App. 676, 87 S.E. 1090 (1916) (decided under former Civil Code 1910, § 5862).

Question of sanity for jury. — Witness having been examined on interrogatories by commission duly issued, the witness was, prima facie, mentally competent to testify, and evidence subsequently taken tending to show that the witness was insane when examined, was for consideration by the jury under proper instructions from the court, and not for final adjudication by the judge presiding, there being also testimony in favor of insanity. Formby v. Wood, 19 Ga. 581 (1856) (decided under former law); Mayor of Gainesville v. Caldwell, 81 Ga. 76, 7 S.E. 99 (1888) (decided under former Code 188, § 3856).

When preliminary examination required. — Once an objection was interposed to the calling of a witness to testify as being incompetent on the ground of having been adjudicated insane, the trial judge must conduct a preliminary examination of the witness and then rule upon the witness's competency. Bryant v. State, 236 Ga. 790, 225 S.E.2d 309 (1976) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, and 38-1612).

Statement admitted when no motion to strike made. — When a defendant objected to admitting a statement made to police implicating the defendant in a murder for reason that the defendant was insane at the time the defendant made the statement, but offered no evidence concurrent with the objection to prove insanity, the trial court properly admitted the statement because no motion was made to strike the statement following the statement's introduction into evidence. Kimbell v. State, 252 Ga. 65, 311 S.E.2d 465 (1984) (decided under former O.C.G.A. § 24-9-5).

Illustrations. — See Ray v. State, 32 Ga. App. 513, 124 S.E. 57 (1924) (woman 21 years old declared incompetent in bastardy proceeding) (decided under former Penal Code 1910, § 1038); Ravenel v. State, 153 Ga. 130, 111 S.E. 643 (1922) (female victim in rape case held competent) (decided under former Penal Code 1910, § 1038).

Retarded Persons

Witness somewhat retarded. — Though there was evidence that the witness was "somewhat retarded," when in response to questions by the court the witness testified that the witness went through the eighth grade in school, attended church and Sunday school, and knew that it was right to tell the truth, the trial court was correct in determining that the witness was competent to testify. Lee v. State, 108 Ga. App. 97, 132 S.E.2d 107 (1963) (decided under former Code 1933, § 38-1607).

Evidence of competency. — After the 22-year-old retarded victim indicated the victim knew how to tell the truth and the victim's mother and sister testified the victim knew the difference between right and wrong, such evidence was sufficient to show that the victim had an appreciation for the truth and could testify. Dumas v. State, 239 Ga. App. 210, 521 S.E.2d 108 (1999) (decided under former O.C.G.A. § 24-9-5).

Mental disability does not necessarily imply incompetent to testify. — Defendant's girlfriend, the victim, was not presumed to be incompetent to testify under former O.C.G.A. § 24-9-7 simply because of the victim's mental disability; absent an objection by the defendant, it was not error to allow the victim to testify without first determining the victim's competence. Austin v. State, 286 Ga. App. 149, 648 S.E.2d 414 (2007), cert. denied, No. SO7C1698, 2007 Ga. LEXIS 687 (Ga. 2007) (decided under former O.C.G.A. § 24-9-7).

Application in Other Circumstances

Impeachment at prior trial. — Fact that a witness for the state had been impeached by the state, as unworthy of belief, in a previous trial of the witness, is not ground for refusing to permit the witness to testify in a present case. Daniel v. State, 118 Ga. App. 370, 163 S.E.2d 863 (1968), cert. denied, 394 U.S. 919, 89 S. Ct. 1193, 22 L. Ed. 2d 453 (1969) (decided under former Code 1933, § 38-1603).

Testimony concerning adultery. — Former O.C.G.A. § 24-9-1 allowed a party to be a witness for oneself on all relevant issues; but former O.C.G.A. § 24-9-2 created an exception for proceedings "instituted in consequence of adultery," with the result that in such proceedings a party was not competent to testify to that party's or that party's spouse's adultery. Owens v. Owens, 247 Ga. 139, 274 S.E.2d 484 (1981) (decided under former O.C.G.A. §§ 24-9-1 and 24-9-2).

Accountant employed under authority of court. — When the judge appointed an auditor to pass upon all questions arising in a case, and authorized the auditor to employ a certified public accountant to assist in examining books, records, and accounts, an accountant who was thereafter so employed, and who had made an examination of books of the plaintiff upon which the defendant relied in part to establish a defense and counterclaim, was not incompetent as a witness to testify as to what the books showed, either because the accountant was employed under authority of the court to assist the auditor, or because the order referring the case to an auditor had been revoked and the objecting party had never had an opportunity to appear before the auditor. Bible v. Somers Constr. Co., 197 Ga. 761, 30 S.E.2d 623 (1944) (decided under former Code 1933, § 38-1603).

Ex parte statements insufficient. — Trial court erred in making a determination that a prospective witness was incompetent to testify based on ex parte statements made by the administrator of the institution where the prospective witness was confined. Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, and 38-1612).

Pre-1979 testimony admissible when not against estate's interests. — Testimony of a transaction alleged to have been undertaken with the deceased in 1978 should have been admitted because it was not against the interest of the estate of the deceased. Bowens v. Holmes, 262 Ga. 179, 415 S.E.2d 632 (1992) (decided under former O.C.G.A. § 24-9-1).

Pre-1979 statement admissible as to appellee's parents regarding decedent's statements. — Appellee's parents were competent witnesses regarding statements made to the parents by the decedent prior to July 1, 1979 to prove that the decedent contracted to adopt the appellee. Morgan v. Howard, 285 Ga. 512, 678 S.E.2d 882 (2009) (decided under former O.C.G.A. § 24-9-1).

Continuing business relationship did not constitute a "transaction" within the meaning of subsection (b) of former O.C.G.A. § 24-9-1 and thus testimony as to an alleged oral contract made before July 1, 1979 with a party since deceased, which defined the relationship which extended beyond that date, was not admissible under the former dead man's statute. Wilson v. Nichols, 253 Ga. 84, 316 S.E.2d 752 (1984) (decided under former O.C.G.A. § 24-9-1).

Former dead man's statute barred testimony regarding a conversation between plaintiff, plaintiff's mother, and a person since deceased because the plaintiff's claim was "against the interest" of the deceased, i.e., the interest of the deceased's estate. Willis v. Kennedy, 267 Ga. 165, 476 S.E.2d 246 (1996) (decided under former O.C.G.A. § 24-9-1).

Application in Other Circumstances (Cont'd)

Former dead man's statute rendered a witness incompetent to testify as to a conversation with a person since deceased regardless of whether the testimony might be admissible under other rules of evidence. Willis v. Kennedy, 267 Ga. 165, 476 S.E.2d 246 (1996) (decided under former O.C.G.A. § 24-9-1).

Under former Code 1933, § 38-1603, neither plaintiff nor his wife could testify as to promise of a "contract for life" allegedly made to plaintiff and plaintiff's spouse by two deceased officers of defendant corporation. Kitfield v. Henderson, Black & Greene, 231 Ga. App. 130, 498 S.E.2d 537 (1998).

For application of former dead man's statute in action seeking cancellation of deed allegedly obtained by fraud, see McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548 (M.D. Ga. 1992) (decided under former O.C.G.A. § 24-9-1); Garbutt v. Southern Clays, Inc., 894 F. Supp. 456 (M.D. Ga. 1995) (decided under former O.C.G.A. § 24-9-1).

Competency rules apply in adultery cases. Owens v. Owens, 247 Ga. 139, 274 S.E.2d 484 (1981), was no longer applicable in view of the 1982 amendment to former O.C.G.A. § 24-9-2 which eliminated language excepting certain adultery cases from the broad competency rules of former O.C.G.A. § 24-9-1 (see now O.C.G.A. § 24-9-601) ; consequently, in such cases the competency rules of former § 24-9-1 were now applicable. Brown v. Hauser, 249 Ga. 513, 292 S.E.2d 1 (1982) (decided under former O.C.G.A. §§ 24-9-1 and 24-9-2).

Offer of proof following introduction of previously suppressed evidence regarding adulterous conduct. — When spouse obtained a favorable ruling on motion in limine to suppress evidence as to the spouse's adulterous conduct, and abided by that ruling, but nevertheless such evidence was offered at trial, that spouse was entitled to make an offer of proof as to such allegations. Reno v. Reno, 249 Ga. 855, 295 S.E.2d 94 (1982) (decided under former O.C.G.A. § 24-9-2).

Expert witness. — Question of qualification as expert witness is one of discretion with the trial court judge. Wilkie v. State, 153 Ga. App. 609, 266 S.E.2d 289 (1980) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, and 38-1612).

Exclusion of expert witness improper. — Trial court abused the court's discretion in excluding a homeowner's expert witness solely on the basis of the expert's alleged interest in the outcome of the case, and because the trial court's unauthorized preemptive protection of the homeowner's attorney immediately led to the dismissal of the claim for damages for failure to produce any expert evidence of causation, the homeowner did not have a day in court; although the expert indicated that, at the time of the expert's deposition, the expert intended to decide how much to bill the homeowner after the trial, based on the expert's own evaluation of whether the expert testimony was "usable," there was no evidence in the truncated voir dire of the expert that the homeowner's attorney agreed to that scheme or otherwise agreed that the expert's compensation would be contingent on the outcome of the case. Meacham v. Franklin-Heard County Water Auth., 302 Ga. App. 69, 690 S.E.2d 186 (2009), cert. denied, No. S10C0865, 2010 Ga. LEXIS 427 (Ga. 2010) (decided under former O.C.G.A. § 24-9-1).

Witness under influence of alcohol or drugs. — Former law required the trial court to determine the competency to testify of a witness who was under the influence of alcohol or other drugs. Geter v. State, 231 Ga. 615, 203 S.E.2d 195 (1974) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611, and 38-1612).

Time of drunkenness. — Evidence that the witness was in a drunken condition when the witness undertook to testify went to the witness's competency, while proof that the witness was drunk on the occasion concerning which the witness testified went only to the witness's credit. Whitus v. State, 222 Ga. 103, 149 S.E.2d 130 (1966) (decided under former Code 1933, § 38-1608).

Prior conviction of felony. — Person convicted of a felony is a competent witness; the fact of the person's conviction

only goes to the person's credit. Bowers v. Southern Ry., 10 Ga. App. 367, 73 S.E. 677 (1912) (decided under former Civil Code 1910, §§ 5858 and 5859); Lewis v. State, 243 Ga. 443, 254 S.E.2d 830 (1979) (decided under former Code 1933, § 38-1603).

Witness testifying to market value. — Competency of the witness to testify as to market value is for the court. Williams v. Colonial Pipeline Co., 110 Ga. App. 824, 140 S.E.2d 150 (1964) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611 and 38-1612).

Alzheimer's disease. — When an attorney-in-fact sought to enjoin the attorney-in-fact's siblings from enforcing a revocation of their parent's durable health care power of attorney, the trial court did not err in determining that the parent, who had Alzheimer's disease, was not competent, as well as in refusing to allow the siblings to present the ailing parent as a witness, given the evidence of the parent's seriously impaired mental capacity. Luther v. Luther, 289 Ga. App. 428, 657 S.E.2d 574 (2008), cert. denied, No. S08C0912, 2008 Ga. LEXIS 520 (Ga. 2008) (decided under former O.C.G.A. § 24-9-7).

Identity of confidential informant. — Trial court did not err by refusing to allow the defendant to learn the identity of the confidential informant on grounds that identity was the defendant's sole defense, and the confidential informant was the one who "fingered" defendant as a drug dealer, given the state's interest in retaining the informant's confidentiality because of other, ongoing investigations and the fact that the evidence as to defendant's identity was overwhelming in that two police officers positively identified the defendant. Wilson v. State, 191 Ga. App. 833, 383 S.E.2d 197 (1989) (decided under former O.C.G.A. § 24-9-7).

Instruction unnecessary. — In the absence of a written request, the trial judge does not ordinarily charge the jury concerning the witness's competency, and it is never error for the judge to omit to instruct the jury concerning the credibility of a witness. Whitus v. State, 222 Ga. 103, 149 S.E.2d 130 (1966) (decided under former Code 1933, §§ 38-1601, 38-1610, 38-1611 and 38-1612).

Appointment of guardian. — Trial court did not err by allowing the victim to testify in a prosecution for aggravated assault, notwithstanding the fact that a probate judge had appointed a guardian for the victim's person and property after the victim's injuries, since the trial court questioned the victim outside the presence of the jury and determined that the victim was competent to testify. McClain v. State, 248 Ga. App. 338, 545 S.E.2d 926 (2001) (decided under former O.C.G.A. § 24-9-7).

Physical problems cannot render a witness incompetent to testify. — See Smith v. State, 249 Ga. App. 39, 547 S.E.2d 598 (2001) (decided under former O.C.G.A. § 24-9-7).

Witness bias did not preclude testimony. — There was no error in permitting the husband's sibling, a family law attorney, to testify as an expert on child custody issues because any bias the sibling had went to the sibling's credibility, not the admissibility of the sibling's testimony. Walls v. Walls, 291 Ga. 757, 732 S.E.2d 407 (2012) (decided under former O.C.G.A. § 24-9-1).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 78 et seq., 82, 86 et seq., 160 et seq., 180 et seq., 195, 203, 204, 681 et seq.

C.J.S. — 98 C.J.S. (Rev), Witnesses, §§ 92, 108 et seq., 102, 124 et seq., 132 et seq., 215, 216, 238, 245, 270, 290, 447.

ALR. — Exhibition of child in criminal prosecution, or civil action, for seduction, 1 ALR 622.

Competency of hospital physician or attendant to testify as to condition of patient, 22 ALR 1217.

Mental condition as affecting competency of witness, 26 ALR 1491; 148 ALR 1140.

Competency or qualification of witness who had not seen or examined property before fire to testify as to damage by fire, 33 ALR 297.

Competency of witness to testify as to

his own age, 39 ALR 376.

Insanity of witness as ground of writ of error coram nobis, 43 ALR 1387.

Admissibility and probative force, on issue as to mental condition, of evidence that one had been adjudged incompetent or insane, or had been confined in insane asylum, 68 ALR 1309.

Infant's admissions out of court as evidence in civil cases, 89 ALR 708; 12 ALR3d 1051.

May question as to qualification or competency of witness be raised by or upon motion for nonsuit or for directed verdict, absent objection on that ground when testimony was given, 93 ALR 788.

Refusal to permit an otherwise competent witness to take witness stand because of mental or physical condition not amounting to unsoundness of mind, 97 ALR 893.

Competency of testimony as to one's mental condition, based upon handwriting, 103 ALR 900.

Judge as a witness in a cause on trial before him, 157 ALR 315.

Competency of child as witness as affected by fact that his prosecution for perjury is prohibited, 159 ALR 1102.

Review on appeal of decision of trial court as to qualification or competency of expert witnesses, 166 ALR 1067.

Conviction in another jurisdiction as disqualifying witness, 2 ALR2d 579.

Right of one against whom testimony is offered to invoke privilege of communication between others, 2 ALR2d 645.

Testimony of children as to grounds of divorce of their parents, 2 ALR2d 1329.

Competence, as against principal, of statements by agent to prove scope, as distinguished from fact, of agency, 3 ALR2d 598.

Effect of voluntary statements damaging to accused, not proper subject of testimony, uttered by testifying police or peace officer, 8 ALR2d 1013.

Alleged incompetent as witness in lunacy inquisition, 22 ALR2d 756.

Admissibility of deposition of child of tender years, 30 ALR2d 771.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 ALR2d 1247.

Court's witnesses (other than expert) in criminal prosecution, 67 ALR2d 538.

Competency of young child as witness in civil case, 81 ALR2d 386.

Admissibility of evidence of train speed prior to grade-crossing accident, and competency of witness to testify thereto, 83 ALR2d 1329.

Declarant's age as affecting admissibility as res gestae, 83 ALR2d 1368; 15 ALR4th 1043.

Competency of physician or surgeon of school of practice other than that to which defendant belongs to testify in malpractice case, 85 ALR2d 1022.

Validity of indictment where grand jury heard incompetent witness, 39 ALR3d 1064.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 ALR3d 1203.

Rule as regards competency of husband or wife to testify as to nonaccess, 49 ALR3d 212.

Power of court to control evidence or witnesses going before grand jury, 52 ALR3d 1316.

Judge as witness in cause not on trial before him, 86 ALR3d 633.

Trial jurors as witnesses in same state court or related case, 86 ALR3d 781.

Conviction by court-martial as proper subject of cross-examination for impeachment purposes, 7 ALR4th 468.

Court's witnesses (other than expert) in state criminal prosecution, 16 ALR4th 352.

Appealability of state criminal court order requiring witness other than accused to undergo psychiatric examination, 17 ALR4th 867.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused, 19 ALR4th 368.

Attorney as witness for client in civil proceedings — Modern state cases, 35 ALR4th 810.

Deaf-mute as witness, 50 ALR4th 1188.

Insured-insurer communications as privileged, 55 ALR4th 336.

Witnesses: child competency statutes, 60 ALR4th 369.

Compelling testimony of opponent's expert in state court, 66 ALR4th 213.

Sufficiency of evidence that witness in criminal case was hypnotized, for purposes of determining admissibility of testimony given under hypnosis or of hypnotically enhanced testimony, 16 ALR5th 841.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial, 37 ALR5th 319.

Admissibility of expert testimony regarding questions of domestic law, 66 ALR5th 135.

Validity, construction, and application of child hearsay statutes, 71 ALR5th 637.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 ALR5th 529.

Calling and interrogation of witnesses by court under Rule 614 of the Federal Rules of Evidence, 53 ALR Fed. 498.

24-6-602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of such matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. The provisions of this Code section are subject to Code Section 24-7-703 and shall not apply to party admissions. (Code 1981, § 24-6-602, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Need for personal knowledge, Fed. R. Evid. 602.

24-6-603. (For effective date, see note.) Oath or affirmation.

(a) Before testifying, every witness shall be required to declare that he or she will testify truthfully by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

(b) (For effective date, see note.) Notwithstanding the provisions of subsection (a) of this Code section, in all proceedings involving dependency as defined by Code Section 15-11-2 and in all criminal proceedings in which a child was a victim of or witness to any crime, the child shall be competent to testify, and the child's credibility shall be determined as provided in this chapter. (Code 1981, § 24-6-603, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 294, § 4-41/HB 242.)

Delayed effective date. — Subsection (b), as set out above, becomes effective January 1, 2014. For version of subsection (b) in effect until January 1, 2014, see the 2013 amendment note.

The 2013 amendment, effective January 1, 2014, substituted "dependency" for "deprivation" near the middle of subsection (b). See editor's note for applicability.

Cross references. — Testimony as to child's description of sexual contact or physical abuse, § 24-8-820. Oath or affirmation to testify truthfully, Fed. R. Evid. 603.

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed

by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews. — For article, "The Need for a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984). For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For note, "The Georgia Child Hearsay Statute, and the Sixth Amendment: Is There a Confrontation?," see 10 Ga. St. U.L. Rev. 367 (1994).

For comment discussing the effect of mental unsoundness on the competency of witnesses, in light of O'Shea v. Jewel Tea Co., 233 F.2d 530 (9th Cir. 1956), see 19 Ga. B.J. 533 (1957). For comment on Western & A.R.R. v. Hart, 95 Ga. App. 810, 99 S.E.2d 302 (1957), holding that the accuracy of the opinion of a 12 year old as to the speed of a train is a matter for the jury to decide and its admission into evidence was not error, see 20 Ga. B.J. 395 (1958). For comment on Bacon v. State, 222 Ga. 151, 149 S.E.2d 111 (1966), see 18 Mercer L. Rev. 506 (1967).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3800, former Code 1873, § 3856, former Code 1882, § 3856, former Civil Code 1895, § 5273, former Penal Code 1895, § 1012, former Civil Code 1910, § 5862, former Penal Code 1910, § 1038, former Code 1933, §§ 38-1607, 38-1701, and former O.C.G.A. §§ 24-9-5 and 24-9-60 are included in the annotations for this Code section.

Oath or affirmation required of all. — In this state, an oath or affirmation is required of all witnesses, and unsworn statements are not treated as amounting to evidence, except in specified cases from necessity. Huiet v. Schwob Mfg. Co., 196 Ga. 855, 27 S.E.2d 743 (1943) (decided under former Code 1933, § 38-1701).

Framing oath according to religious faith. — It was not error to accept testimony of a witness who declined to take an oath, saying: "Well, I'm not going to swear but I promise to tell you the truth." Chapman v. State, 257 Ga. 19, 354 S.E.2d 149 (1987) (decided under former O.C.G.A. § 24-9-60).

Objection to lack of oath or affirmation. — When a party, without objection, allows a witness to go on the stand and testify against the party without being first sworn, such party cannot, after verdict against the party, urge in this court the failure of the witness to take the oath as a ground for rejecting the brief of the evidence, which has the approval of the trial judge, since such objection was not raised in the court below. Neidlinger v. Mobley, 76 Ga. App. 599, 46 S.E.2d 747 (1948) (decided under former Code 1933, § 38-1701).

When a party, without objection, allows a witness to testify against the party without first being sworn, that party, through the party's failure to object, has waived the requirements of an oath. Belcher v. State, 173 Ga. App. 509, 326 S.E.2d 857 (1985) (decided under former O.C.G.A. § 24-9-60).

Former Georgia witness competency statutes presented a reasonable requirement regarding the minimal level of understanding for people participating in one of the most important functions of government and did not violate the equal protection clause. Ambles v. State, 259 Ga. 406, 383 S.E.2d 555 (1989) (decided under

former O.C.G.A. § 24-9-5).

State had standing to challenge the former Georgia witness competency statutes. Ambles v. State, 259 Ga. 406, 383 S.E.2d 555 (1989) (decided under former O.C.G.A. § 24-9-5).

No hearing unless specific ground of incompetency alleged. — When, before the defendant's first trial, the defendant made the defendant's "motion to exclude the testimony of the victim on grounds of incompetency . . . pursuant to §§ 24-9-5 & 24-9-7 [now repealed]" in the broadest of terms without distinctly alleging what category of "persons who do not have the use of reason" the victim fit into, and at no point in the defendant's first or second trials did the defendant raise a distinct objection to the competency of the witness, but simply requested a hearing without specifying any valid ground of incompetency as applied to the facts and circumstances of the case, the court did not err in refusing to conduct an examination. In addition to the court's observation of the victim and the victim's testimony during the course of the first trial, no applicable specific ground of incompetency was alleged. Webb v. State, 187 Ga. App. 348, 370 S.E.2d 204 (1988) (decided under former O.C.G.A. § 24-9-5).

Nothing in the record to indicate witness could not understand trial oath. — Ruling that a witness was incompetent to testify under former O.C.G.A. § 24-9-5(a) (see now O.C.G.A. §§ 24-6-601 and 24-6-603) failed since there was absolutely nothing in the record to demonstrate that the witness could not understand the nature of the trial oath simply because the witness was originally from Somalia and spoke in halting English. Trueblood v. State, 248 Ga. App. 78, 545 S.E.2d 628 (2001) (decided under former O.C.G.A. § 24-9-5).

Role of Court

Trial court determines competency of a witness and jury decides credibility. Bearden v. State, 159 Ga. App. 892, 285 S.E.2d 606 (1981) (decided under former O.C.G.A. § 24-9-5).

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Constitutionality. — Former subsection (b) of O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) did not violate due process; it was not fundamentally unfair to require one accused of child molestation to face one's accuser, even if the accuser was unable to articulate the meaning of an oath, and the defendant had the opportunity to cross-examine the child witness, and test the child's credibility before the jury. Sims v. State, 260 Ga. 782, 399 S.E.2d 924 (1991) (decided under former O.C.G.A. § 24-9-5).

Subsection (b) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) applied equally to all those accused of child molestation, and therefore did not violate the equal protection clause of the federal constitution. Sims v. State, 260 Ga. 782, 399 S.E.2d 924 (1991) (decided under former O.C.G.A. § 24-9-5).

Child "available to testify" in former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) meant one competent to testify under former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). For offenses occurring before April 19, 1989, including child molestation, a child incompetent as a witness was not available to testify and any out-of-court statements were not rendered admissible by former § 24-3-16. Hunnicutt v. State, 194 Ga. App. 714, 391 S.E.2d 790 (1990) (decided under former O.C.G.A. § 24-9-5).

Former O.C.G.A. §§ 24-9-5 and 24-3-16 (see now O.C.G.A. §§ 24-6-601, 24-6-603, and 24-8-820) must be construed together. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18 (1990) (decided under former O.C.G.A. § 24-9-5); McGarity v. State, 212 Ga. App. 17, 440 S.E.2d 695 (1994) (decided under former O.C.G.A. § 24-9-5).

Child was considered "available to testify" under former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) only if the child was "competent" to testify within the meaning of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). Shaver v. State, 199 Ga. App. 428, 405 S.E.2d 281, cert. denied, 199 Ga. App. 907, 405 S.E.2d 281 (1991) (decided under former O.C.G.A. § 24-9-5).

Former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) did not expand the circumstances under which hearsay statements of a child could

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be admitted in evidence. Thornton v. State, 264 Ga. 563, 449 S.E.2d 98 (1994) (decided under former O.C.G.A. § 24-9-5).

Competency of children to testify in a divorce action could be established only by demonstrating that the children understood the nature of an oath as required by subsection (a) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). Woodruff v. Woodruff, 272 Ga. 485, 531 S.E.2d 714 (2000) (decided under former O.C.G.A. § 24-9-5).

No required showing child competent to testify. — For offenses involving child victims occurring after April 19, 1989, a determination that the child victim is competent to testify was not necessary; a child witness was "available" for purposes of the Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), as long as the child was physically available to appear at trial. Gibby v. State, 213 Ga. App. 20, 443 S.E.2d 852 (1994) (decided under former O.C.G.A. § 24-9-5).

Statement admissible regardless of child's age or degree of comprehension. — Out-of-court statements of a victim of child molestation are admissible whenever the victim is available to appear at trial, whether or not the child is capable of understanding the nature of an oath and thus regardless of age or degree of comprehension. Lang v. State, 201 Ga. App. 836, 412 S.E.2d 866 (1991) (decided under former O.C.G.A. § 24-9-5).

Oath not required when child did not comprehend oath's nature. — Under subsection (b) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603), which provided that in certain limited categories of cases a child was deemed legally competent to testify, the prerequisite administration of the oath otherwise called for by former O.C.G.A. § 24-9-60 had been obviated when the child did not comprehend the oath's nature. The child simply became an unsworn witness, made so because incapable of taking an oath. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18 (1990) (decided under former O.C.G.A. §§ 24-9-5 and 24-9-60).

Children who did not understand nature of oath were incompetent. — Porter v. State, 237 Ga. 580, 229 S.E.2d 384 (1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1603, 51 L. Ed. 2d 806 (1977) (decided under former Code 1933, § 38-1607).

Mentally retarded children subject to competency challenge. — Former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) was construed as subjecting children to a competency challenge based on the allegation that children did not understand the nature of an oath. Children, like adults, were also subject to a competency challenge on the ground that the children do not have the use of reason because of mental retardation. Sizemore v. State, 262 Ga. 214, 416 S.E.2d 500 (1992) (decided under former O.C.G.A. § 24-9-5).

Determining factor in deciding competency of a witness to testify was not age but rather the ability to understand the nature of an oath. Horton v. State, 35 Ga. App. 493, 133 S.E. 647 (1926) (decided under former Penal Code 1910, § 1038); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321 (1945) (decided under former Code 1933, § 38-1607).

Standard of intelligence required to qualify child as a witness is not that the child be able to define the meaning of an oath, nor that the child understand the process under which the oath is administered, but rather that the child know and appreciate the fact that as a witness the child assumes a solemn and binding obligation to tell the truth relative to the case and concerning such matters as the child may be interrogated on, and that if the child violates the obligation the child is subject to be punished by the court. Jones v. State, 219 Ga. 245, 132 S.E.2d 648 (1963) (decided under former Code 1933, § 38-1607); Smith v. State, 247 Ga. 511, 277 S.E.2d 53 (1981) (decided under former Code 1933, § 38-1607); Alvin v. State, 253 Ga. 740, 325 S.E.2d 143 (1985), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530, 2006 Ga. LEXIS 840 (2006) (decided under former O.C.G.A. § 24-9-5).

Knowledge of nature of oath. — It is enough if children know the mere nature

of an oath, regardless of knowledge of the oath's effects, and whether or not the children have such knowledge is to be determined by the court on a preliminary examination. Peterson v. State, 47 Ga. 524, later appeal, 50 Ga. 142 (1873) (decided under former Code 1868, § 3800); Moore v. State, 79 Ga. 498, 5 S.E. 51 (1887) (decided under former Code 1882, § 3856); Young v. State, 122 Ga. 725, 50 S.E. 996 (1905) (decided under former Penal Code 1895, § 1012); Beebee v. State, 124 Ga. 775, 53 S.E. 99 (1906) (decided under former Penal Code 1895, § 1012); Young v. State, 125 Ga. 584, 54 S.E. 82 (1906) (decided under former Penal Code 1895, § 1012); Richardson v. State, 141 Ga. 782, 82 S.E. 134 (1914) (decided under former Penal Code 1910, § 1038); Reece v. State, 155 Ga. 350, 116 S.E. 631 (1923) (decided under former Penal Code 1910, § 1038).

Challenge for "understanding truth." — Understanding the truth was one element of understanding the nature of an oath, and as such, subsection (b) of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) excepted a child from a competency challenge brought on such basis. Norton v. State, 263 Ga. 448, 435 S.E.2d 30 (1993) (decided under former O.C.G.A. § 24-9-5); Jeffries v. State, 272 Ga. 510, 530 S.E.2d 714 (2000), cert. denied, 531 U.S. 1116, 121 S. Ct. 864, 148 L. Ed. 2d 777 (2001) (decided under former O.C.G.A. § 24-9-5).

Child should not be held competent when the child does not understand nature of oath. — While questions of this character are to be left largely to the discretion of the trial judge, the judge should not hold a child-witness competent when it does not appear that such witness sufficiently understands the nature and obligation of an oath to testify in the case. Pace v. State, 157 Ga. App. 442, 278 S.E.2d 90 (1981) (decided under former Code 1933, § 38-1607).

It was not necessary for child to understand meaning of the word "oath." Pace v. State, 157 Ga. App. 442, 278 S.E.2d 90 (1981) (decided under former Code 1933, § 38-1607); Raborn v. State, 192 Ga. App. 99, 383 S.E.2d 650 (1989) (decided under former O.C.G.A. § 24-9-5).

It is not necessary that a child understand the penalties for perjury in order for the trial court to rule the child competent to testify. Hill v. State, 251 Ga. 430, 306 S.E.2d 653 (1983) (decided under former O.C.G.A. § 24-9-5).

Age not determinative of competency as a witness. Johnson v. State, 146 Ga. 190, 91 S.E. 42 (1916) (decided under former Penal Code 1910, § 1038).

Capacity to commit crime not determinative of competency as a witness. Johnson v. State, 61 Ga. 35 (1878) (decided under former Code 1873, § 3856).

Testimony of children sufficiently reliable. — Record contained sufficient evidence of indicia of reliability when the two girls, who were 12 and 10 years old, were interviewed separately on at least two different occasions, their statements were consistent with each other over time, the state's witnesses were all professionals trained in interviewing victims of child abuse without asking leading questions, and all three considered the girls credible. Gibby v. State, 213 Ga. App. 20, 443 S.E.2d 852 (1994) (decided under former O.C.G.A. § 24-9-5).

Failure of trial court to conduct examination on the issue of whether the witness understands the nature of an oath is reversible error when the witness is under 14 years of age. Bennett v. State, 145 Ga. App. 56, 243 S.E.2d 265 (1978) (decided under former Code 1933, § 38-1607).

Examination of child sufficient. — When the principal state's witness against a defendant is a child and on examination by the court to determine the child's competency to testify stated the child knew what it meant to tell a lie and that the child was supposed to tell the truth, such examination was sufficient to determine whether the child understood the nature of an oath as required by law. Turpin v. State, 121 Ga. App. 294, 173 S.E.2d 455 (1970) (decided under former Code 1933, § 38-1607); Decker v. State, 139 Ga. App. 707, 229 S.E.2d 520 (1976) (decided under former Code 1933, § 38-1607).

Since each child testified that the child knew the meaning of an oath, the child's belief in God, that it was wrong to lie, and that the child would tell the truth, the

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fact-finder and the district attorney could decide such statements were sufficient to establish the child understood the nature of the child's oath. Bearden v. State, 159 Ga. App. 892, 285 S.E.2d 606 (1981) (decided under former Code 1933, § 38-1607).

When the record revealed that, during the trial the prosecuting attorney asked the victim, nearly nine years old, a series of questions, the answers to which clearly demonstrated that the child understood both the difference between truth and falsehood and the importance of telling only the truth, and the record further revealed that the defendant's counsel failed to question the witness following the examination by the state, or to object at that time on competency grounds, counsel's conduct amounted to a waiver of the right to raise the issue of the witness's competency on appeal. Wood v. State, 195 Ga. App. 424, 393 S.E.2d 720 (1990) (decided under former O.C.G.A. § 24-9-5).

Since the trial court examined each of three juvenile witnesses at the beginning of his or her testimony to ascertain that the child knew the difference between telling the truth and telling a lie and understood why telling the truth was better than telling a falsehood, and obtained from each witness a promise to tell the truth in response to questions from counsel, it was not an abuse of discretion to allow the children to testify. Carter v. State, 195 Ga. App. 489, 393 S.E.2d 746 (1990) (decided under former O.C.G.A. § 24-9-5).

Since the 15-year-old victim of a sexual abuse testified at trial that the victim knew it was bad to tell a lie, that the victim would be punished if the victim did so and that the victim also understood the importance of telling the truth, the trial court did not abuse the court's discretion in refusing to strike the victim's testimony. Lott v. State, 206 Ga. App. 886, 426 S.E.2d 667 (1992) (decided under former O.C.G.A. § 24-9-5).

Defense counsel was not ineffective for falling to challenge the competency of child witnesses because both victims were asked to demonstrate their understanding of the difference between the truth and a lie and both stated that they would tell the truth; the defendant gave no basis upon which, had defense counsel challenged their competency, the trial court would have ruled the children incompetent to testify, and defense counsel was not required to make a meritless objection. Vaughn v. State, 307 Ga. App. 754, 706 S.E.2d 137 (2011) (decided under former O.C.G.A. § 24-9-5).

Presumption not conclusive. — Child over 14 is presumed competent to testify, but to hold that this presumption is so conclusive that the court is inhibited from examining the witness on this point unless objection has been specifically made on one of the grounds stated in this statute would be to circumscribe the authority of the court to elicit the truth, and would seriously impede the administration of justice. Schamroth v. State, 84 Ga. App. 580, 66 S.E.2d 413 (1951) (decided under former Code 1933, § 38-1607).

Trial court determines if child competent. — It is left to sound discretion of trial court to determine whether or not a child of tender years is a competent witness; and when the court examines a child as to the child's understanding of the nature of an oath and decides that the child is competent to testify, this court will not interfere, if it does not appear that such discretion has been manifestly abused. Gordon v. State, 186 Ga. 615, 198 S.E. 678 (1938) (decided under former Code 1933, § 38-1607); Young v. State, 72 Ga. App. 811, 35 S.E.2d 321 (1945) (decided under former Code 1933, § 38-1607); Russell v. State, 83 Ga. App. 841, 65 S.E.2d 264 (1951) (decided under former Code 1933, § 38-1607); Middleton v. State, 194 Ga. App. 815, 392 S.E.2d 293 (1990) (decided under former O.C.G.A. § 24-9-5).

Competency of a child as a witness is within the sound discretion of the court, and the court's ruling will not be disturbed unless there is a manifest abuse of discretion. Adams v. State, 166 Ga. App. 807, 305 S.E.2d 651 (1983) (decided under former O.C.G.A. § 24-9-5).

Trial court had sound discretion to determine whether a child was competent to testify. Hill v. State, 251 Ga.

430, 306 S.E.2d 653 (1983) (decided under former O.C.G.A. § 24-9-5).

Once a child's competency has been thoroughly tested in court, it is within the sound discretion of the trial court whether or not to rule the child competent to testify as a witness. Pope v. State, 167 Ga. App. 328, 306 S.E.2d 326 (1983) (decided under former O.C.G.A. § 24-9-5).

Testimony admitted erroneously. — When an examination by the court shows that the child has no knowledge of the nature of an oath, it is error to permit the child to testify over proper objection. Horton v. State, 35 Ga. App. 493, 133 S.E. 647 (1926) (decided under former Penal Code 1910, § 1038).

Infant's admission against interest. — While the decision of whether a child, or "infant," is competent to testify is one made in the sound discretion of the judge, based upon the capacity of the child to know the nature of the oath rather than upon the child's years, the admission in evidence of an infant's admission against interest must be very carefully scanned because of the child's immaturity and the deleterious effect such admissions would have. Howard v. Hall, 112 Ga. App. 247, 145 S.E.2d 70 (1965) (decided under former Code 1933, §§ 38-1601, 38-1607, 38-1610, 38-1611, 38-1612).

No error in refusing to give statute in charge. — Since the question of the competency of a victim's ten-year-old brother was one of law for the trial court to determine, the court did not err in refusing to give in charge to the jury the requested language contained in former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603) which was relevant only to that issue. Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275 (1981) (decided under former Code 1933, § 38-1607).

Inconsistency in a child's testimony did not render the child incompetent to testify, but went to the child's credibility as a witness. Pendergrass v. State, 168 Ga. App. 190, 308 S.E.2d 585 (1983) (decided under former O.C.G.A. § 24-9-5).

When a four-year-old victim expressed the victim's understanding of the difference between the truth and a lie and of the importance of telling the truth, expressed a fear of punishment if the victim did not tell the truth, and stated that the victim would tell the truth, there was no abuse of the trial court's discretion in the court's determination that the child was competent to testify, even though there may have been some inconsistency in the child's responses. Hutton v. State, 192 Ga. App. 239, 384 S.E.2d 446 (1989) (decided under former O.C.G.A. § 24-9-5).

Child witness's unresponsiveness to a number of questions as put by the defendant did not constitute a deprivation of defendant's constitutional confrontation right so as to require that the witness's out-of-court statements be stricken since the defendant was not denied the right to a thorough and sifting cross-examination of a witness who appeared to answer as well as the witness was capable of answering. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18 (1990) (decided under former O.C.G.A. § 24-9-5).

Defendant's right to confront and cross-examine a child witness was protected in spite of the child's unresponsiveness on cross-examination as to the merits of the case brought against the defendant; the child's unresponsiveness did not preclude the defendant from thoroughly cross-examining the child as to the veracity of hearsay statements made against the defendant's interests by the child's parents and the caseworker. Byrd v. State, 204 Ga. App. 252, 419 S.E.2d 111 (1992) (decided under former O.C.G.A. § 24-9-5).

Trial court did not abuse the court's discretion in ruling competent to testify children who witnessed a crime since the children testified that to tell the truth means "to tell what really happened" as opposed to "making something up," and also testified that the children understand the significance of their oath to tell the truth while testifying in court and that if the children lied they would "get in big trouble." Hill v. State, 251 Ga. 430, 306 S.E.2d 653 (1983) (decided under former O.C.G.A. § 24-9-5).

When a child was examined at length by the court and by counsel, and the court found that the child was inattentive and not responsive, and also found that there were inconsistencies in the testimony of the child, there was no abuse of discretion

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in the court refusing to allow the child to testify. Batton v. State, 260 Ga. 127, 391 S.E.2d 914 (1990) (decided under former O.C.G.A. § 24-9-5).

After two videotapes of interviews with a child were showed to a jury, the child was called as the court's witness and testified similarly, and the child was examined by all parties, there was no abuse of the court's discretion in finding the child qualified to testify, nor in admitting the videotapes. Frazier v. State, 195 Ga. App. 109, 393 S.E.2d 262 (1990) (Trial held prior to April 19, 1989). (decided under former O.C.G.A. § 24-9-5).

For illustrations of preliminary examination to test a child's competency, see Minton v. State, 99 Ga. 254, 25 S.E. 626 (1896) (decided under former Penal Code 1895, § 1012); Gaines v. State, 99 Ga. 703, 26 S.E. 760 (1896) (decided under former Penal Code 1895, § 1012); Miller v. State, 109 Ga. 512, 35 S.E. 152 (1900) (decided under former Penal Code 1895, § 1012).

Children held competent in the following cases. — See Johnson v. State, 76 Ga. 76 (1885) (child of six) (decided under former Code 1882, § 3856); Marshall v. State, 74 Ga. 26 (1884) (child of seven) (decided under former Code 1882, § 3856); Minton v. State, 99 Ga. 254, 25 S.E. 626 (1896) (child of eight) (decided under former Penal Code 1895, § 1012); Hicks v. State, 105 Ga. 627, 31 S.E. 579 (1898) (child of ten) (decided under former Penal Code 1895, § 1012); Central of Ga. Ry. v. Skandamis, 40 Ga. App. 78, 149 S.E. 60 (1929) (child of twelve) (decided under former Civil Code 1910, § 5862); Thurmond v. State, 220 Ga. 227, 138 S.E.2d 372 (1964) (child of eight) (decided under former Code 1933, § 38-1607); Perryman v. State, 244 Ga. 720, 261 S.E.2d 588 (1979) (victim's nine-year-old daughter) (decided under former Code 1933, § 38-1607); Brown v. State, 167 Ga. App. 245, 306 S.E.2d 361 (1983) (child of seven) (decided under former O.C.G.A. § 24-9-5); Aleywine v. State, 169 Ga. App. 805, 315 S.E.2d 35 (1984) (child of eight) (decided under former O.C.G.A. § 24-9-5); Westbrook v. State, 186 Ga. App. 493, 368 S.E.2d 131, cert. denied, 186 Ga. App. 919, 368 S.E.2d 131 (1988) (child of five) (decided under former O.C.G.A. § 24-9-5); Syfrett v. State, 210 Ga. App. 185, 435 S.E.2d 470 (1993) (child of nine) (decided under former O.C.G.A. § 24-9-5).

Testimony of competent child, not formerly sworn, admitted. — Testimony of a child witness who, in response to questioning by the state, demonstrated that the child was aware that the child was under an obligation to tell the truth and could have been punished for not doing so, and who was shown to be competent, was properly admitted although the child was not sworn, when, after the preliminary questioning by the state, the defendant failed to request that the child be formally sworn and did not object to the child's testifying. Hilson v. State, 204 Ga. App. 200, 418 S.E.2d 784 (1992) (decided under former O.C.G.A. § 24-9-5).

Parent's objection to competency of child rejected. — In an action wherein two parents were found to have deprived an adopted child due to one parent's sexual abuse of the child and the other parent's failure to protect the child from such abuse, the juvenile court did not abuse the court's discretion by allowing the testimony of a forensic interviewer regarding statements made by the child as the Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), permitted such testimony, despite the parents' challenges to the competency of the child. In the Interest of B.H., 295 Ga. App. 297, 671 S.E.2d 303 (2008) (decided under former O.C.G.A. § 24-9-5).

Jury judges child's credibility. — Thrust of the child witness statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), was to allow the jury, which must be convinced of guilt beyond a reasonable doubt, to judge the credibility of a child's accusations. If a child, who had reported child molestation to an adult permitted to testify to the out-of-court statement at trial, was incapable of reiterating the accusation at trial or was unresponsive or evasive during cross-examination, the jury must decide the child's credibility. Jones v. State, 200 Ga. App. 103, 407 S.E.2d 85 (1991) (decided under former O.C.G.A. § 24-9-5).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 38-1701 are included in the annotations under this Code section.

Affirmations. — Former statute although dealing with oaths as given in the trial of cases, nevertheless substantiated the belief that the word "swear" could be stricken and the word "affirm" used in loyalty oaths. 1948-49 Op. Att'y Gen. p. 565 (decided under former Code 1933, § 38-1701).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 78 et seq., 82, 86 et seq.

Am. Jur. Proof of Facts. — Qualifying Child Witness to Testify, 35 POF2d 665.

C.J.S. — 98 C.J.S. (Rev), Witnesses, §§ 92, 102, 108 et seq., 124 et seq., 132 et seq., 215, 216, 238, 245, 270, 290, 447.

ALR. — Mental condition as affecting competency of witness, 26 ALR 1491; 148 ALR 1140.

Infant's admissions out of court as evidence in civil cases, 89 ALR 708; 12 ALR3d 1051.

Refusal to permit an otherwise competent witness to take witness stand because of mental or physical condition not amounting to unsoundness of mind, 97 ALR 893.

Competency of child as witness as affected by fact that his prosecution for perjury is prohibited, 159 ALR 1102.

Testimony of children as to grounds of divorce of their parents, 2 ALR2d 1329.

Admissibility of deposition of child of tender years, 30 ALR2d 771.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 ALR2d 1247.

Competency of young child as witness in civil case, 81 ALR2d 386.

Declarant's age as affecting admissibility as res gestae, 83 ALR2d 1368; 15 ALR4th 1043.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 ALR3d 1203.

Witnesses: child competency statutes, 60 ALR4th 369.

Validity, construction, and application of child hearsay statutes, 71 ALR5th 637.

Sufficiency, under rules 603 and 604 of Federal Rules of Evidence, of wording of oath, affirmation, or other declaration made by witness, or proposed witness or by court, relating to truthfulness of witness's testimony, 127 ALR Fed. 207.

24-6-604. Interpreters.

Except as provided in Code Sections 24-6-656 and 24-6-657 or by the rules promulgated by the Supreme Court of Georgia pursuant to Code Section 15-1-14, an interpreter shall be subject to the provisions of Code Section 24-7-702. Interpreters shall be required to take an oath or affirmation to make a true translation. (Code 1981, § 24-6-604, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Interpreter, Fed. R. Evid. 604.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-1609 and former O.C.G.A. § 24-9-4 are included in the annotations for this Code section.

Purpose. — If a procedure such as provided for by the former statute were not permissible, the witness unable to communicate in English or otherwise disabled would never be able to give the witness's testimony. Hensley v. State, 228 Ga. 501, 186 S.E.2d 729 (1972) (decided under former Code 1933, § 38-1609).

Questions for court and jury. — Use of an interpreter, and the extent to which the examination will be allowed to proceed through the interpreter must necessarily lie within the sound discretion of the trial judge. Whether the evidence elicited be credible is a question for the jury who were there and who observed the witness, the witness's behavior on the stand and response to the questions and the manner of communication between the witness and the interpreter. Hensley v. State, 228 Ga. 501, 186 S.E.2d 729 (1972) (decided under former Code 1933, § 38-1609).

Discretion of trial judge. — Use of an interpreter, and the extent to which the interpreter may be used in the examination of a witness, must necessarily lie within the sound discretion of the trial judge. Reed v. State, 249 Ga. 52, 287 S.E.2d 205 (1982) (decided under former O.C.G.A. § 24-9-4).

Court officer as interpreter. — When the witness in a criminal case was unable from the witness's physical condition to speak audibly, the witness's answers may be communicated in the witness's hearing and presence by a sworn officer of the court. Conner v. State, 25 Ga. 515, 71 Am. Dec. 184 (1858) (decided under former law).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 180.

C.J.S. — 98 C.J.S. (Rev), Witnesses, § 124.

ALR. — Use of interpreter in court proceedings, 172 ALR 923.

Deaf-mute as witness, 50 ALR4th 1188.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of foreign language speaking defendant, 79 ALR4th 1102.

24-6-605. Judge as witness.

The judge presiding at the trial shall not testify in that trial as a witness. No objection need be made in order to preserve this issue. (Code 1981, § 24-6-605, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Judge's competency as a witness, Fed. R. Evid. 605.

24-6-606. Juror as witness.

(a) A member of the jury shall not testify as a witness before that jury in the trial of the case in which the juror is sitting. If a juror is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify by affidavit or otherwise nor shall a juror's statements be received in evidence as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the jury deliberations or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict

or indictment or concerning the juror's mental processes in connection therewith; provided, however, that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the juror's attention, whether any outside influence was improperly brought to bear upon any juror, or whether there was a mistake in entering the verdict onto the verdict form. (Code 1981, § 24-6-606, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Action by juror on private knowledge as to facts, witnesses, or parties, § 17-9-20. Juror's competency as a witness, Fed. R. Evid. 606.

Law reviews. — For article, "Juror's Testimony to Set Aside Verdict in Georgia," see 11 Ga. B.J. 408 (1949). For article, "Justice and Juror," see 20 Ga. L. Rev. 257 (1986). For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011). For article, "Georgia's New Evidence Code: After the Celebration, a Serious Review of Anticipated Subjects of Litigation to be Brought on by the New Legislation," see 64 Mercer L. Rev. 1 (2012).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions under former Civil Code 1895, §§ 5337, 5338, former Civil Code 1910, § 5933, former Code 1933, §§ 110-108, 110-109, and former O.C.G.A. §§ 9-10-9 and 17-9-41 are included in the annotations for this Code section. The reader is advised to consult the annotations following Code Section 17-9-20, which may also be applicable to this Code section.

Member of jury impaneled to try case is not debarred from testifying in such case as a witness, if otherwise competent. Savannah, F. & W. Ry. v. Quo, 103 Ga. 125, 29 S.E. 607, 68 Am. St. R. 85 (1897) (decided under former Civil Code 1895, § 5337).

Jurors themselves may be sworn as witnesses without disqualifying themselves from serving as jurors in the case. Williams v. Barnes, 181 Ga. 514, 182 S.E. 897 (1935) (decided under former Code 1933, § 110-108).

Juror cannot impeach verdict, except when Sixth Amendment protections applicable. — As a matter of public policy, a juror cannot be heard to impeach the juror's verdict, either by way of disclosing the incompetency or misconduct of fellow jurors, or by showing the juror's own misconduct or disqualification from any cause. The only exception to the firm application of this rule is when protections provided a criminal defendant by the Sixth Amendment are applicable. Lozynsky v. Hairston, 168 Ga. App. 276, 308 S.E.2d 605 (1983) (decided under former O.C.G.A. § 9-10-9).

Verdict cannot be impeached by affidavits of the jurors. Shippen v. Thompson, 45 Ga. App. 736, 166 S.E. 41 (1932) (decided under former Civil Code 1910, § 5933).

When the jury was instructed to return a verdict for the full amount of damages due appellee without deducting the settlement, affidavits from members of the jury (averring that the jury deducted the settlement before making an award) worked to impeach, rather than sustain, the verdict. The trial court's entry of judgment in accordance with the affidavits thus impermissibly added to the jury's verdict. King Cotton, Ltd. v. Powers, 190 Ga. App. 845,

General Consideration (Cont'd)

380 S.E.2d 481 (1989) (decided under former O.C.G.A. § 9-10-9).

General partners' (GPs') motion for a new trial was properly denied as the juror affidavits filed by the GPs outlining alleged juror misconduct constituted an attempt to impeach the jury's verdict in the exact manner prohibited by former O.C.G.A. § 9-10-9. Kellett v. Kumar, 281 Ga. App. 120, 635 S.E.2d 310 (2006) (decided under former O.C.G.A. § 9-10-9).

Affidavits as to statements after dispersing. — Jurors cannot impeach their verdict, and affidavits by members of the jury or of counsel, as to their sayings after dispersing, cannot be received for that purpose. Wade v. State, 12 Ga. 25 (1852) (decided under former law); Corbin v. McCrary, 22 Ga. App. 472, 96 S.E. 445, cert. denied, 22 Ga. App. 803, 96 S.E. 445 (1918) (decided under former Civil Code 1910, § 5933); Rylee v. State, 28 Ga. App. 230, 110 S.E. 749 (1922) (decided under former Civil Code 1910, § 5933).

Jurors' statements upon reassembling cannot alter plain import of verdict. — After the jury has published their verdict and dispersed, their expressions, on being reassembled, as to the intent of the jury's verdict, cannot add to or change the plain import and intent of the verdict. Ryner v. Duke, 205 Ga. 280, 53 S.E.2d 362 (1949) (decided under former Code 1933, § 110-109).

Jurors' affidavits which attempted to establish mistake as to the meaning of instructions and in effect impeached their verdict could not be considered. Perryman v. Rosenbaum, 205 Ga. App. 784, 423 S.E.2d 673 (1993) (decided under former O.C.G.A. § 9-10-9).

Juror's affidavits as to special findings impermissible on motion for new trial of tort action. — Court errs, in a tort case, in allowing and considering, upon the hearing of the defendant's motion for new trial, affidavits of the jurors as to what findings the jurors had made in reaching their verdicts, since the effect of such affidavits is to amend the verdict into special findings of fact, and special verdicts are only permissible in equity cases. Davison-Paxon Co. v. Archer, 91 Ga. App. 131, 85 S.E.2d 182 (1954) (decided under former Code 1933, § 110-109).

Juror's affidavits concerning reenactment of crime. — State death row inmate's claim that the state habeas court should have considered the affidavits of jurors in connection with the inmate's argument that the jury considered non-record evidence when the state reenacted the crime at the murder scene failed because considering the affidavits would have violated former O.C.G.A. §§ 9-10-9 and 17-9-41, and the trial judge had specifically precluded the state from reenacting the crime at the jury's viewing of the scene. Crowe v. Terry, 426 F. Supp. 2d 1310 (N.D. Ga. 2005) (decided under former O.C.G.A. § 9-10-9).

Defendant in error under no duty to produce jurors' affidavits on motion for new trial. — When there is no prima-facie showing that the verdict is a compromise, no duty rests on the defendant in error to produce at the hearing of the motion for a new trial any affidavits of the jurors to uphold the verdict. North British & Mercantile Ins. Co. v. Parnell, 53 Ga. App. 178, 185 S.E. 122 (1936), criticized, Mullite Co. v. Thornton, 124 Ga. App. 568, 185 S.E.2d 548 (1971) (decided under former Code 1933, § 110-109).

Required showing for setting aside verdict arrived at by chance. — In order to authorize the setting aside of a verdict upon the ground that it was arrived at by chance, it must affirmatively appear that the jurors bound themselves in advance to arrive at the verdict in this manner, and that the jurors in fact did so. City of Columbus v. Ogletree, 102 Ga. 293, 29 S.E. 749 (1897) (decided under former Civil Code 1895, § 5338).

Juror will not be heard to claim verdict result of mistake or misunderstanding of evidence. — That a verdict was caused by mistake or a misunderstanding of the evidence, as disclosed by a member of the jury, will not be heard. Bowman v. Bowman, 230 Ga. 395, 197 S.E.2d 372 (1973) (decided under former Code 1933, § 110-109).

Nothing from juror will be heard to impeach verdict. — Nothing coming from a juror, either directly or indirectly, in the way of a narrative with respect to

the manner in which a verdict was arrived at will be heard to impeach the verdict. Southern Ry. v. Sommer, 112 Ga. 512, 37 S.E. 735 (1900) (decided under former Civil Code 1895, § 5338); Corbin v. McCrary, 22 Ga. App. 472, 96 S.E. 445, cert. denied, 22 Ga. App. 803, 96 S.E. 445 (1918) (decided under former Civil Code 1910, § 5933); Rylee v. State, 28 Ga. App. 230, 110 S.E. 749 (1922) (decided under former Civil Code 1910, § 5933).

It is settled beyond all possibility of dispute that a juror will not be heard to impeach the juror's verdict. Swift v. S.S. Kresge Co., 159 Ga. App. 571, 284 S.E.2d 74 (1981) (decided under former Code 1933, § 110-109).

In a trespass case, a trial court properly refused to consider a juror's affidavit regarding sympathy for an opposing party because such evidence could not have been considered to impeach the verdict. Bullard v. Bouler, 272 Ga. App. 397, 612 S.E.2d 513 (2005) (decided under former O.C.G.A. § 9-10-9).

Including oral testimony at hearing. — Prohibition against the impeachment by a juror of the juror's verdict extends to oral testimony offered at a hearing. Pie Nationwide, Inc. v. Prickett, 189 Ga. App. 77, 374 S.E.2d 837 (1988) (decided under former O.C.G.A. § 9-10-9); Riddle v. Becker, 232 Ga. App. 393, 501 S.E.2d 893 (1998) (decided under former O.C.G.A. § 9-10-9).

After verdict has been received and jury has dispersed, juror will never be heard to say that the juror did not agree to the verdict. Sims v. Sims, 113 Ga. 1083, 39 S.E. 435 (1901) (decided under former Civil Code 1895, § 5338).

Affidavits showing communication between jury and sheriff not to be considered. — So much of the affidavits of the jurors as tended to show that the deputy sheriff or the bailiff had improper communications with the jury could not be considered by the judge in passing upon the issue as to whether such communications were had with the jury. Tolbirt v. State, 124 Ga. 767, 53 S.E. 327 (1906) (decided under former Civil Code 1895, § 5338).

Allegations of untruthful answers to voir dire questions. — While allegations that a juror gave untruthful answers to questions propounded on voir dire furnish a valid basis for reversal, such averments must be supported by evidence of probative value. Affidavits by fellow jurors do not meet this requirement. Fidelity Nat'l Bank v. Kneller, 194 Ga. App. 55, 390 S.E.2d 55 (1989) (decided under former O.C.G.A. § 9-10-9).

Affidavits from third persons not to be considered. — If a verdict may not be impeached by an affidavit of one or more of the jurors who found it, certainly it cannot be impeached by affidavits from third persons establishing the utterance by a juror of remarks tending to impeach the juror's verdict; hence, the affidavit of a party that some of the jurors told the party the verdict was caused by a mistake furnishes no cause to set the verdict aside. Corbin v. McCrary, 22 Ga. App. 472, 96 S.E. 445, cert. denied, 22 Ga. App. 803, 96 S.E. 445 (1918) (decided under former Civil Code 1910, § 5933); Rylee v. State, 28 Ga. App. 230, 110 S.E. 749 (1922) (decided under former Civil Code 1910, § 5933); Ward v. Morris, 159 Ga. 526, 126 S.E. 291 (1925) (decided under former Civil Code 1910, § 5933).

New trial granted based on affidavit of a nonjuror. — Affiant's testimony as to a juror calling affiant during deliberations to request information about a case did not run afoul of former O.C.G.A. § 9-10-9 because the affiant was neither a juror offering testimony to impeach the affiant's own verdict nor a third-party witness testifying about the hearsay, impeaching statements of the jurors; rather, the affiant was a nonjuror witness to the actual misconduct. Dryman v. Watts, 268 Ga. App. 710, 603 S.E.2d 51 (2004).

It was not error to exclude an affidavit of a juror as to conduct of the foreman, made for the purpose of impeaching the verdict. Landers v. Cobb, 150 Ga. 80, 102 S.E. 428 (1920) (decided under former Civil Code 1910, § 5933).

Juror's statements that jury considered matter which was not in evidence will not be received for the purpose of impeaching the verdict. Rylee v. State, 28 Ga. App. 230, 110 S.E. 749 (1922) (decided under former Civil Code 1910, § 5933).

General Consideration (Cont'd)

Affidavit of juror will not be received to show that the jurors in arriving at their verdict acted upon private knowledge or upon matters which were not in evidence. Central of Ga. R.R. v. Nash, 150 Ga. App. 68, 256 S.E.2d 619 (1979) (decided under former Code 1933, § 110-109); Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980) (decided under former Code 1933, § 110-109).

Public policy prohibits jurors from impeaching their verdicts. — As a matter of public policy, a juror cannot be heard to impeach the juror's verdict, either by way of disclosing the incompetency or misconduct of the juror's fellow jurors or by showing the juror's own misconduct or disqualification from any cause. Pope v. State, 28 Ga. App. 568, 112 S.E. 169 (1922) (decided under former Civil Code 1895, § 5933).

Juror will not be heard to impeach the juror's verdict by showing the juror's own incompetency or disqualification. Moore v. Keller, 153 Ga. App. 651, 266 S.E.2d 325 (1980) (decided under former Code 1933, § 110-109). Worthy v. Kendall, 232 Ga. App. 528, 501 S.E.2d 515 (1998) (decided under former O.C.G.A. § 9-10-9).

Juror cannot impeach own verdict. — In a defendant's motion for a new trial based on newly discovered evidence, the introduction of a newly discovered witness was not allowed simply because this testimony would have produced a different result at trial because two jurors said that the testimony would have caused a different result; a juror cannot impeach their verdict. Allain v. State, 202 Ga. App. 706, 415 S.E.2d 315 (1992) (decided under former O.C.G.A. § 9-10-9).

It was error for the trial court to fail to qualify the jury in an excess carrier insurance case, and that error was not cured by the post-verdict offhand questioning of the jury as to possible relationships with officers or employees of the insurance company, since stockholders were not included in the relationships questioning and, more importantly, jurors are unable to impeach their own findings after a verdict by showing their own disqualification. Lewis v. Emory Univ., 235 Ga. App. 811, 509 S.E.2d 635 (1998) (decided under former O.C.G.A. § 9-10-9).

Juror's affidavit concerning defendant's mailing the juror's dividends. — When the juror in question stated in an affidavit that the juror had not been influenced by the mailing of dividends to the juror by the defendant and that the juror had not revealed it to the other jurors, the trial court was authorized to conclude that the jury had not been influenced by the conduct of the defendant and that the plaintiff's right to a fair and impartial trial had not been violated. Wright v. Satilla Rural Elec. Coop., 179 Ga. App. 230, 345 S.E.2d 892 (1986) (decided under former O.C.G.A. § 9-10-9).

Statute had a valid and salutary application in disallowing jurors to impeach the jurors' verdicts on the basis of statements made to one another in the jury room and the effect of those statements upon the minds of the individual jurors. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980) (decided under former Code 1933, § 110-109).

Verdict impeached. — Trial court's decision to grant a motion for new trial based on the testimony of two original jurors that the jury foreperson personally investigated the scene of an accident impeached the verdict which the jurors had returned. Newson v. Foster, 261 Ga. App. 16, 581 S.E.2d 666 (2003) (decided under former O.C.G.A. § 9-10-9).

Purpose of former section was plainly to prohibit after-the-fact picking at the negotiating positions of the jurors and of the jurors attempts to persuade one another. Aguilar v. State, 240 Ga. 830, 242 S.E.2d 620 (1978) (decided under former Code 1933, § 110-109).

Public policy considerations. — As a matter of public policy, a juror cannot be heard to impeach the juror's own verdict, either by way of disclosing the incompetency or misconduct of fellow jurors, or by showing the juror's own misconduct or disqualification from any cause. Pope v. State, 28 Ga. App. 568, 112 S.E. 169 (1922) (decided under former Civil Code 1910, § 5933); Bissell v. State, 153 Ga.

App. 564, 266 S.E.2d 238 (1980) (decided under former Code 1933, § 110-109).

It was well settled, as a matter of public policy, that a juror would not be heard to impeach the juror's verdict by showing the juror's own incompetency or disqualification. Reece v. State, 208 Ga. 690, 69 S.E.2d 92 (1952) (decided under former Code 1933, § 110-109).

There were a number of important public policy considerations underlying the former section. Among those considerations were: the need to keep inviolate the sanctity of juror deliberations; the desirability of promoting the finality of jury verdicts; and the necessity of protecting jurors from posttrial harassment. Watkins v. State, 237 Ga. 678, 229 S.E.2d 465 (1976) (decided under former Code 1933, § 110-109).

Fairness and effect of section generally. — Rule of the former section was recognized, regardless of the fairness or unfairness thereof. Its effect was that jurors who contend the jurors were not influenced by the improper remarks may swear to that effect. If the truth was to the contrary, the jurors' lips were sealed. Its further effect was that jurors who were asked the question were called upon either to refuse to answer, which meant the jurors were influenced in violation of the jurors' oaths, or to swear that the jurors were not influenced. King v. State, 92 Ga. App. 616, 89 S.E.2d 585 (1955) (decided under former Code 1933, § 110-109).

Exceptions were narrowly permitted. — Exceptions were narrowly permitted to the general rule that affidavits of jurors could be taken to sustain but not to impeach the juror's verdict. Nichols v. State, 234 Ga. App. 553, 507 S.E.2d 793 (1998) (decided under former O.C.G.A. § 17-9-41).

Defendant's appellate counsel was not entitled to access to the juror contact information for the purpose of determining whether alleged premature deliberations had an effect on the jury's verdict, convicting defendant of multiple crimes, as defendant failed to request that the jurors be questioned individually at the time that the deliberations were reported to the trial court, and there was no indication that anything had occurred that might effect any juror's ability to be fair and impartial in deliberations; exceptions to the rule that affidavits of jurors may be taken to sustain but not to impeach the jury's verdict, pursuant to former O.C.G.A. § 17-9-41, were not applicable. Rogers v. State, 271 Ga. App. 698, 610 S.E.2d 679 (2005) (decided under former O.C.G.A. § 17-9-41).

Statements by Jurors

Inconsistent statement by jury foreperson following verdict. — Statement made by the jury foreperson following the rendering of the jury verdict of guilty, even assuming that the statement was inconsistent with the verdict of guilty, cannot impeach the verdict. Mangrum v. State, 155 Ga. App. 334, 270 S.E.2d 874 (1980) (decided under former Code 1933, § 110-109).

Testimony that the jury foreperson injected improper legal concepts into the jury's deliberation was not admissible to impeach the jury's verdict. Moore v. State, 224 Ga. App. 797, 481 S.E.2d 892 (1997) (decided under former O.C.G.A. § 17-9-41).

Trial court's refusal to allow a defendant to impeach the verdict with testimony about alleged juror misconduct was proper because the exceptions to former O.C.G.A. § 17-9-41 did not include the jurors' provision of legal information to other jurors or jurors' misapprehension or confusion regarding the law. Perry v. State, 276 Ga. 836, 585 S.E.2d 614, rev'd, 276 Ga. 839, 584 S.E.2d 253 (2003) (decided under former O.C.G.A. § 17-9-41).

Verdict based on private knowledge or matters not in evidence. — Affidavit of a juror will not be received to show that the jurors in arriving at their verdict acted upon private knowledge or upon matters which were not in evidence. Alley v. State, 99 Ga. App. 322, 108 S.E.2d 282 (1959) (decided under former Code 1933, § 110-109); Emmett v. State, 243 Ga. 550, 255 S.E.2d 23 (1979) (decided under former Code 1933, § 110-109).

Juror's statements to the effect that the jury considered matter not in evidence will not be received for the purpose of impeaching the juror's verdict. Rylee v. State, 28 Ga. App. 230, 110 S.E.

Statements by Jurors (Cont'd)

749 (1922) (decided under former Civil Code 1910, § 5933).

Jury foreperson's testimony that the jury considered an unsupported comment made by the state's attorney during the attorney's opening statement did not entitle defendants to a new trial. Stokes v. State, 232 Ga. App. 232, 501 S.E.2d 599 (1998) (decided under former O.C.G.A. § 17-9-41).

Juror's affidavit in which juror claimed the juror only voted on one count of indictment did not suffice to impeach verdict. Dansby v. State, 165 Ga. App. 41, 299 S.E.2d 579 (1983) (decided under former O.C.G.A. § 17-9-41).

Post-verdict letter stating that juror felt coerced during deliberations. — Juror's post-verdict letter to the trial judge stating that the juror felt coerced during deliberations by the court's Allen charge was incompetent to impeach a verdict of guilt presented by the jurors in open court. Wilson v. State, 211 Ga. App. 457, 439 S.E.2d 685 (1993) (decided under former O.C.G.A. § 17-9-41).

Coercion of jury members by other jury members. — Trial court properly refused to consider testimony from a juror who claimed that the juror's vote for a guilty verdict resulted from coercive pressure applied by other members of the jury; the proffered testimony was not within any exception to the general rule that jurors were incompetent to impeach their own verdict. Roebuck v. State, 277 Ga. 200, 586 S.E.2d 651 (2003) (decided under former O.C.G.A. § 17-9-41).

Juror affidavit as to jury's own investigation. — Although a defendant complained that the court failed to instruct the jury not to conduct an investigation of their own, no request for such a charge was made when the jury dispersed for the night; thus, the defendant's attempt to show this extracurricular activity by the affidavit of a juror was not permitted. Lord v. State, 194 Ga. App. 749, 392 S.E.2d 17 (1990) (decided under former O.C.G.A. § 17-9-41).

Juror's personal knowledge of the crime scene. — Alleged irregular conduct was not so prejudicial so as to have rendered the trial fundamentally unfair and to have contributed to the conviction since: (1) even if the court were to assume that one or more jurors related personal knowledge of the crime scene to the jury, there was no evidence regarding exactly what that information was or how it related to the jury's deliberations regarding any particular defendant; (2) there was no evidence that the jurors who allegedly provided this extrajudicial information attempted to sway other jurors with the information; and (3) two witnesses said that such information did not contribute to the verdict, and one juror merely raised the possibility that the information might have contributed to the juror's verdict, but this was only after stating that the juror was not sure it had an impact on the juror's verdict. Butler v. State, 270 Ga. 441, 511 S.E.2d 180 (1999) (decided under former O.C.G.A. § 17-9-41).

Juror's affidavit concerning reenactment of crime. — State death row inmate's claim that the state habeas court should have considered the affidavits of jurors in connection with the inmate's argument that the jury considered non-record evidence when the state reenacted the crime at the murder scene failed because considering the affidavits would have violated O.C.G.A. § 9-10-9 and former O.C.G.A. § 17-9-41, and the trial judge had specifically precluded the state from reenacting the crime at the jury's viewing of the scene. Crowe v. Terry, 426 F. Supp. 2d 1310 (N.D. Ga. 2005).

In a case in which an inmate asserted that during the sentencing trial there was an improper reenactment of the murder when the jury viewed the crime scene, the inmate could not establish prejudice because the affidavits of three jurors were inadmissible in a Georgia court pursuant to O.C.G.A. § 9-10-9 and former O.C.G.A. § 17-9-41; the affidavits of jurors could be taken to sustain, but not to impeach the jury's verdict. Crowe v. Hall, 490 F.3d 840 (11th Cir. 2007), cert. denied, 553 U.S. 1007, 128 S. Ct. 2053, 170 L. Ed. 2d 798; reh'g denied, 553 U.S. 1103, 128 S. Ct. 2928, 171 L. Ed. 2d 859 (2008) (decided under former O.C.G.A. § 17-9-41).

Intentional gathering and communication of extrajudicial information

by jurors. — Former section had a valid and salutary application in disallowing jurors to impeach their verdicts on the basis of statements made to one another in the jury room and the effect of those statements on the minds of the individual jurors. However, the intentional gathering of extrajudicial evidence, highly prejudicial to the accused, by members of the jury and the communication of that information to the other jurors in the closed jury room was inimical to the present jury trial system. Watkins v. State, 237 Ga. 678, 229 S.E.2d 465 (1976) (decided under former Code 1933, § 110-109).

Juror misconduct or irregularity. — Limited discussion among jurors concerning a news story about the murder of a state's witness, which occurred during an unrelated drug transaction on the evening following the witness' testimony at the trial, did not warrant an exception to the rule that jurors are not permitted to impeach the jury's own verdict. Oliver v. State, 265 Ga. 653, 461 S.E.2d 222 (1995) (decided under former O.C.G.A. § 17-9-41).

Jurors' testimony that the jurors were confused about the definition of knowledge and participation with regard to being a party to a crime was inadmissible to impeach the jury's verdict. Ross v. State, 231 Ga. App. 506, 499 S.E.2d 351 (1998) (decided under former O.C.G.A. § 17-9-41).

Trial court did not err in refusing to allow a juror to testify at the hearing on defendant's motion for new trial regarding a juror's alleged misunderstanding of the law, and a juror's alleged assertion during deliberations that the defendant would get probation if convicted. Lewis v. State, 249 Ga. App. 812, 549 S.E.2d 732 (2001), overruled on other grounds, Miller v. State, 285 Ga. 285, 676 S.E.2d 173 (2009) (decided under former O.C.G.A. § 17-9-41).

Manner of arriving at verdict. — Nothing coming from a juror, either directly or indirectly, in the way of a narrative with respect to the manner in which a verdict was arrived at will be heard to impeach the verdict. Rylee v. State, 28 Ga. App. 230, 110 S.E. 749 (1922) (decided under former Civil Code 1910, § 5933).

Extrajudicial and prejudicial information exception to former O.C.G.A. § 17-9-41 was inapplicable, since the defendant relied on the affidavit of a jury foreperson to assert that the verdict was based solely on the victim's testimony that the defendant had a drug problem, non-jurors did not interfere with jury deliberations, and the information at issue was not extrajudicial. Young v. State, 258 Ga. App. 238, 573 S.E.2d 487 (2002) (decided under former O.C.G.A. § 17-9-41).

Improper communication with deputy sheriff or bailiff. — Affidavits which tend to show that the deputy sheriff or the bailiff had improper communications with the jury cannot be considered by the judge in passing upon the issue as to whether such communications were had with the jury. Tolbirt v. State, 124 Ga. 767, 53 S.E. 327 (1906) (decided under former Civil Code 1895, § 5338).

Inmate's 28 U.S.C. § 2254 habeas petition challenging a death sentence was improperly denied because an improper bailiff-jury communication during the penalty phase violated the inmate's Sixth Amendment right to a fair trial and defendant's Fourteenth Amendment due process right to have the jury decide the punishment based on the evidence presented in court, in accordance with the rules and instructions of the court and with the full knowledge of the parties. The state habeas court erroneously determined that the affidavits of three jurors were inadmissible under former O.C.G.A. § 17-9-41 after ruling that a bailiff's comments to a juror concerning a defendant's parole eligibility constituted an exception to former § 17-9-41's rule prohibiting the use of jurors' affidavits to impeach their verdict; the inmate was actually prejudiced by the improper bailiff-jury communication because the jurors indicated that the jurors imposed the death sentence based on the bailiff's communication to the jurors that life without parole was not a sentencing option. Ward v. Hall, 592 F.3d 1144 (11th Cir.), cert. denied, U.S. , 131 S. Ct. 647; 178 L. Ed. 2d 513 (2010) (decided under former O.C.G.A. § 17-9-41).

Juror's affidavit of racial remarks by other jurors. — Trial court did not err

Statements by Jurors (Cont'd)

in refusing to consider a juror's post-trial affidavit stating the juror overheard two white jurors making racially derogatory comments about the defendant, since there was no other evidence that racial bias materially affected the jury's decision to convict the defendant and to impose a death sentence. Spencer v. State, 260 Ga. 640, 398 S.E.2d 179 (1990), cert. denied, 500 U.S. 960, 111 S. Ct. 2276, 114 L. Ed. 2d 727 (1991) (decided under former O.C.G.A. § 17-9-41).

Affidavit which impeaches verdict cannot be ground for new trial. — Ground for a motion for a new trial based upon an affidavit of a juror impeaching the verdict was without merit. Stanley v. State, 25 Ga. App. 461, 103 S.E. 689 (1920) (decided under former Civil Code 1910, § 5933).

Juror's unsworn statement cannot impeach verdict. — Since a juror's affidavit will not be taken to impeach the jury verdict, the unsworn statement of a juror cannot impeach the verdict. Mangrum v. State, 155 Ga. App. 334, 270 S.E.2d 874 (1980) (decided under former Code 1933, § 110-109).

Affidavits of third persons. — If a verdict may not be impeached by an affidavit of one or more of the jurors who found the verdict, certainly the verdict cannot be impeached by affidavits from third persons, establishing the utterance by a juror of remarks tending to impeach the juror's verdict. The affidavit of a party that some of the jurors told the party the verdict was caused by a mistake furnishes no cause to set the verdict aside. Rylee v. State, 28 Ga. App. 230, 110 S.E. 749 (1922) (decided under former Civil Code 1910, § 5933).

Verdict may not be impeached by the affidavit of a third person establishing the utterance by a juror of remarks which may impeach the juror's verdict. Arnold v. State, 166 Ga. App. 313, 304 S.E.2d 118 (1983) (decided under former O.C.G.A. § 17-9-41).

No misconduct established. — With regard to a defendant's convictions for incest and child molestation, the defendant was not denied a fair trial when allegedly extrajudicial evidence was introduced to the jury through juror misconduct about the requirement upon a school teacher to report abuse as the defendant not only failed to establish that the verdict lacked due process, the defendant neglected to show that any statement by the juror in question amounted to misconduct as the only juror who arguably alleged improper conduct admitted that the juror could barely hear the statement in question and could not remember what it was. Hubert v. State, 297 Ga. App. 71, 676 S.E.2d 436 (2009) (decided under former O.C.G.A. § 17-9-41).

Practice and Procedure

Denial of new trial where only ground is affidavit that some jurors were disqualified. — Court does not err in refusing to grant a new trial upon the alleged ground that some of the jurors who tried the case were disqualified as the only attempted proof in support of such alleged disqualification consists of affidavits of the jurors themselves since the verdict which the jurors returned cannot be impeached by the jurors. Gossett v. State, 203 Ga. 692, 48 S.E.2d 71 (1948), appeal dismissed, 214 Ga. 840, 108 S.E.2d 272 (1959) (decided under former Code 1933, § 110-109).

Trial court properly declined to consider affidavit. — With regard to a defendant's murder conviction, the trial court did not abuse the court's discretion by declining to consider a juror affidavit in ruling on the defendant's motion for new trial, which alleged that the jury was ready to acquit the defendant until one of the jurors reported seeing the defendant driving in the same vehicle that was alleged to have been involved in the murder as well as was seen responding to a nickname of "Blood" in the hallway of the courthouse, which was the name the victim's sibling indicated was used by the defendant. The trial court properly determined that the affidavit contained significant credibility issues and that it was fatal that the defense did not have the affiant testify in open court where the state could cross-examine the affiant so that the affiant's credibility could be more readily and definitely evaluated by the

trial court. Henley v. State, 285 Ga. 500, 678 S.E.2d 884, cert. denied, 130 S. Ct. 800, 175 L. Ed. 2d 559, 2009 U.S. LEXIS 8805 (2009) (decided under former O.C.G.A. § 17-9-41).

Petition by jurors for new trial. — If jurors petition the trial judge to grant a new trial and the trial judge declines so to do, no meritorious question of law is presented to the Supreme Court authorizing a judgment of reversal as under Ga. Const. 1877, Art. VI, Sec. II, Para. V (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III) the Supreme Court is a court only for the correction of errors of law. Myrick v. State, 199 Ga. 244, 34 S.E.2d 36 (1945), overruled on other grounds, Dunagan v. State, 269 Ga. 590, 502 S.E.2d 726 (1998) (decided under former O.C.G.A. § 17-9-41).

Request to poll jury. — Request to poll the jury must be made at the time the jury renders the jury's verdict, that is, right after the jury has returned a verdict of guilty or right after a jury has rendered the sentence to be imposed. Plummer v. State, 229 Ga. 749, 194 S.E.2d 419 (1972) (decided under former Code 1933, § 110-109).

Exclusion of evidence of jury "perjury". — As defendant failed to present any jurors' testimony and could not impeach the verdict by showing the jury did not understand or misapplied the law, the trial court properly excluded evidence of jury "perjury" and denied the motion for new trial on this basis. Williams v. State, 255 Ga. App. 177, 564 S.E.2d 759 (2002) (decided under former O.C.G.A. § 17-9-41).

RESEARCH REFERENCES

Am. Jur. 2d. — 75B Am. Jur. 2d, Trial, § 1899 et seq.

C.J.S. — 89 C.J.S., Trial, § 1087 et seq.

ALR. — Right of juror who has agreed to verdict to dissent on poll, 49 ALR 1301.

Admissibility of testimony or affidavits of members of jury to show communications or other improper acts of third person, 90 ALR 249; 146 ALR 514.

Testimony or affidavit by one other than a juror, who overheard jury's deliberations, as receivable to impeach verdict, 129 ALR 803.

Admissibility in civil case of affidavit or testimony of juror in support of verdict attacked on ground of bias or disqualification of juror, 30 ALR2d 914.

Competency of jurors' statements or affidavits to show that they never agreed to purported verdict, 40 ALR2d 1119.

Admissibility and effect, in criminal case, of evidence as to juror's statements, during deliberations, as to facts not introduced into evidence, 58 ALR2d 556.

Quotient verdicts, 8 ALR3d 335.

Competency of juror's statement or affidavit to show that verdict in a civil case was not correctly recorded, 18 ALR3d 1132.

Juror's reluctant, equivocal, or conditional assent to verdict, on polling, as ground for mistrial or new trial in criminal case, 25 ALR3d 1149.

Admissibility, in civil case, of juror's affidavit or testimony relating to juror's misconduct outside jury room, 32 ALR3d 1356.

Propriety of juror's tests or experiments in jury room, 31 ALR4th 566.

Impeachment of verdict by juror's evidence that he was coerced or intimidated by fellow juror, 39 ALR4th 800.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 59 ALR5th 1.

Prejudicial effect of juror misconduct arising from internet usage, 48 ALR6th 135.

24-6-607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness. (Code 1981, § 24-6-607, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Mode and order of witness interrogation and presentation, § 24-6-611. Who may impeach a witness, Fed. R. Evid. 607.

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's note. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3869, former Code 1882, § 3869, former Ga. L. 1890-91, p. 78, § 1, former Civil Code 1895, § 5290, former Penal Code 1895, § 1024, former Civil Code 1910, § 5879, former Penal Code 1910, § 1050, former Code 1933, § 38-1801, and former O.C.G.A. § 24-9-81 are included in the annotations for this Code section.

Neither the arrest nor the indictment of a witness was impeaching, since, until proof of conviction, the witness was protected by the legal presumption of innocence. Hood v. State, 179 Ga. App. 387, 346 S.E.2d 867 (1986) (decided under former O.C.G.A. § 24-9-81).

Failure to charge former statute was not error in absence of a timely written request. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

Impeachment of Own Witness

1. In General

Former statute prohibited a party from impeaching the party's own witness. — See Ellenburg v. State, 239 Ga. 309, 236 S.E.2d 650 (1977) (decided under former Code 1933, § 38-1801).

Even if a trial court erred by allowing the state to impeach the state's own witness with a prior statement when the witness could not vouch for the statement's accuracy pursuant to former O.C.G.A. § 24-9-81, no harm resulted due to the overwhelming evidence of defendant's guilt. Coleman v. State, 278 Ga. 486, 604 S.E.2d 151 (2004) (decided under former O.C.G.A. § 24-9-81).

Broad construction. — Right to impeach one's own witness was broadly construed. Canady v. State, 147 Ga. App. 640, 249 S.E.2d 690 (1978) (decided under former Code 1933, § 38-1801); Robinson v. State, 150 Ga. App. 642, 258 S.E.2d 294 (1979) (decided under former Code 1933, § 38-1801).

Strict construction. — Party may be "misled" but not "entrapped," since the former statute, which was in derogation of the common law and must be construed strictly, used the word "entrapped" and not "misled." Jeens v. Wrightsville & T.R.R., 144 Ga. 48, 85 S.E. 1055 (1915) (decided under former Civil Code 1910, § 5879); Jenkins v. State, 73 Ga. App. 515, 37 S.E.2d 230 (1946) (decided under former Code 1933, § 38-1801).

Applicability to state. — Former statute applied to the state as well as to the defendant. Dixon v. State, 86 Ga. 754, 13 S.E. 87 (1891) (decided under former Ga. L. 1890-91, p. 78, § 1).

Treatment as hostile witness. — Trial court did not err in declaring that defendant's cousin, who had earlier pled guilty to the theft for which the defendant was on trial, was a hostile witness and in allowing the state to ask the cousin leading questions because the trial court had great latitude to allow the state to treat a person as a hostile witness and propound leading questions, and allowing it in the present case was proper because the state was not aware that the cousin would change the cousin's testimony at trial from earlier statements the cousin had made about the theft. Wilson v. State, 258 Ga. App. 166, 573 S.E.2d 432 (2002) (de-

cided under former O.C.G.A. § 24-9-81).

Effect of exercising constitutional privilege. — After defendant's counsel pled entrapment but when called upon to testify, the defendant took advantage under oath of the constitutional privilege of refusing to answer on the ground that to answer might tend to incriminate the defendant, and thereafter counsel attempted to cross-examine the witness as to what this witness told counsel about the circumstances surrounding this matter, the court erred in refusing to allow a thorough and sifting cross-examination of the witness as to the entrapment. Interstate Life & Accident Ins. Co. v. Wilmont, 123 Ga. App. 337, 180 S.E.2d 913 (1971) (decided under former Code 1933, § 38-1801).

Entrapment referred to the right of a party to impeach the party's own witness after the party testified to matters which were contradictory to statements previously made, authorizing a thorough and sifting cross-examination of the party's own witness. Interstate Life & Accident Ins. Co. v. Wilmont, 123 Ga. App. 337, 180 S.E.2d 913 (1971) (decided under former Code 1933, § 38-1801).

Testimony cannot be withdrawn. — Witness who delivered testimony hurtful to the party introducing the witness cannot be withdrawn; but if the party was entrapped by the witness, the law permitted the witness's impeachment by the party introducing the witness. Zipperer v. Mayor of Savannah, 128 Ga. 135, 57 S.E. 311 (1907) (decided under former Civil Code 1895, § 5290).

Showing contradictions of facts. — Although a party may not impeach the party's own witness, unless entrapped by the party, the party may show that the facts are different from the statement of the witness. Cronan v. Roberts & Co., 65 Ga. 678 (1880) (decided under former Code 1873, § 3869); Hollingsworth v. State, 79 Ga. 605, 4 S.E. 560 (1887) (decided under former Code 1882, § 3869); McElmurray v. Turner, 86 Ga. 215, 12 S.E. 359 (1890) (decided under former Code 1882, § 3869); Christian v. Macon Ry. & Light Co., 120 Ga. 314, 47 S.E. 923 (1904) (decided under former Civil Code 1895, § 5290); Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S.E. 143 (1904) (decided under former Civil Code 1895, § 5290); Robert R. Sizer & Co. v. G. T. Melton & Sons, 129 Ga. 143, 58 S.E. 1055 (1907) (decided under former Civil Code 1895, § 5290); Luke v. Cannon, 4 Ga. App. 538, 62 S.E. 110 (1908) (decided under former Civil Code 1895, § 5290); Sessions v. State, 6 Ga. App. 336, 64 S.E. 1101 (1909) (decided under former Civil Code 1895, § 5290); Carter & Martin v. Carter, 7 Ga. App. 216, 66 S.E. 630 (1909) (decided under former Civil Code 1895, § 5290); Southern Ry. v. Wessinger, 32 Ga. App. 551, 124 S.E. 100, cert. denied, 32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5879); Lewis v. American Rd. Ins. Co., 119 Ga. App. 507, 167 S.E.2d 729 (1969) (decided under former Code 1933, § 38-1801).

Refusal to respond to questions in discovery proceedings was not tantamount to making a statement or giving testimony contradictory to testimony on trial. Lewis v. American Rd. Ins. Co., 119 Ga. App. 507, 167 S.E.2d 729 (1969) (decided under former Code 1933, § 38-1801).

Putting witness up merely for purpose of discrediting the witness, or merely to lay a foundation for the witness to be contradicted on a material point and thereby rendered unworthy of belief, was reversible error. Eberhart v. State, 121 Ga. App. 663, 175 S.E.2d 73 (1970) (decided under former Code 1933, § 38-1801).

Proof of bad character. — One who knows the general bad character of a witness by reason of previous felony convictions should not be allowed first to impliedly accredit the witness by offering the witness before a jury as worthy of belief, and then, when entrapped by the witness's testimony, prove, in addition to the contradictory statements by which the witness was surprised and deceived, the general bad character which neither surprised nor misled the witness. Kitchens v. Hall, 116 Ga. App. 41, 156 S.E.2d 920 (1967) (decided under former Code 1933, § 38-1801).

Use of misdemeanor convictions to impeach. — Trial court did not err by refusing to allow the defendant to im-

Impeachment of Own Witness (Cont'd)
1. In General (Cont'd)

peach the defendant's own witness, who had not been declared hostile, by proof of convictions of misdemeanors involving moral turpitude. Paradise v. State, 212 Ga. App. 166, 441 S.E.2d 497 (1994) (decided under former O.C.G.A. § 24-9-81).

Either party could waive the former statutory requirements and allow a party to impeach the party's own witness without first having shown the court that the witness had entrapped the party. O'Dell v. State, 120 Ga. 152, 47 S.E. 577 (1904) (decided under former Penal Code 1895, § 1024).

Directing witness to time and place of previous testimony. — Witness cannot be impeached by proof of contradictory statement until the witness's attention has been directed to the time, as well as the place, at which the alleged previous contradictory statements are alleged to have been made. Luke v. Cannon, 4 Ga. App. 538, 62 S.E. 110 (1908) (decided under former Civil Code 1895, § 5290).

Admission for impeachment only. — When impeachment is allowed, the prior inconsistent statement is admitted in evidence for impeachment purposes only. (decided under former Code 1933, § 38-1801); Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

Impeachment of prior testimony. — Trial court did not err in allowing one of the state's witnesses to testify that another state witness told the witness immediately before the shooting that the witness saw the defendant get a gun from the car in which the defendant was a passenger that night because the statement was offered and admitted to impeach the other witness's prior testimony that the witness had never witnessed the defendant retrieve anything from the car after the concert. Anderson v. State, 286 Ga. 57, 685 S.E.2d 716 (2009) (decided under former O.C.G.A. § 24-9-81).

Improper admission of inconsistent statement harmless error. — In a divorce proceeding, admission of the testimony of a witness called by a spouse that impeached the testimony of the other spouse's lover, also called by the spouse, would have been proper as prior inconsistent statements under former O.C.G.A. §§ 24-9-81 and 24-9-83 (see now O.C.G.A. §§ 24-6-607, 24-6-608, and 24-6-613), but the timing of the impeaching testimony before the lover's testimony made the admission improper; there was no harm in the error, however, because the spouse's lover was called as a witness and was questioned about the contradictory statements. Moxley v. Moxley, 281 Ga. 326, 638 S.E.2d 284 (2006) (decided under former O.C.G.A. § 24-9-81).

Deposition admitted for impeachment. — When it appeared that the witness was questioned about the depositions while the witness was on the stand, and that the witness testified somewhat at variance from the depositions, it was not an abuse of discretion for the court to allow the depositions in evidence for the purpose of impeachment. Parker & Co. v. Glenn, 90 Ga. App. 500, 83 S.E.2d 263 (1954) (decided under former Code 1933, § 38-1801).

Admission of repudiated statement. — It was not erroneous to admit written statement later repudiated by a witness, over the objection made to the state's admission, since the repudiation would tend to impeach the witness. Fincher v. State, 211 Ga. 89, 84 S.E.2d 76 (1954) (decided under former Code 1933, § 38-1801).

When, on direct examination, a witness testified that the witness lied in a statement the witness gave the police, the trial court did not err in allowing the state to impeach the state's own witness by admitting the witness's prior inconsistent statement as substantive evidence. Willis v. State, 214 Ga. App. 659, 448 S.E.2d 755 (1994) (decided under former O.C.G.A. § 24-9-81).

Former statute inapplicable to witness who must explain or deny contradictory statement. — First sentence of former O.C.G.A. § 24-9-81 was applicable to impeachment of witnesses by prior contradictory statements, but since a prior contradictory statement of a witness was admissible as substantive evidence, the first sentence was inapplicable to a

witness who must be given an opportunity to explain or deny the prior contradictory statement. Riley v. State, 166 Ga. App. 369, 304 S.E.2d 497 (1983) (decided under former O.C.G.A. § 24-9-81).

Inconsistent statement admissible for impeachment purposes only. — When impeachment of one's own witness is allowed, the prior inconsistent statement is admitted in evidence for impeachment purposes only and not to prove the truth of the prior statement. Arnold v. State, 166 Ga. App. 313, 304 S.E.2d 118 (1983) (decided under former O.C.G.A. § 24-9-81).

Use of prior inconsistent statements. — Prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence and is not limited in value only to impeachment purposes. Ranger v. State, 249 Ga. 315, 290 S.E.2d 63 (1982) (decided under former O.C.G.A. § 24-9-81); Riley v. State, 166 Ga. App. 369, 304 S.E.2d 497 (1983) (decided under former O.C.G.A. § 24-9-81); Jackson v. Ensley, 168 Ga. App. 822, 310 S.E.2d 707 (1983) (decided under former O.C.G.A. § 24-9-81).

In defendant's trial on a charge that the defendant molested his 13-year-old stepdaughter by touching her "private area" and placing his hands under her shirt, the record did not support defendant's claim that the state called the stepdaughter's mother solely for the purpose of impeaching her, and the trial court properly allowed the state to call two investigators to testify that the mother gave them a statement that was not the same as her testimony at trial. Black v. State, 261 Ga. App. 263, 582 S.E.2d 213 (2003) (decided under former O.C.G.A. § 24-9-81).

Witness's testimony that the witness did not recall details included in a prior statement given to police was inconsistent with the prior statement about those details, and thus, the requirements of former O.C.G.A. § 24-9-81 were met; a trial court thus properly allowed the state to impeach the state's own witness who denied having previously identified the defendant as the shooter in a murder incident. Cummings v. State, 280 Ga. 831, 632 S.E.2d 152 (2006) (decided under former O.C.G.A. § 24-9-81).

Defendant as witness for state. — Introduction by state in a criminal prosecution of defendant's statement to police did not make defendant a witness for the state. Wiley v. State, 250 Ga. 343, 296 S.E.2d 714 (1982) (decided under former O.C.G.A. § 24-9-81).

When counsel elicits testimony unfavorable to a client, counsel will not be heard to object to the testimony, no matter how prejudicial the testimony may be, if the testimony is a direct and pertinent response to the question propounded. Rutland v. State, 158 Ga. App. 315, 279 S.E.2d 757 (1981) (decided under former Code 1933, § 38-1801).

2. What Must Be Shown

Statement made to party or attorney. — Party may not impeach party's own witness by proof of a previous contradictory statement, even if the party claims to have been surprised and entrapped, unless the statement was made directly to the party or the party's attorney, or was made to some third person with instruction to communicate it or for the purpose of being communicated to the party or the party's counsel. Jeens v. Wrightsville & T.R.R., 144 Ga. 48, 85 S.E. 1055 (1915) (decided under former Civil Code 1910, § 5879); Carter v. State, 17 Ga. App. 244, 86 S.E. 413 (1915) (decided under former Penal Code 1910, § 1050); Burns v. State, 20 Ga. App. 77, 92 S.E. 548 (1917) (decided under former Penal Code 1910, § 1050); Allen v. State, 71 Ga. App. 517, 31 S.E.2d 107 (1944) (decided under former Code 1933, § 38-1801); Sparks v. State, 209 Ga. 250, 71 S.E.2d 608 (1952) (decided under former Code 1933, § 38-1801).

Statements made to others. — Prior inconsistent statements made by a witness called by the state were not limited to those given to police investigators or prosecuting attorneys. Park v. State, 230 Ga. App. 274, 495 S.E.2d 886 (1998) (decided under former O.C.G.A. § 24-9-81).

Showing of entrapment required. — Prosecutor must show to the court that the prosecutor has been entrapped by the witness by a previous contradictory statement. Jenkins v. State, 73 Ga. App. 515,

Impeachment of Own Witness (Cont'd)
2. What Must Be Shown (Cont'd)

37 S.E.2d 230 (1946) (decided under former Code 1933, § 38-1801).

One's own witness may be impeached when one can show the court that one has been entrapped by that witness by a previous contradictory statement. James v. State, 157 Ga. App. 763, 278 S.E.2d 696 (1981) (decided under former Code 1933, § 38-1801).

Party may not impeach party's own witness without a showing of entrapment. Hood v. State, 179 Ga. App. 387, 346 S.E.2d 867 (1986) (decided under former O.C.G.A. § 24-9-81).

Impeachment error absent entrapment. — Admittance of a certified copy of a witness's prior felony conviction was harmful error if it was for the purpose of impeachment, no announcement having been made by the state that this witness was being called for the purpose of cross-examination and no entrapment on the part of the witness having been shown. Hicks v. State, 204 Ga. App. 232, 418 S.E.2d 794 (1992) (decided under former O.C.G.A. § 24-9-81).

Surprise and prejudice. — Term "entrapment" required that one desiring to impeach one's own witness show both surprise and prejudice by the actual testimony as opposed to the earlier statement. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

While a defendant was entitled to cross-examine a state's witness about pending criminal charges to show the witness's bias, that right did not extend to the defendant's own witness when the defendant failed to show surprise or entrapment by the witness's previous contradictory statement. Arnold v. State, 284 Ga. App. 598, 645 S.E.2d 68 (2007) (decided under former O.C.G.A. § 24-9-81).

Total surprise unnecessary. — To establish entrapment, it is not required that the witness's testimony be a total surprise or that it be affirmatively damaging. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801); Ellenburg v. State, 239 Ga. 309, 236 S.E.2d 650 (1977) (decided under former Code 1933, § 38-1801); Johnson v. State, 150 Ga. App. 405, 258 S.E.2d 22 (1979) (decided under former Code 1933, § 38-1801); Wofford v. State, 152 Ga. App. 739, 263 S.E.2d 707 (1979) (decided under former Code 1933, § 38-1801); Bryant v. State, 155 Ga. App. 652, 271 S.E.2d 904 (1980) (decided under former Code 1933, § 38-1801); Andrews v. State, 156 Ga. App. 734, 275 S.E.2d 782 (1980) (decided under former Code 1933, § 38-1801); Young v. State, 156 Ga. App. 865, 275 S.E.2d 804 (1981) (decided under former Code 1933, § 38-1801); Ingram v. State, 161 Ga. App. 5, 288 S.E.2d 842 (1982) (decided under former O.C.G.A. § 24-9-81); Davis v. State, 249 Ga. 309, 290 S.E.2d 273 (1982) (decided under former O.C.G.A. § 24-9-81).

Prior showing of surprise unnecessary. — Since it is not error for the trial judge to allow an attorney to cross-examine and lead the witness without first subjecting the attorney personally to an examination, any rule under which a showing of surprise and prejudice must first be made is wrong. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

What constitutes surprise. — Even though the state in a criminal case knows of a repudiation of an earlier statement by one of the state's witnesses before one testifies at trial, if it only goes to the details of the defendant's alleged confession, there is still sufficient "surprise" to admit into evidence the witness's prior statement for impeachment purposes only. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

Showing of surprise was no longer required before a party was allowed to impeach the party's own witness. Davis v. State, 249 Ga. 309, 290 S.E.2d 273 (1982) (decided under former O.C.G.A. § 24-9-81); Coleman v. State, 162 Ga. App. 340, 291 S.E.2d 402 (1982) (decided under former O.C.G.A. § 24-9-81).

Showing of surprise was no longer required under former O.C.G.A. § 24-9-81. Coleman v. State, 162 Ga. App. 340, 291 S.E.2d 402 (1982) (decided under

former O.C.G.A. § 24-9-81).

Surprise or prejudice unnecessary. — To meet the requirement of establishing entrapment before one might impeach one's own witness, a showing of prejudice or surprise was no longer necessary. Peterson v. State, 166 Ga. App. 719, 305 S.E.2d 447 (1983) (decided under former O.C.G.A. § 24-9-81).

Refusing party opportunity to introduce further testimony. — There is no abuse of discretion if the trial court refuses party opportunity to introduce further evidence which would impeach the party's previous testimony absent surprise or entrapment. Gorrell v. Fowler, 248 Ga. 801, 286 S.E.2d 13, appeal dismissed, 457 U.S. 1113, 102 S. Ct. 2918, 73 L. Ed. 2d 1324 (1982) (decided under former Code 1933, § 38-1801).

Belief of prosecutor. — To establish entrapment, it was sufficient that the prosecutor believed the witness would testify consistently with the earlier testimony. Johnson v. State, 150 Ga. App. 405, 258 S.E.2d 22 (1979) (decided under former Code 1933, § 38-1801); Bryant v. State, 155 Ga. App. 652, 271 S.E.2d 904 (1980) (decided under former Code 1933, § 38-1801).

Statement by district attorney that the district attorney was surprised by the testimony was sufficient, in the absence of a showing to the contrary, to show entrapment. Thomas v. State, 239 Ga. 734, 238 S.E.2d 888 (1977) (decided under former Code 1933, § 38-1801); James v. State, 157 Ga. App. 763, 278 S.E.2d 696 (1981) (decided under former Code 1933, § 38-1801); Foskey v. State, 229 Ga. App. 209, 493 S.E.2d 595 (1997) (decided under former O.C.G.A. § 24-9-81).

Testimony failing to bolster case. — Trial court did not err in allowing the district attorney to impeach the state's own witness by introducing prior inconsistent statements, even though the witness's testimony did not damage the state's case save by failing to bolster the case as hoped. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

Inconsistent testimony. — Impeachment is allowed when the testimony is merely "inconsistent" with a prior written statement. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

Although the requirements of surprise and prejudice have been removed from the element of entrapment, the plain language of former O.C.G.A. § 24-9-81 still required as a threshold matter a showing that the witness made a statement inconsistent with the witness's testimony at trial. Jones v. State, 270 Ga. 25, 505 S.E.2d 749 (1998) (decided under former O.C.G.A. § 24-9-81).

No entrapment shown. — Evidence did not show that the prosecutor was entrapped by a witness. King v. State, 166 Ga. 10, 142 S.E. 160 (1928) (decided under former Code 1933, § 38-1801).

Examination of Opposite Party

Balancing of rights. — Former Code 1933, § 38-1801, providing for the right of thorough and sifting cross-examination, must be balanced with former Code 1933, § 38-1704 (see now O.C.G.A §§ 24-9-611 and 24-6-623), protecting the right of a witness to be examined only as to relevant matter and to be protected from improper questions and from harsh or insulting demeanor. Crawford v. State, 144 Ga. App. 622, 241 S.E.2d 492 (1978), overruled on other grounds, Stephens v. State, 245 Ga. 825, 268 S.E.2d 330 (1980) (decided under former Code 1933, § 38-1801).

Calling opposite party for purposes of impeachment. — When defendant was not permitted to recall the victim as the defendant's own witness for purposes of impeachment, since there was no showing of entrapment, this was not permitted. Mingo v. State, 195 Ga. App. 438, 394 S.E.2d 104 (1990) (decided under former O.C.G.A. § 24-9-81).

There was no prohibition about the prior inconsistent statement being lengthier than the in-court testimony; also, the fact that a witness admitted to making the inconsistent pre-trial statement did not render the statement inadmissible. Warner v. State, 281 Ga. 763, 642 S.E.2d 821 (2007) (decided under former O.C.G.A. § 24-9-81).

Testimony of deceased party. — Defendant can introduce former testimony of deceased plaintiff, and then impeach the

Examination of Opposite Party (Cont'd)

testimony by the defendant's own testimony. McLendon v. Baldwin, 166 Ga. 794, 144 S.E. 271 (1928), later appeal, 170 Ga. 437, 153 S.E. 18 (1930) (decided under former Civil Code 1910, § 5879).

Defendant's mother questioned about prior inconsistent statement. — State properly questioned the defendant's mother as to whether the mother believed that the crimes defendant was on trial for were gang-related as the question was asked for the purpose of laying a foundation to introduce the mother's prior inconsistent statement after the mother had testified in response to a defense question that the mother did not believe that defendant was involved in gang activity, pursuant to former O.C.G.A. §§ 24-9-81 and 24-9-83. Garrett v. State, 280 Ga. 30, 622 S.E.2d 323 (2005) (decided under former O.C.G.A. § 24-9-81).

Examination of Own Witness

Use of inconsistent prior statements. — Because a state witness, who was also one of defendant's cohorts, was evasive concerning the facts stated in the witness's prior interview and also testified to facts that were inconsistent with those previously stated in the interview, the trial court did not err in permitting the state to ask leading questions or in allowing the taped interview to be introduced into evidence. Johnson v. State, 279 Ga. App. 489, 631 S.E.2d 720 (2006) (decided under former O.C.G.A. § 24-9-81).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 447 et seq., 501, 506, 509.

ALR. — Estoppel of party to contradict what he testified to, adversely to his present opponent, in a prior action to which he was not a party, 5 ALR 1505.

Impeaching witness examined by both parties, 54 ALR 1374.

Right of party surprised by unfavorable testimony of own witness to ask him concerning previous inconsistent statements, 74 ALR 1042.

Proper practice and relief on development of hostility by party's own witness, 117 ALR 326.

May a witness who testifies to facts be impeached by showing of prior inconsistent expressions of opinion by him, 158 ALR 820.

Federal Civil Procedure Rule 43(b), and similar state rule, relating to the calling and interrogation of adverse party as witness at trial, 35 ALR2d 756.

Right of counsel representing party at trial, but employed by his liability insurer, to cross-examine or impeach him for asserted contradictory statements, 48 ALR2d 1239.

Party litigant in civil personal injury or death case as bound by conflicting testimony of his own medical witnesses, 53 ALR2d 1229.

Who is "employee" within statute permitting examination, as adverse witness, of employee of party, 56 ALR2d 1108.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 ALR4th 829.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence, 83 ALR5th 277.

Propriety, under Uniform Rule of Evidence 607, of impeachment of party's own witness, 3 ALR6th 269.

24-6-608. Evidence of character and conduct of witness.

(a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to the following limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness; and

(2) Evidence of truthful character shall be admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime as provided in Code Section 24-6-609, or conduct indicative of the witness's bias toward a party may not be proved by extrinsic evidence. Such instances may however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

(1) Concerning the witness's character for truthfulness or untruthfulness; or

(2) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(c) The giving of testimony, whether by an accused or by any other witness, shall not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness. (Code 1981, § 24-6-608, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — A witness's character for truthfulness or untruthfulness, Fed. R. Evid. 608.

Law reviews. — For article, "The Need For a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984). For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, §§ 3871, 3872, 3873, 3874, 3875, former Code 1882, §§ 3871, 3872, 3873, 3874, 3875, former Civil Code 1895, §§ 5292, 5293, former Penal Code 1895, §§ 1026, 1027, former Civil Code 1910, §§ 5881, 5882, former Penal Code 1910, §§ 1052, 1053, former Code 1933, §§ 38-1803, 38-1804, and former O.C.G.A. §§ 24-9-83 and 24-9-84 are included in the annotations for this Code section.

In general. — General character of a witness, when that character was put in issue, was a proper mode of ascertaining that weight that should be attached to the witness's testimony. Simpson v. State, 78 Ga. 91 (1886) (decided under former Code

General Consideration (Cont'd)

1882, §§ 3871, 3873, 3874).

Any witness, other than an accused, could be discredited by evidence of bad character and by convictions involving moral turpitude. Beasley v. State, 168 Ga. App. 255, 308 S.E.2d 560 (1983) (decided under former O.C.G.A. § 24-9-84); Nelson v. State, 190 Ga. App. 142, 378 S.E.2d 186 (1989) (decided under former O.C.G.A. § 24-9-84).

Former statute specified the questions to be propounded and "impliedly excludes all others." Barnwell v. Hannegan, 105 Ga. 396, 31 S.E. 116 (1898) (decided under former Civil Code 1895, § 5293); Gordon v. Gilmer, 141 Ga. 347, 80 S.E. 1007 (1914) (decided under former Civil Code 1910, § 5882); Rudolph v. State, 16 Ga. App. 353, 85 S.E. 365 (1915) (decided under former Civil Code 1910, § 5882); Taylor v. State, 17 Ga. App. 787, 88 S.E. 696 (1916) (decided under former Civil Code 1910, § 5882); Cameron v. State, 66 Ga. App. 414, 18 S.E.2d 16 (1941) (decided under former Code 1933, § 38-1804).

Criminal defendant, when a witness, stands before the court as any other witness. Klug v. State, 77 Ga. 734 (1886) (decided under former Code 1882, §§ 3871, 3872, 3875); Coleman v. State, 141 Ga. 731, 82 S.E. 228 (1914) (decided under former Penal Code 1910, § 1052).

Prosecutor, when a witness, stands before the court as any other witness. Womack v. State, 72 Ga. 215 (1883) (decided under former Code 1882, §§ 3871, 3872, 3875).

Former O.C.G.A. § 24-9-84 prescribed a specific progression of questions to be asked when inquiring into the general reputation of a witness for impeachment purposes. Harper v. State, 157 Ga. App. 480, 278 S.E.2d 28 (1981) (decided under former Code 1933, § 38-1804).

Former O.C.G.A. § 24-9-84 required that the impeaching witness should be first asked as to the impeaching witness's knowledge of the general character of the witness, and next as to what that character was, and lastly the impeaching witness may be asked if, from that character, the impeaching witness would believe the witness on the witness's oath. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698 (1981) (decided under former Code 1933, § 38-1804).

Character means reputation. — Person's character was not to be proved by asking a witness what kind of a man that person was but the person's "character," as used in legal parlance, was to be proved by asking about the person's "reputation." P.D. v. State, 151 Ga. App. 662, 261 S.E.2d 413 (1979) (decided under former Code 1933, § 38-1804).

Evidence as to character was irrelevant and inadmissible unless it was used to show the character of the witness for veracity or intended specifically to be used in the impeachment of witnesses for bad character, or equally to rebut an attempt at impeachment by a showing of good character. Edwards v. Simpson, 123 Ga. App. 44, 179 S.E.2d 266 (1970) (decided under former Code 1933, § 38-1804).

Contradictory statements as to reputation as affecting witness's credibility. — When witness testified as to defendant's reputation in community, any subsequent contradiction simply went to the witness's credibility with the jury, and it was error for the court to strike such witness's testimony in toto. Hudson v. State, 163 Ga. App. 845, 295 S.E.2d 123 (1982) (decided under former O.C.G.A. § 24-9-84).

Limitation of question. — Direct examination to prove the character of the accused must be limited to questions concerning the accused's general reputation in the community in which the accused lives. Overby v. State, 125 Ga. App. 759, 188 S.E.2d 910 (1972) (decided under former Code 1933, § 38-1804).

Fact that the witness's "neighborhood" was the penal institution in which the witness was incarcerated and which was composed of the witness's fellow inmates did not negate the fact that the penal institution was the place where people had the best opportunity to form a correct estimate of the witness's character. Martinez v. State, 189 Ga. App. 69, 375 S.E.2d 123 (1988) (decided under former Code 1933, § 38-1804).

Nothing in former O.C.G.A. § 24-9-84 indicated that the impeaching testimony is limited solely to the reputation of the challenged witness in a neighborhood composed of law abiding citizens. Martinez v. State, 189 Ga. App. 69, 375 S.E.2d 123 (1988) (decided under former Code 1933, § 38-1804).

Community was not community at large. — "Classroom community" comprised of students who were removed from the general school population because of special educational needs may not be the "community at large" contemplated by former O.C.G.A. § 24-9-84. Clark v. State, 225 Ga. App. 851, 485 S.E.2d 543 (1997) (decided under former O.C.G.A. § 24-9-84).

Testimony based on personal opinion. — If, under the entire testimony of a witness, it appeared that the witness's testimony as to the character and reputation of a party was based entirely on the witness's personal opinion, the trial judge could properly have excluded the witness's testimony. Gravitt v. State, 220 Ga. 781, 141 S.E.2d 893 (1965) (decided under former Code 1933, § 38-1804).

Admission for jury to consider conflicts in evidence. — Expired decal authorizing defendant's use of the wrecker's emergency rotational lights was relevant as going to the likelihood of defendant's pre-collision activation of those lights, as claimed; thus, the evidence was admissible for whatever weight the jury wished to give it in resolving conflicts in the evidence. Crowe v. State, 259 Ga. App. 780, 578 S.E.2d 134 (2003) (decided under former O.C.G.A. § 24-9-84).

Character witness gave nonexpert opinion testimony and on cross-examination had the right of all such witnesses to give reasons for the witnesses's opinions. Banks v. State, 113 Ga. App. 661, 149 S.E.2d 415 (1966) (decided under former Code 1933, § 38-1804).

Jury may believe witness. — Question of credibility is always for the jury, and though a witness swore falsely on the other trial, the witness's contention that it was under duress may cause the jury to believe the witness. Williams v. State, 69 Ga. 11 (1882) (decided under former Code 1873, §§ 3871, 3872, 3875).

Failure to impeach not grounds for reversal. — Even assuming defense counsel's failure to impeach a prison rape victim with proof of general bad character as evinced by prior felony convictions fell below a presumed level of competence, the omission did not require reversal and a new trial. Scott v. State, 223 Ga. App. 479, 477 S.E.2d 901 (1996) (decided under former O.C.G.A. § 24-9-84).

Alternate objection raised first on appeal. — When defendant contended that the testimony exceeded the proper scope of good character evidence permissible under former O.C.G.A. § 24-9-84, but at trial the defendant objected to the testimony only on the ground that the testimony was irrelevant, the testimony was not excluded because an alternate objection may not be raised for the first time on appeal. Reed v. State, 248 Ga. App. 107, 545 S.E.2d 655 (2001) (decided under former O.C.G.A. § 24-9-84).

Proof of Bad Character

Bad character meant bad moral character. — General bad character, as a ground of impeachment, referred to general bad moral character, the word "moral" being used in the word's broadest sense. Sparks v. Bedford, 4 Ga. App. 13, 60 S.E. 809 (1908) (decided under former Civil Code 1895, § 5293). See also Allred v. State, 126 Ga. 537, 55 S.E. 178 (1906) (decided under former Penal Code 1895, § 1027).

Bad character did not render a witness incompetent; but the witness's credibility was for the jury, who could find a verdict on the sole testimony of such witness, unless the Code expressly required corroboration. Stone v. State, 118 Ga. 705, 45 S.E. 630, 98 Am. St. R. 145 (1903) (decided under former Penal Code 1895, § 1027). See also Franklin v. State, 69 Ga. 36 (1882) (decided under former Code 1873, §§ 3871, 3872, 3875).

Bad character evidence properly excluded when witness had not yet testified. — Trial court did not err in not allowing a defendant to impeach an inmate witness by showing the inmate's bad character for truthfulness when the inmate had not yet testified; furthermore,

Proof of Bad Character (Cont'd)

the jail shift supervisor through whom the defendant sought to introduce the impeachment testimony testified that the supervisor did not know about the inmate's general character or reputation within the jail community. Felder v. State, 286 Ga. App. 271, 648 S.E.2d 753 (2007) (decided under former O.C.G.A. § 24-9-84).

How state may prove bad character. — When defendant, in the trial of a criminal case, puts defendant's character in issue, the state (a) may cross-examine the witnesses offered by the defendant in order to test the witness's knowledge of the defendant's character; (b) may also offer witnesses to prove defendant's general bad character; and (c) the state may, when the defendant has been previously convicted of a crime involving moral turpitude, introduce the record of such conviction in the manner provided by law. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698 (1981) (decided under former Code 1933, § 38-1804); Cunningham v. State, 182 Ga. App. 591, 356 S.E.2d 542 (1987) (decided under former O.C.G.A. § 24-9-84).

Conviction of an offense involving moral turpitude or a felony was a proper method of showing bad character and tended to impeach the credibility of that witness. McNeely v. Wal-Mart Stores, Inc., 246 Ga. App. 852, 542 S.E.2d 575 (2000) (decided under former O.C.G.A. § 24-9-84).

Specific acts may not be shown. — General bad character of a witness could be shown for the purpose of impeachment, but specific acts cannot be shown for that purpose. Andrews v. State, 118 Ga. 1, 43 S.E. 852 (1903) (decided under former Penal Code 1895, § 1027); Haynes v. Phillips, 67 Ga. App. 574, 21 S.E.2d 261 (1942) (decided under former Code 1933, § 38-1804); Security Life Ins. Co. v. Newsome, 122 Ga. App. 137, 176 S.E.2d 463 (1970) (decided under former Code 1933, § 38-1804); McCarty v. State, 139 Ga. App. 101, 227 S.E.2d 898 (1976) (decided under former Code 1933, § 38-1804); Colvin v. State, 155 Ga. App. 736, 272 S.E.2d 516 (1980) (decided under former Code 1933, § 38-1804). See also Johnson v. State, 61 Ga. 305 (1878) (decided under former Code 1873, §§ 3871, 3873, 3874); Black v. State, 119 Ga. 746, 47 S.E. 370 (1904) (decided under former Penal Code 1895, § 1027); Rudolph v. State, 16 Ga. App. 353, 85 S.E. 365 (1915) (decided under former Penal Code 1910, § 1053); Taylor v. State, 17 Ga. App. 787, 88 S.E. 696 (1916) (decided under former Penal Code 1910, § 1053); Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698 (1981) (decided under former Code 1933, § 38-1804); Heaton v. State, 214 Ga. App. 460, 448 S.E.2d 49 (1994) (decided under former O.C.G.A. § 24-9-84); Wetta v. State, 217 Ga. App. 128, 456 S.E.2d 696 (1995) (decided under former O.C.G.A. § 24-9-84); Venson v. Georgia, 74 F.3d 1140 (11th Cir. 1996) (decided under former O.C.G.A. § 24-9-84); Jones v. State, 226 Ga. App. 420, 487 S.E.2d 56 (1997) (decided under former O.C.G.A. § 24-9-84); Johnson v. State, 244 Ga. App. 128, 534 S.E.2d 480 (2000) (decided under former O.C.G.A. § 24-9-84).

In response to defendant's claim of self-defense, although evidence of one victim's prior violent acts were excluded because the victim was not the aggressor, the other victim's general reputation for violence was admitted in accordance with former O.C.G.A. § 24-9-84. Quillian v. State, 279 Ga. 698, 620 S.E.2d 376 (2005) (decided under former O.C.G.A. § 24-9-84).

Personnel reports of law enforcement. — Trial court did not err by not disclosing a disciplinary report in a police officer's personnel file as: (1) no attempt was made to impeach the officer by disproving the facts testified to by the officer under former O.C.G.A. § 24-9-82 (see now O.C.G.A. § 24-6-621); (2) there was no showing that any of the documents disallowed contained any contradictory statements previously made by the officer as to matters relevant to the officer's testimony and the case under former O.C.G.A. § 24-9-83; (3) there was no contention that the officer had been convicted of a crime involving moral turpitude; and (4) the evidence was, at best, related solely to specific bad acts and not to the general bad character of the officer, which was not admissible as impeachment material un-

der former O.C.G.A. § 24-9-84. Lopez v. State, 267 Ga. App. 178, 598 S.E.2d 898 (2004) (decided under former O.C.G.A. § 24-9-84).

Testimony from spouse of defendant. — Precluding defendant's spouse from testifying as to specific instances of a child victim's dishonesty was proper since the spouse attempted to testify regarding the child's specific problems at school and with discipline, as well as instances of the child's lying and stealing. Frazier v. State, 278 Ga. App. 685, 629 S.E.2d 568 (2006), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007) (decided under former O.C.G.A. § 24-9-84).

Questioning on prior drug offense. — Trial court did not commit reversible error under former O.C.G.A. § 24-9-84 in prohibiting defense counsel from asking the state's witness specifically about a prior drug offense when the witness testified that the witness had not previously been in trouble; generally, questioning a witness about a crime unrelated to the case was impermissible, and the defendant was afforded ample avenues for portraying the witness as biased and motivated to lie. Curtis v. State, 282 Ga. App. 322, 638 S.E.2d 773 (2006), cert. denied, No. S07C0427, 2007 Ga. LEXIS 203 (Ga. 2007) (decided under former O.C.G.A. § 24-9-84).

Failure of other jury to return guilty verdict. — Former Code 1933, § 38-1803 did not allow the impeachment of a witness by the mere showing that a jury which had previously heard the same testimony in another context in another trial failed to return a verdict of guilty. An acquittal merely exempts a defendant from punishment and from another prosecution. It did not necessarily show that defendant was innocent and that, therefore, the state's witnesses did not testify truthfully. Jones v. State, 159 Ga. App. 634, 284 S.E.2d 651 (1981) (decided under former Code 1933, § 38-1803).

Testimony of sheriff's department investigator admitted. — Sheriff's department investigator's explanation of the nature of the interview was highly relevant to whether the statement defendant gave was voluntary. Therefore, the trial court did not abuse the court's discretion in admitting the waiver certificate, even if the admission incidentally placed the defendant's character in issue under former O.C.G.A. § 24-9-83. Bynum v. State, 300 Ga. App. 163, 684 S.E.2d 330 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. 2010) (decided under former O.C.G.A. § 24-9-83).

Use of term "bad guys." — Defendant's motion for a mistrial was properly denied as a witness's use of the term "bad guys" in explaining undercover operations did not improperly inject defendant's character into evidence; even assuming the comment was improper, the error was harmless in light of the overwhelming evidence of defendant's guilt. Salgado v. State, 268 Ga. App. 18, 601 S.E.2d 417 (2004) (decided under former O.C.G.A. § 24-9-83).

Evidence of gang membership admissible. — Because evidence of defendant's gang membership was admissible both as part of the res gestae of the crime and to show motive, the trial court properly denied defendant's motions in limine and for a new trial, even though the evidence implicated defendant's character. Garibay v. State, 275 Ga. App. 170, 620 S.E.2d 424 (2005) (decided under former O.C.G.A. § 24-9-83).

Foundation. — References to the impeaching witness's "personal knowledge" of or "association" with the witness that was being impeached serve only to develop a foundation upon which to base the witness's statement as to reputation. Such a foundational line of questioning was not only permitted, but was mandated by statute. Ballenger Corp. v. Dresco Mechanical Contractors, 156 Ga. App. 425, 274 S.E.2d 786 (1980) (decided under former Code 1933, § 38-1804).

Knowledge of impeaching witness. — It was error to exclude testimony of a witness introduced for the purpose of impeaching another witness when the impeaching witness testifies that the impeaching witness knew that the witness's general reputation, and that that reputation was not good, and, from the impeaching witness's knowledge of the witness's reputation, the impeaching witness would not believe the witness upon the witness's

Proof of Bad Character (Cont'd)

oath. Dent v. State, 14 Ga. App. 269, 80 S.E. 548 (1914) (decided under former Penal Code 1910, § 1053).

Opinion based on personal observation inadmissible. — Witness's opinion of a party's character which is based solely upon the witness's personal observation of the party is not an approved mode of character evidence and is subject to being struck. Gresham v. State, 169 Ga. App. 525, 314 S.E.2d 111 (1984) (decided under former O.C.G.A. § 24-9-84).

Trial court properly excluded testimony of probation officer's personal opinion as to the victim's reputation for general character based upon personal observation coupled with unspecified reports received from unidentified law enforcement officials rendered under undisclosed circumstances. Bogan v. State, 206 Ga. App. 696, 426 S.E.2d 392 (1992) (decided under former O.C.G.A. § 24-9-84).

Opinion of single individuals not sufficient. — Person's general bad character and reputation cannot be proved on the opinions of single individuals. Haynes v. Phillips, 67 Ga. App. 574, 21 S.E.2d 261 (1942) (decided under former Code 1933, § 38-1804).

Trial court did not err in striking the testimony of a character witness in an assistant professor's action against the Board of Regents (BOR) of the University System of Georgia for breach of an employment contract because there was no abuse of discretion in determining that the testimony that the witness did not know whether the witness would believe the professor under oath did not meet the requirements of former O.C.G.A. § 24-9-84; the BOR's counsel acquiesced in the trial court's final ruling on the matter. Bd. of Regents of the Univ. Sys. of Ga. v. Ambati, 299 Ga. App. 804, 685 S.E.2d 719 (2009), cert. denied, No. S10C0086, 2010 Ga. LEXIS 34 (Ga. 2010) (decided under former O.C.G.A. § 24-9-84).

Dying declaration not used to show violent character. — While dying declaration of the person slain may be subject to impeachment, where under the facts of the case the evidence that deceased "brought" a witness some liquor on the day of the killing was not relevant for that purpose; nor was it admissible to show the violent character of the deceased. Green v. State, 195 Ga. 759, 25 S.E.2d 502 (1943) (decided under former Code 1933, § 38-1803).

Ill feeling will not impeach. — Witness can be impeached only by proof of general bad character, such as would cause the impeaching witness to disbelieve the witness on oath. A witness cannot be impeached on the ground that the impeaching witness had an ill feeling toward the witness it sought to impeach because the latter owed the former money and would not pay the impeaching witness. Haynes v. Phillips, 67 Ga. App. 574, 21 S.E.2d 261 (1942) (decided under former Code 1933, § 38-1804).

Reputation at place of employment. — When it was sought to impeach a witness by proof of bad character by means of the statutory questions as set forth in the former statute, a witness who was familiar with the witness's reputation in the place where the witness pursued the witness's regular daily vocation or work may testify as to the witness's reputation in such place, although not familiar with the community in which the witness lived. Pethel v. State, 89 Ga. App. 8, 78 S.E.2d 428 (1953) (decided under former Code 1933, § 38-1804); Bennett v. George, 105 Ga. App. 527, 125 S.E.2d 122 (1962) (decided under former Code 1933, § 38-1804).

Even though a rebuttal witness had stopped working at the General Motors plant ten years before the trial took place, the trial court did not abuse the court's discretion in allowing the witness to testify regarding a party's reputation at that plant because the witness worked there for 42 years, and kept in touch with the General Motors community since the witness retired by continuing to attend union meetings. MacGibbon v. Akins, 245 Ga. App. 871, 538 S.E.2d 793 (2000) (decided under former O.C.G.A. § 24-9-84).

No evidence of bad character. — When there was no evidence before the court which attacked the witness for the defendant either for bad character or for contradictory statements, it was not error

for the court to refuse to allow the defendant's witness to testify as to the witness's own character for veracity. P.D. v. State, 151 Ga. App. 662, 261 S.E.2d 413 (1979) (decided under former Code 1933, § 38-1804).

Admission of first offender record. — In both civil and criminal cases, unless there was an adjudication of guilt, a witness could not be impeached on general credibility grounds by evidence of a first offender record. Matthews v. State, 268 Ga. 798, 493 S.E.2d 136 (1997) (decided under former O.C.G.A. § 24-9-84).

Copy of record of conviction must be introduced. — Witness cannot be discredited even by the witness's own testimony that the witness was convicted of a crime involving moral turpitude, rather, it was necessary that a copy of the record of conviction be introduced; accordingly, the testimony of a witness that the witness did some act that the law made a crime was not a legal method of impeachment. Richards v. State, 157 Ga. App. 601, 278 S.E.2d 63 (1981) (decided under former Code 1933, § 38-1804).

Because admission of booking photograph did not suggest guilt of prior crime or enflame jury, the admission did not place defendant's character into evidence or deprive defendant of a fair trial. Hunter v. State, 273 Ga. App. 52, 614 S.E.2d 179 (2005) (decided under former O.C.G.A. § 24-9-83).

Testimony by investigating officer. — When the defendant placed the defendant's character in issue, the investigating police officer, though not a member of the defendant's community, could be an impeaching witness since the officer testified that the officer possessed personal knowledge of the defendant's character and reputation in the community. Catchings v. State, 256 Ga. 241, 347 S.E.2d 572 (1986) (decided under former O.C.G.A. § 24-9-84).

Conviction could be introduced even though appeal pending. — Prior conviction of a witness for a crime involving moral turpitude was admissible for impeachment purposes when, at the time of the proffer thereof, the judgment of conviction was the subject of a pending appeal. James v. State, 160 Ga. App. 185, 286 S.E.2d 506 (1981) (decided under former Code 1933, § 38-1804).

Defendant's testimony regarding never being in trouble. — It was not error to admit evidence of defendant's prior assault conviction because the conviction was offered as impeachment evidence rather than evidence of bad character since defendant testified, and defendant's counsel emphasized, that defendant had "never been in trouble." Walker v. State, 260 Ga. App. 241, 581 S.E.2d 295 (2003) (decided under former O.C.G.A. § 24-9-84).

Conviction of misdemeanor. — Proof of conviction of a misdemeanor, if it was a crime of moral turpitude, was a proper method of showing "bad character." Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698 (1981) (decided under former Code 1933, § 38-1804).

Misdemeanor crime not involving moral turpitude. — Witnesses could not be impeached by proof of convictions for simple battery and for misdemeanor possession of marijuana which were not crimes involving moral turpitude. Ely v. State, 272 Ga. 418, 529 S.E.2d 886 (2000) (decided under former O.C.G.A. § 24-9-84).

Misdemeanor issuance of bad checks was crime of moral turpitude as a matter of law. Carruth v. Brown, 202 Ga. App. 656, 415 S.E.2d 470 (1992) (decided under former O.C.G.A. § 24-9-84).

Offense of simple assault was not a crime involving moral turpitude. Polk v. State, 202 Ga. App. 738, 415 S.E.2d 506 (1992) (decided under former O.C.G.A. § 24-9-84).

Conviction for giving false name admissible to negate good character. — Certified copy of an accusation which showed that the defendant pled guilty to having given a false name to a law enforcement officer was admissible as impeachment evidence against the defendant when the defendant placed the defendant's character in issue by presentation of evidence of good character. Hicks v. State, 169 Ga. App. 542, 314 S.E.2d 113 (1984) (decided under former O.C.G.A. § 24-9-84).

Crime of moral turpitude. — Misdemeanor of issuing a bad check in violation

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of O.C.G.A. § 16-9-20(a) was a crime of moral turpitude and the jury may consider evidence of a witness's guilty plea to such a crime as proof of general bad moral character which tends to impeach the credibility of that witness within the meaning of former O.C.G.A. § 24-9-84. Paradise v. State, 212 Ga. App. 166, 441 S.E.2d 497 (1994) (decided under former O.C.G.A. § 24-9-84).

When a codefendant was not a witness in the case, the codefendant was not subject to impeachment, and the trial court did not err in refusing to permit another codefendant to impeach the codefendant by a previous conviction of a crime involving moral turpitude. Moss v. State, 275 Ga. 96, 561 S.E.2d 382 (2002) (decided under former O.C.G.A. § 24-9-84).

Prior interest in drug trafficking admissible. — When a defendant was charged with marijuana trafficking, testimony that, two years prior to the subject sale of marijuana, the defendant expressed an interest in trafficking in illegal drugs logically tended to disprove the defendant's defense, and thus was clearly relevant as rebuttal, even though the testimony did not allege participation in the crime at bar and was inadmissible as impeachment testimony. Kraus v. State, 169 Ga. App. 54, 311 S.E.2d 493 (1983) (decided under former O.C.G.A. § 24-9-84).

Defendant's status as "drunk". — Victim advocate's testimony that a domestic abuse victim had told the advocate that the defendant was drunk when the defendant hit the victim was hearsay and not admissible as a prior inconsistent statement of the victim, because the victim did not testify as to whether or not the defendant was drunk. However, counsel's failure to object was not ineffective assistance because there was no showing of a reasonable probability that the result would have been different if the jury thought defendant was drunk or not at the time of the incident. Miller v. State, 300 Ga. App. 652, 686 S.E.2d 302 (2009) (decided under former O.C.G.A. § 24-9-83).

Juvenile arrest records were not admissible to show general bad character, but could be used to impeach defendant's testimony that the defendant had never been in trouble before. Williams v. State, 171 Ga. App. 927, 321 S.E.2d 423 (1984) (decided under former O.C.G.A. § 24-9-84).

Whether victim was a "bad" person was irrelevant because it was as unlawful to commit a crime against a "bad" person as against a "good" one. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698 (1981) (decided under former Code 1933, § 38-1804).

In a prosecution for aggravated assault, to the extent that the defendant sought to attack the victim's character through testimony about the victim's use of alcohol during pregnancy, whether the victim hid the defendant from the police, and the victim's alleged jealousy over the defendant's new relationship, the trial court did not abuse the court's discretion in limiting the scope of cross-examination to the issues directly related to the incidents. Massey v. State, 278 Ga. App. 303, 628 S.E.2d 706 (2006) (decided under former O.C.G.A. § 24-9-84).

Impeachment of the victim. — Jury instruction on impeachment of the victim by evidence of bad character was properly refused under former O.C.G.A. § 24-9-84 because there was no testimony as to the victim's general reputation for truthfulness in the community or whether the witness would believe the victim under oath, so the victim's credibility was not impeached. Callahan v. State, 256 Ga. App. 482, 568 S.E.2d 780 (2002) (decided under former O.C.G.A. § 24-9-84).

Trial court properly denied defendant's motion to introduce evidence of the victim's reputation for violence; defendant failed to make a prima facie showing that shooting the victim, defendant's supervisor, was justified or in self-defense; the evidence revealed that the initial altercation had been over for at least ten minutes before defendant initiated the chase which ended with the victim's shooting. Bryant v. State, 283 Ga. App. 295, 641 S.E.2d 277 (2007) (decided under former O.C.G.A. § 24-9-84).

Defense counsel's failure to redact bad character evidence from a defense exhibit was deficient perfor-

mance and based on the evidence against the defendant, as well as the prejudice caused by the unredacted defense exhibit, there was a reasonable probability that the outcome of the defendant's trial would have been different but for counsel's deficiency, and therefore the conviction was reversed. Whitaker v. State, 276 Ga. App. 226, 622 S.E.2d 916 (2005) (decided under former O.C.G.A. § 24-9-84).

Sexual offenses. — Impeachment evidence of prior bad acts of victims in a child abuse prosecution was properly excluded. Duncan v. State, 232 Ga. App. 157, 500 S.E.2d 603 (1998) (decided under former O.C.G.A. § 24-9-84).

Letters indicating lack of enjoyment of sexual activities. — Letters defendant wrote to other inmates were improperly admitted as impeachment evidence because the state claimed that the letters were admissible to impeach defendant's testimony that defendant did not have an extramarital affair and that because the husband had raped defendant, defendant did not enjoy sexual intercourse; the letters did not contain any statements regarding the alleged affair or rape, were not inconsistent with defendant's testimony, and did not address issues in the trial. Sammons v. State, 279 Ga. 386, 612 S.E.2d 785 (2005) (decided under former O.C.G.A. § 24-9-83).

Victim need not be shown to be assailant before victim can be impeached. — Former O.C.G.A. § 24-9-84 did not require that before a victim-witness in a battery case may be impeached by evidence of the victim's bad character there must be a prima-facie showing that the victim was the assailant. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698 (1981) (decided under former Code 1933, § 38-1804).

Cross-examination scope limited. — Witness who was impeached by the introduction of a certified copy of a previous felony conviction, but who had not attempted to rehabilitate the witness's character by explaining the circumstances of the conviction, could not be cross-examined concerning the facts surrounding the conviction. Vincent v. State, 264 Ga. 234, 442 S.E.2d 748 (1994) (decided under former O.C.G.A. § 24-9-84).

State was properly held not to be entitled to question an expert witness about matters that bore no relation to the scientific issues about which the witness testified at trial in order to show that the witness's professional credentials were in jeopardy. King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834 (2002) (decided under former O.C.G.A. § 24-9-84).

Cross-examination concerning specific facts. — It was not permissible to prove specific facts, except on cross-examination for the purposes of testing the knowledge of the witness and of impeaching knowingly false statements. Mimbs v. State, 189 Ga. 189, 5 S.E.2d 770 (1939) (decided under former Code 1933, § 38-1804); Haynes v. Phillips, 67 Ga. App. 574, 21 S.E.2d 261 (1942) (decided under former Code 1933, § 38-1804); Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824 (1944) (decided under former Code 1933, § 38-1804).

Cross-examination as to agreement between witness and state. — When defendant failed to prove either that there had been a deal or that the witness had any expectation of a deal, the trial court did not impermissibly abridge the defendant's Sixth Amendment rights by limiting defendant's crossexamination concerning charges against the witness. Wright v. State, 266 Ga. 887, 471 S.E.2d 883 (1996) (decided under former O.C.G.A. § 24-9-84).

Redirect examination. — When on cross-examination the impeaching witness was questioned as to the impeaching witness's feeling toward the witness it sought to impeach and testified that the impeaching witness entertained ill feelings toward the witness, the impeaching witness could be questioned on redirect examination as to why the impeaching witness entertains such feeling toward the other witness. Haynes v. Phillips, 67 Ga. App. 574, 21 S.E.2d 261 (1942) (decided under former Code 1933, § 38-1804).

Indictment against witness. — After a witness testified, an indictment charging the witness with embezzlement was inadmissible in evidence for the purpose

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of impeaching the witness. Gardner v. State, 81 Ga. 144, 7 S.E. 144 (1888) (decided under former Code 1882, §§ 3871, 3873, 3874); McCray v. State, 134 Ga. 416, 68 S.E. 62, 20 Ann. Cas. 101 (1910) (decided under former Penal Code 1895, § 1027); Beach v. State, 138 Ga. 265, 75 S.E. 139 (1912), overruled on other grounds, Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Penal Code 1910, § 1053).

While a witness may be discredited by proof of general bad character or conviction of a crime involving moral turpitude, it was not competent to discredit the witness by showing that the witness had committed, been arrested for, confined for, or even indicted for such an offense, and neither may general bad character be proved by individual acts. Richards v. State, 157 Ga. App. 601, 278 S.E.2d 63 (1981) (decided under former Code 1933, § 38-1804).

Error to consider testimony of witness as to conviction of crime in sentencing defendant. — Although it was harmless error to admit, erroneously, a witness's own testimony that the witness was convicted of a crime involving moral turpitude, it was error for the trial court to consider such testimony in determining an appropriate sentence for the defendant. Richards v. State, 157 Ga. App. 601, 278 S.E.2d 63 (1981) (decided under former Code 1933, § 38-1804).

Secondary evidence admitted without objection. — When two witnesses testified that the witnesses pled guilty to the larceny for which the defendant was on trial, and while, over proper objection, this would not have been sufficient proof of bad character of itself to impeach the witnesses since there was no objection on the ground that the record of conviction would be the highest and best evidence of this fact, the secondary evidence admitted without objection could be considered by the jury, which would, under the circumstances, have a right to disbelieve that part of the testimony tending to exonerate the defendant from complicity in the theft. Roach v. State, 90 Ga. App. 44, 81 S.E.2d 886 (1954) (decided under former Code 1933, § 38-1804).

Failure to object to prior conviction waived. — Defendant's failure to object to proof of a prior conviction introduced by defendant's testimony in response to a prosecutorial cross-examination waived any "best evidence rule" objections to this testimony on appeal. Howard v. State, 206 Ga. App. 610, 426 S.E.2d 181 (1992) (decided under former O.C.G.A. § 24-9-84).

Attacked witness may be believed. — Witness who was attacked for general bad character may be believed by the jury regardless of whether there was any evidence to sustain the witness's good character or any corroborating evidence. Rowe v. State, 68 Ga. App. 161, 22 S.E.2d 210 (1942) (decided under former Code 1933, § 38-1804).

Questioning of witness about nolle prossed crime. — Trial court did not commit reversible error under former O.C.G.A. § 24-9-84 in declining to allow defense counsel to question the state's witness about the specific crime that was nolle prossed in exchange for the witness's testimony against the defendant; defense counsel was permitted to bring out that a charge against the witness had been dismissed and that the witness had faced 10 years in prison on the charge. Curtis v. State, 282 Ga. App. 322, 638 S.E.2d 773 (2006), cert. denied, No. S07C0427, 2007 Ga. LEXIS 203 (Ga. 2007) (decided under former O.C.G.A. § 24-9-84).

Proof of witness's reputation for violence was not a proper method of impeachment. Peters v. State, 55 Ga. App. 870, 192 S.E. 84 (1937) (decided under former Code 1933, § 38-1804).

Character evidence inadmissible in the following cases: Long v. State, 22 Ga. 40 (1857) (gambling) (decided under former law); Smithwick v. Evans, 24 Ga. 461 (1858) (prostitution) (decided under former law); McDowell v. Preston, 26 Ga. 528 (1858) (drug addiction) (decided under former law); Weathers v. Barksdale, 30 Ga. 888 (1860) (bastardy) (decided under former law); Pulliam v. Cantrell, 77 Ga. 563, 3 S.E. 280 (1886) (embezzlement) (decided under former Code 1882, §§ 3871, 3873, 3874); Gordon v. Gilmer, 141 Ga. 347, 80 S.E. 1007 (1914) (character as to truthfulness) (decided under former Civil Code 1910, § 5882).

Proof of Good Character

Evidence of good character admissible when the general character of a witness is impeached. Stamper v. Griffin, 12 Ga. 450 (1853) (decided under former law).

Evidence of good character inadmissible. — When not impeached otherwise than by disproving the truth of the witness's evidence, or by testimony tending to disprove the evidence, the witness cannot be supported by proof of the witness's general good character. Miller v. Western & Atl. R.R., 93 Ga. 480, 21 S.E. 52 (1893) (decided under former Code 1882, §§ 3871, 3873, 3874).

When evidence of good character admissible. — When it was sought to impeach a witness by proof of contradictory statements, this rendered admissible in the witness's favor testimony as to the witness's general good character. Bell Bros. v. Aiken, 1 Ga. App. 36, 57 S.E. 1001 (1907) (decided under former Civil Code 1895, § 5292); Georgia Life Ins. Co. v. McCranie, 12 Ga. App. 855, 78 S.E. 1115 (1913) (decided under former Civil Code 1910, § 5881); Ricks v. State, 70 Ga. App. 395, 28 S.E.2d 303 (1943) (decided under former Code 1933, § 38-1803).

Reputation for truth and veracity. — When evidence of contradictory statements by a witness is offered by way of impeaching the witness's veracity, general evidence that the witness is a man of truth and veracity may be admitted, controverted, and denied. Stamper v. Griffin, 12 Ga. 450 (1853) (decided under former law).

Proof of good character. — See Price v. State, 72 Ga. 441 (1884) (decided under former Code 1882, §§ 3871, 3873, 3874); Clark v. State, 117 Ga. 254, 43 S.E. 853 (1903) (decided under former Penal Code 1895, § 1026); Gordon v. State, 10 Ga. App. 35, 72 S.E. 544 (1911) (decided under former Penal Code 1910, § 1052); Haywood v. State, 12 Ga. App. 240, 76 S.E. 1077 (1913) (decided under former Penal Code 1910, § 1052).

Testimony under oath from witness who accepted plea bargain. — With regard to defendant's conviction for trafficking in methamphetamine, the trial court properly denied defendant's motion for a new trial, and did not err by allowing the testimony of a defense witness taken under oath when that witness entered into a plea agreement as, although the trial court initially determined that some of the defense witness's statements were inadmissible, the statements regarding prior drug dealings between the defense witness and defendant became admissible for impeachment purposes since the defense witness personally contradicted the witness's own testimony. Corn v. State, 290 Ga. App. 792, 660 S.E.2d 782 (2008) (decided under former O.C.G.A. § 24-9-83).

Rebuttal by proof of good character. — When, in order to discredit a witness, the witness's reputation was assailed, the party by whom the witness was introduced had the right to introduce rebutting evidence to show that the witness's character and reputation were good, even though the attempt to discredit was made on examination of the witness personally. Gazaway v. State, 15 Ga. App. 467, 83 S.E. 857 (1914) (decided under former Penal Code 1910, § 1053). See also Suddeth v. State, 112 Ga. 407, 37 S.E. 747 (1900) (decided under former Penal Code 1895, § 1027).

Character for veracity irrelevant. — When the statutory questions were asked to sustain the character of a witness sought to be impeached by evidence of general bad character, other questions, such as the character of the witness for veracity, may not be asked. Edwards v. Simpson, 123 Ga. App. 44, 179 S.E.2d 266 (1970) (decided under former Code 1933, § 38-1804).

Evidence of veracity when credibility not attacked. — Until the adverse party attacked the credibility of a witness, either for bad character or because of contradictory statements, the party calling the witness cannot introduce evidence in support of the witness's character for veracity. P.D. v. State, 151 Ga. App. 662, 261 S.E.2d 413 (1979) (decided under former Code 1933, § 38-1803).

Direct and cross-examination. — Witness, in testifying as to the defendant's good character, must categorically answer the questions impliedly included in the former statute and no others. On

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cross-examination, the solicitor (now district attorney) may bring out specific facts for the purpose of testing the witness's knowledge, and may ask as a hypothetical question whether, if the witness knew certain facts, the witness's opinion would still be that the defendant's character was good. Banks v. State, 113 Ga. App. 661, 149 S.E.2d 415 (1966) (decided under former Code 1933, § 38-1804).

Cross-examination of defendant's character witness in a child molestation case, that consisted of questions inquiring whether witness was aware defendant pled guilty to practicing law without a license, was admissible for the purpose of testing the witness's familiarity with the defendant. Davidson v. State, 231 Ga. App. 605, 499 S.E.2d 697 (1998) (decided under former O.C.G.A. § 24-9-84).

Trial court did not err by allowing the state to cross-examine the defendant's biological daughter about having previously worked as a stripper and having abused drugs because the evidence was offered by the state in rebuttal to the daughter's testimony after the defendant intentionally elicited the testimony as to the defendant's and the daughter's own good character; since the only conceivable purpose of the questions defense counsel asked the daughter was to elicit testimony concerning the character of the defendant and the daughter, the trial court did not err when the court held that the state could introduce rebuttal evidence on the same subject. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010) (decided under former O.C.G.A. § 24-9-84).

Evidence not in compliance with former statute. — When the only evidence in any way tending to sustain a witness was the testimony of another witness that the impeaching witness knew the witness to be honest, industrious, and well-liked by the customers of the latter witness, such evidence was not a compliance with the requirement that an impeached witness may be sustained by proof of general good character. Jackson v. Middlebrooks, 86 Ga. App. 259, 71 S.E.2d 462 (1952) (decided under former Code 1933, § 38-1804).

Evidence in mitigation of capital punishment. — Constitution required that evidence which would be inadmissible under an evidentiary rule must not automatically be excluded if tendered in a capital case in mitigation of punishment, rather, the potentially mitigating influence of the testimony must be weighed against the harm resulting from the violation of the evidentiary rule, and in close cases the doubt should be resolved in favor of admissibility. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), overruled on other grounds, Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981) (decided under former Code 1933, § 38-1804). Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, McClellan v. State, 274 Ga. 819, 561 S.E.2d 82 (2002) (decided under former O.C.G.A. § 24-9-84).

Failure to charge concerning character. — Proper instruction should be given in every case when the accused puts the accused's character in issue; but, in the absence of a timely request, an omission to give a specific charge on the subject would not require a new trial. It was only in exceptional cases where the court failed to charge relative to the good character of the accused that a new trial should be granted. Taylor v. State, 83 Ga. App. 735, 64 S.E.2d 598 (1951) (decided under former Code 1933, § 38-1804).

Character witnesses excluded. — Trial court did not err by refusing to allow two of defendant's character witnesses to explain their answers since the transcript showed that the testimony sought exceeded the permissible scope of former O.C.G.A. § 24-9-84. Collar v. State, 206 Ga. App. 448, 426 S.E.2d 43 (1992) (decided under former O.C.G.A. § 24-9-84).

Pastor testifying to truthfulness of parties. — Trial court erred by admitting the testimony of a pastor regarding the reputation for truthfulness of a husband and a wife and that the pastor would believe the husband and the wife under oath because the character for truthfulness of the husband and wife had not been attacked since the pastor testified during the case-in-chief of the husband and wife, before any defense witnesses had testified; the error was not harmless because

the jury's verdict was based in large part upon the jury's determinations regarding the parties' credibility. Barnett v. Farmer, 308 Ga. App. 358, 707 S.E.2d 570 (2011) (decided under former O.C.G.A. § 24-9-84).

Instructions

No evidence of good character. — Charge could omit the part of the former statute which related to sustaining the witness by proof of general good character since there was no such evidence of general good character of a witness thus attacked. Reeves v. State, 22 Ga. App. 628, 97 S.E. 115 (1918) (decided under former Penal Code 1910, § 1052); Geer v. State, 184 Ga. 805, 193 S.E. 776 (1937) (decided under former Code 1933, § 38-1803); Jones v. State, 193 Ga. 449, 18 S.E.2d 844 (1942) (decided under former Code 1933, § 38-1803); Knight v. State, 92 Ga. App. 785, 90 S.E.2d 46 (1955) (decided under former Code 1933, § 38-1803).

No evidence of bad character. — In charging upon the law of impeachment of witnesses, when the court charged as to impeachment by disproving facts testified to, and by contradictory statements, it was not error, but was proper, to omit to charge the law of impeachment by proof of general bad character, since there was no evidence seeking to impeach any witness upon that ground. Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945), overruled on other grounds, Milton v. State, 245 Ga. 20, 262 S.E.2d 789 (1980) (decided under former Code 1933, § 38-1803).

Charge on impeachment by bad character. — When plaintiff introduced evidence as to the bad character of a witness for the defendant to show the witness unworthy of belief and when the court charged the jury that a witness could be impeached by bad character, it was error for the court to fail to charge without request that a witness could be sustained by proof of good character, there being evidence of the witness's good character. Haynes v. Phillips, 69 Ga. App. 524, 26 S.E.2d 186 (1943) (decided under former Code 1933, § 38-1804).

If a defendant wished to have the jury charged that the defendant would not be subject to impeachment pursuant to former O.C.G.A. § 24-9-84, the defendant should request such a charge. Absent such a request, the appellate court need not decide whether the defendant was entitled to a jury charge on that issue. King v. State, 195 Ga. App. 865, 395 S.E.2d 1 (1990) (decided under former O.C.G.A. § 24-9-84).

Trial court did not err in refusing to instruct the jury regarding impeachment by general bad character pursuant to former O.C.G.A. § 24-9-84 since neither side relied on that method of impeachment at defendant's trial. Kirkland v. State, 67 Ga. App. 256, 19 S.E.2d 787 (1942) (decided under former O.C.G.A. § 24-9-84).

Charge when no evidence of bad character. — In charging upon the law of impeachment of witnesses, when the court charges as to impeachment by disproving facts testified to, and by contradictory statements, it was not error, but was proper, to omit to charge the law of impeachment by proof of general bad character since there was no evidence seeking to impeach any witness upon that ground. Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945), overruled on other grounds, Milton v. State, 245 Ga. 20, 262 S.E.2d 789 (1980) (decided under former Code 1933, § 38-1804).

Charge in connection with conviction of crime. — Charge of the trial court was not error requiring reversal because of the use of the term "general bad character" in connection with the charge of impeachment of certain witnesses because of convictions of crimes involving moral turpitude. Tyler v. State, 91 Ga. App. 87, 84 S.E.2d 843 (1954) (decided under former Code 1933, § 38-1804).

Failure to charge statute. — It was not reversible error to fail to charge the law of credibility of witnesses without a written request. Ailstock v. State, 159 Ga. App. 482, 283 S.E.2d 698 (1981) (decided under former Code 1933, § 38-1804).

Court's reference to offense involving moral turpitude. — Trial court's inclusion in the court's general charge on the various methods of impeachment of a reference to impeachment by proof of a witness's conviction of an offense involving moral turpitude was erroneous since the defendant had not put the defendant's

Instructions (Cont'd)

own character in issue; however, the charge was harmless when, immediately following the reference to impeachment pursuant to former O.C.G.A. § 24-9-84, the jury was given extensive instructions as to impeachment by other methods. Francis v. State, 266 Ga. 69, 463 S.E.2d 859 (1995) (decided under former O.C.G.A. § 24-9-84).

Curative instruction. — Trial court properly denied the defendant's motion for a mistrial based on a claim that a friend's testimony improperly interjected character evidence as a curative instruction given by the trial court was an adequate remedy. Reid v. State, 281 Ga. App. 640, 637 S.E.2d 62 (2006) (decided under former O.C.G.A. § 24-9-83).

Trial court erred in denying the defendant's motion for a mistrial after a state's witness impermissibly interjected the defendant's character into evidence by referring to the defendant's prior arrest record. Although the trial court gave the jury a curative instruction informing the jury that the testimony regarding the defendant's prior arrest history was improper, could not be considered in determining guilt or innocence in the case, and was required to be disregarded; the trial court further polled the jury to determine whether the jury could abide by the curative instructions and render a verdict based upon the competent evidence duly admitted, and all of the jurors indicated that the jurors could follow the curative instructions. Kohler v. State, 300 Ga. App. 692, 686 S.E.2d 328 (2009) (decided under former O.C.G.A. § 24-9-83).

Curative instruction advising not to consider improper character evidence. — Trial court erred in admitting evidence of a prior conviction and defendant's involvement in other drug deals because the defendant offered no evidence in support of the entrapment defense and the state had no basis on which to admit the character evidence; however, the denial of the defendant's motion for mistrial was not an abuse of discretion in light of the overwhelming evidence of the defendant's guilt and a detailed curative instruction advising the jury not to consider the improperly-admitted evidence. Nettles v. State, 276 Ga. App. 259, 623 S.E.2d 140 (2005) (decided under former O.C.G.A. § 24-9-83).

Lack of convictions insufficient for charge. — Merely having no convictions or a clean record was insufficient for the defendant to invoke good character; consequently, the trial court did not err by refusing to give the defendant's requested charge. Godsey v. State, 271 Ga. App. 663, 610 S.E.2d 634 (2005) (decided under former O.C.G.A. § 24-9-83).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 362, 365 et seq., 663. 81 Am. Jur. 2d, Witnesses, §§ 215 et seq., 272 et seq., 286 et seq., 406 et seq., 423 et seq., 458 et seq., 487, 501, 505.

ALR. — Right to impeach accused as a witness by proof of general bad moral character or reputation, 90 ALR 870.

Instruction regarding good or bad character of witnesses as affecting their credibility, 120 ALR 1442.

Cross-examination of character witness for accused with reference to particular acts or crimes, 47 ALR2d 1258.

Impeachment of witness with respect to intoxication, 8 ALR3d 749.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Admissibility of testimony as to general reputation at place of employment, 82 ALR3d 525.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 ALR3d 1181.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than the accused, 97 ALR3d 967.

Admissibility of evidence of character of or reputation of party to civil action for sexual assault on issues other than impeachment, 100 ALR3d 569.

Conviction by court-martial as proper subject of cross-examination for impeachment purposes, 7 ALR4th 468.

Cross-examination of character witness for accused with reference to particular acts or crimes--modern state rules, 13 ALR4th 796.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case — modern state cases, 30 ALR4th 414.

Admissibility of impeached witness's prior consistent statement — modern state criminal cases, 58 ALR4th 985; 59 ALR4th 1000.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness — state cases, 58 ALR4th 1229.

Propriety of using prior conviction for drug dealing to impeach witness in criminal trial, 37 ALR5th 319.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence, 83 ALR5th 277.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule-nonviolent crimes, 84 ALR5th 487.

Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of the Federal Rules of Evidence, in civil cases, 171 ALR Fed. 483.

Impeachment of federal trial witness with respect to intoxication, 106 ALR Fed. 371.

24-6-609. Impeachment by evidence of conviction of a crime.

(a) **General rule.** For the purpose of attacking the character for truthfulness of a witness:

(1) Evidence that a witness other than an accused has been convicted of a crime shall be admitted subject to the provisions of Code Section 24-4-403 if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the accused; or

(2) Evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of such crime required proof or admission of an act of dishonesty or making a false statement.

(b) **Time limit.** Evidence of a conviction under this Code section shall not be admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for such conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old, as calculated in this subsection, shall not be admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such

evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Effect of pardon, annulment, certificate of rehabilitation, or discharge from a first offender program.** Evidence of a final adjudication of guilt and subsequent discharge under any first offender statute shall not be used to impeach any witness and evidence of a conviction shall not be admissible under this Code section if:

(1) The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year; or

(2) The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Nolo contendere pleas and juvenile adjudications.** A conviction based on a plea of nolo contendere shall not be admissible to impeach any witness under this Code section. Evidence of juvenile adjudications shall not generally be admissible under this Code section. The court may, however, in a criminal proceeding allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence of the accused.

(e) **Pendency of appeal.** The pendency of an appeal shall not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal shall be admissible. (Code 1981, § 24-6-609, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Use of child's disposition and evidence, § 15-11-79.1. Impeachment by evidence of a criminal conviction, Fed. R. Evid. 609.

Law reviews. — For annual survey on the death penalty, see 64 Mercer L. Rev. 109 (2012). For annual survey on evidence law, see 64 Mercer L. Rev. 137 (2012).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-84.1 are included in the annotations for this Code section.

Constitutionality. — Based on the slight probative value of over-age convictions, the fact that former O.C.G.A. § 24-9-84.1(b) permitted use of such convictions on a showing of specific facts and circumstances establishing the probative value of the particular conviction, and the fact that former § 24-9-84.1 did not preclude all inquiry on a subject with respect to which a defendant was entitled to a reasonable cross examination, former § 24-9-84.1 was not unconstitutional as a violation of the confrontation clause. Hinton v. State, 280 Ga. 811, 631 S.E.2d 365 (2006) (decided under former O.C.G.A. § 24-9-84.1).

Defendant's constitutional attack on former O.C.G.A. § 24-9-84.1(a)(2), which allowed impeachment of the defendant

with defendant's prior convictions if defendant chose to testify, was meritless. The constitutional right to testify did not carry with it a right to prohibit impeachment by prior convictions. Childs v. State, 287 Ga. 488, 696 S.E.2d 670 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Construction of former provisions. — Former O.C.G.A. § 24-9-84.1(a)(2), by the statute's own terms, applied to the admissibility of prior convictions for the purpose of impeaching a testifying defendant, and the statute did not apply when the prior conviction was admitted as a similar transaction for non-impeachment purposes because the analyses for each purpose were treated differently in case law; for example, when a conviction was admitted for impeachment, it was impermissible to use the prior conviction to show a criminal propensity or as substantive evidence of the offense at issue, and likewise, similar transactions were admissible not for impeachment but for the purpose of showing identity, motive, plan, scheme, bent of mind, and course of conduct. Robertson v. State, 306 Ga. App. 721, 703 S.E.2d 343 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Supreme Court of Georgia adopted the date the witness testified or the evidence of the prior conviction was introduced as the end point for determining whether a conviction fell within the ten-year limit prescribed by former O.C.G.A. § 24-9-84.1(b). Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Federal interpretation of balancing tests. — Looking for guidance from federal courts and state courts interpreting Fed. R. Evid. 609(b) or analogous state evidentiary rules regarding impeachment by convictions older than ten years, and citing the Eleventh Circuit opinion of United States v. Pritchard, 973 F.2d 905 (11th Cir. 1992), the Georgia Supreme Court adopted a five-factor analysis for weighing a prior conviction's probity regarding the accused's veracity against the prejudice to the accused: (1) the nature, i.e., impeachment value of the crime; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime, so that admitting the prior conviction does not create an unacceptable risk that the jury will consider that conviction as evidence that the defendant committed the crime for which the defendant is on trial; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Federal interpretation of ten year limitation. — In a matter of first impression, the Georgia Supreme Court looked to the decisions of federal courts in Trindle v. Sonat Marine, 697 F. Supp. 879 (E.D. Pa. 1988), and United States v. Cathey, 591 F.2d 268 (5th Cir. 1979), interpreting Fed. R. Evid. 609(b), in adopting the date that the witness testifies or that the evidence of the prior conviction is introduced as the end point for determining whether a conviction falls within the ten-year limit prescribed by former O.C.G.A. § 24-9-84.1(b). Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Balancing required. — Supreme Court of Georgia adopted the application of the following five factors in conducting the balancing required under former O.C.G.A. § 24-9-84.1(b): (1) the nature, i.e., impeachment value of the crime; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime, so that admitting the prior conviction did not create an unacceptable risk that the jury would consider it as evidence that the defendant committed the crime for which the defendant was on trial; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. While this list was not exhaustive and a trial court had the discretion to consider other factors as the court may deem appropriate in a particular case, these five factors outline the basic concerns relevant to the required balancing. Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012) (decided under former O.C.G.A. § 24-9-84.1).

On-the-record finding required. — Trial court must make an on-the-record finding of the specific facts and circumstances upon which the court relied in

determining that the probative value of a prior conviction that was more than ten years old substantially outweighed the prejudicial effect before admitting evidence of the conviction for impeachment purposes under former O.C.G.A. § 24-9-84.1(b). To the extent Treadwell v. State, 285 Ga. 736 (2009) and Wilkes v. State, 293 Ga. App. 724 (2008) could be interpreted to hold otherwise, those decisions were overruled. Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Redaction not required. — Neither case law nor former O.C.G.A. § 24-9-84.1(a)(2) required redaction of portions of a validly admitted felony conviction. Wilkes v. State, 293 Ga. App. 724, 667 S.E.2d 705 (2008), overruled on other grounds, Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Obstructing or hindering law enforcement officers. — In a parent's tort action arising from an accusation by store employees that the parent's child stole from the store, the trial court properly refused to strike evidence of an employee's conviction for violating O.C.G.A. § 16-10-24 by obstructing or hindering law enforcement officers submitted in the parent's motion for summary judgment response even though the conviction was not used to impeach the employee at the employee's deposition. The conviction could be used for impeachment at trial under former O.C.G.A. § 24-9-84.1(a)(1) because the violation was a felony punishable by imprisonment for not less than one nor more than five years and similarly may be submitted in the summary judgment motion even though it was not presented to the witness at the deposition. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Crimes involving dishonesty. — For impeachment purposes, crimes of "dishonesty" were limited to those crimes that bear upon a witness's propensity to testify truthfully; accordingly, misdemeanor theft by receiving stolen property was not a crime involving dishonesty within the meaning of former O.C.G.A. § 24-9-84.1(a)(3). Adams v. State, 284 Ga. App. 534, 644 S.E.2d 426 (2007) (decided under former O.C.G.A. § 24-9-84.1).

Federal interpretation of crimes of dishonesty. — Noting that the General Assembly, in enacting former O.C.G.A. 24-9-84.1(a)(2), had chosen to use the language of Fed. R. Evid. 609(a)(2), and citing the Eleventh Circuit precedent of United States v. Sellers, 906 F.2d 597 (11th Cir. 1990), and the Fifth Circuit precedent of United States v. Ashley, 569 F.2d 975 (1978), and other federal circuits construing Rule 609(a)(2), as well as some state appellate courts with evidence rules similar to Rule 609(a)(2), the Court of Appeals held that, for impeachment purposes, crimes of "dishonesty" are limited to those crimes that bear upon a witness's propensity to testify truthfully, and not to crimes such as misdemeanor theft by receiving stolen property or shoplifting. Adams v. State, 284 Ga. App. 534, 644 S.E.2d 426 (2007) (decided under former O.C.G.A. § 24-9-84.1).

Impeachment for conviction in civil tort action. — In an intentional tort action against a retailer and one of the retailer's employees, the employee could be impeached with a conviction under O.C.G.A. § 16-10-24 which occurred after that employee gave a deposition as the length of punishment that could be imposed thereunder satisfied the requirements of former O.C.G.A. § 24-9-84.1(a)(1) for impeachment with a conviction, and no other evidence was presented which prohibited the employee's impeachment. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008) (decided under former O.C.G.A. § 24-9-84.1); Chandler v. State, 281 Ga. 712, 642 S.E.2d 646 (2007) (decided under former O.C.G.A. § 24-9-84.1).

In a personal injury suit filed by a car driver against a truck driver, because the trial court erred by admitting evidence of the car driver's prior DUI charges and testimony by the investigating officer about charges filed against the car driver in traffic court, and by excluding an admission by the car driver's treating emer-

gency room physician, a new trial was ordered. Laukaitis v. Basadre, 287 Ga. App. 144, 650 S.E.2d 724 (2007) (decided under former O.C.G.A. § 24-9-84.1).

Convictions did not show dishonesty. — In a trial for aggravated assault, the trial court did not err in barring the defendant from introducing evidence about a third person's misdemeanor convictions for criminal trespass and family violence battery; the convictions did not involve dishonesty and did not support the defendant's self-defense theory as the third person remained behind as the defendant advanced on the victim. Fields v. State, 285 Ga. App. 345, 646 S.E.2d 326 (2007) (decided under former O.C.G.A. § 24-9-84.1).

Because defendant made no effort to show that the conviction defendant intended to use to impeach an accomplice who testified involved fraud or deceit, the trial court did not err in excluding that conviction for use for impeachment purposes under former O.C.G.A. § 24-9-84.1(a)(3). Clements v. State, 299 Ga. App. 561, 683 S.E.2d 127 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Conviction did not show fraud and deceit. — Because the defendant did not show that a misdemeanor shoplifting conviction involved fraud and deceit, the trial court properly refused to allow the defendant to use the conviction to impeach a witness under former O.C.G.A. § 24-9-84.1(a)(3). Martin v. State, 300 Ga. App. 39, 684 S.E.2d 111 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Indictment is not a conviction. — Trial court did not err by only allowing into evidence the certified convictions of the state's witness and by not allowing the indictments associated with those convictions to be admitted into evidence as well because the indictments should not have been admitted into evidence along with the witness's convictions; an indictment represented only accusations against a defendant, and was not in itself a conviction. Carter v. State, 289 Ga. 51, 709 S.E.2d 223 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Trial court must establish that it balanced use of defendant's prior conviction against risk of prejudice. — With regard to defendant's conviction for aggravated assault, which was reversed on appeal as a result of the trial court erring in recharging the jury on a question it asked, the appellate court was unable to determine whether the trial court engaged in any meaningful analysis of the relevant factors of the evidence of defendant's prior felony conviction for possession of cocaine or whether the trial court balanced the probative value against the prejudicial effect to the accused. In the event of retrial, the trial court was directed to balance the probative value of defendant's prior felony conviction against its prejudicial effect and to make a finding on the record as to whether the former substantially outweighed the latter, subject to appellate review for an abuse of discretion. Quiroz v. State, 291 Ga. App. 423, 662 S.E.2d 235 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Trial court failed to enter express findings on the record as to whether the probative value of a defendant's 1981 bail-jumping conviction substantially outweighed the conviction's prejudicial effect. If on remand, the trial court determined that the prior conviction was inadmissible after engaging in the balancing test required under former O.C.G.A. § 24-9-84.1(b), then a new trial was required. But, if the trial court determined that the prior conviction was admissible, a new trial was not mandated, subject to appellate review for an abuse of discretion. Robinson v. State, 312 Ga. App. 736, 719 S.E.2d 601 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Federal interpretation on defendant's failure to testify and impact upon utilization of prior conviction. — The Georgia Supreme Court turned to Luce v. United States, 469 U.S. 38, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984), and its progeny in holding that, by choosing not to testify at trial, defendant rendered the record inadequate for meaningful review of the preliminary ruling that defendant's prior conviction constituted impeachment evidence under former O.C.G.A. § 24-9-84.1; for the record to have been adequate for review, defendant had to testify, as even a proffer would be insuffi-

cient because defendant's trial testimony could differ. Because it was an issue of first impression, and recognizing that the language of former § 24-9-84.1 mirrors that of Rule 609(b) of the Federal Rules of Evidence and the statutes based on Rule 609(b) that have been enacted by several other states, it was proper to look for guidance to the judicial decisions of the federal courts construing Rule 609(b), and the courts of other states construing their statutes modeled on Rule 609(b), in interpreting that provision. Warbington v. State, 316 Ga. App. 614, 730 S.E.2d 90 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Balancing test applied during motion for new trial sufficient. — Trial court engaged in the required balancing test and made express findings in accordance with former O.C.G.A. § 24-9-84.1(a)(2), which supported the admission of a defendant's prior conviction for enticing a child for indecent purposes in an aggravated assault trial. The statute was satisfied even though these findings were not made until the hearing on the defendant's motion for new trial. Carter v. State, 303 Ga. App. 142, 692 S.E.2d 753 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Remand required to address admissibility of prior convictions. — There was sufficient evidence to support a defendant's conviction for manufacturing methamphetamine as it was for the jury to reject the defendant's defense that others had equal access to the contraband found in the defendant's home and vehicle. However, the conviction was conditionally affirmed and the case was remanded to the trial court for the court to set forth an express ruling on the record as to whether the probative value of the evidence of the defendant's prior conviction substantially outweighed the prejudicial effect of the evidence as the record failed to contain any such findings. Miller v. State, 298 Ga. App. 792, 681 S.E.2d 225 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Prior convictions properly admitted for both impeachment and sentencing purposes. — Trial court properly admitted certified copies of the defendant's two prior convictions of aggravated assault and possession of a firearm during the commission of a felony as: (1) it carefully balanced the competing interests; (2) the prior offenses had a substantial probative value which outweighed their prejudicial effect; and (3) nothing prevented the use of a defendant's convictions for both impeachment and sentencing purposes. Moreover, the court rejected the defendant's claim that by adding the word "substantially" to the balancing test, the Georgia legislature meant to incorporate the standard for admissibility embodied in Fed. R. Evid. 609(b). Newsome v. State, 289 Ga. App. 590, 657 S.E.2d 540 (2008), cert. denied, No. S08C1042, 2008 Ga. LEXIS 494 (Ga. 2008) (decided under former O.C.G.A. § 24-9-84.1).

Federal interpretation of balancing for admissibility of previous conviction. — Citing the Eleventh Circuit holding construing Fed. R. Evid. 609(a)(2) in United States v. Chilcote, 724 F2d 1498 (11th Cir. 1984), the Georgia Court of Appeals held that, under former O.C.G.A. § 24-9-84.1(a)(2), when evaluating the admissibility of a prior conviction, the trial court's balancing properly focused on whether the previous conviction indicated a probable lack of veracity for purposes of impeaching the defendant's credibility rather than a propensity to commit the crime of which the defendant was charged. Tate v. State, 289 Ga. App. 479, 657 S.E.2d 531 (2008), cert. denied, No. S08C0986, 2008 Ga. LEXIS 386 (Ga. 2008) (decided under former O.C.G.A. § 24-9-84.1).

Because the language of former O.C.G.A. § 24-9-84.1(b) mirrors that of Fed. R. Evid. 609(b) and the statutes based on Rule 609(b) that have been enacted by several other states, in determining the end point for the 10-year period specified in former § 24-9-84.1(b), requiring a stricter balancing test for the admission of prior convictions older than ten years for impeachment purposes, it is proper to look for guidance to the judicial decisions of the federal courts construing Rule 609(b) and the courts of sister states construing their statutes modeled on Rule 609(b) in interpreting that provision. Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Prior conviction properly admitted to impeach defendant's credibility. — Trial court did not err in admitting evidence of the defendant's 1993 interference with government property conviction; a new trial was properly denied because the evidence was properly admitted, not as substantive evidence of the offense at issue, but only as to the issue of credibility, providing support for the admission of the evidence. Tate v. State, 289 Ga. App. 479, 657 S.E.2d 531 (2008), cert. denied, No. S08C0986, 2008 Ga. LEXIS 386 (Ga. 2008) (decided under former O.C.G.A. § 24-9-84.1).

In a prosecution for entering an automobile with the intent to commit theft, the trial court allowed the state to impeach the defendant's testimony with evidence of a burglary conviction that was over 10 years old. Admission of this evidence did not violate former O.C.G.A. § 24-9-84.1 as the defendant testified on direct examination about the sentence the defendant served for that crime. Love v. State, 293 Ga. App. 499, 667 S.E.2d 656 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Given that a defendant's defense to charges of burglary and criminal trespass was that the defendant believed the defendant had permission to remove a television and DVD player from an apartment, the trial court did not abuse the court's discretion in admitting two prior convictions for burglary and attempted burglary, which indicated a probable lack of veracity by the defendant. Love v. State, 302 Ga. App. 106, 690 S.E.2d 246 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Trial court did not err in admitting the defendant's prior felony conviction because the court did not abuse the court's discretion in concluding that the probative value of admitting the evidence substantially outweighed its prejudicial effect since the prior conviction's probative value went to the defendant's credibility and the likelihood or not that someone convicted of a felony would disregard the duty to testify truthfully; the trial court instructed the jury that the prior felony conviction was to be considered only for impeachment purposes, and, because the defendant testified and denied knowledge that the co-defendant had a gun, the defendant's credibility was highly relevant to the jury's decision. Cobb v. State, 302 Ga. App. 821, 692 S.E.2d 65 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Defendant failed to show that the trial court abused the court's discretion in admitting the defendant's prior conviction for burglary, O.C.G.A. § 16-7-1(a), as impeachment evidence under former O.C.G.A. § 24-9-84.1 because the defendant's credibility as to intent was highly relevant to the jury's decision; observing that both the charged offense and the burglary offense for which the defendant was previously convicted involved an intent to commit a theft, the trial court found that the defendant's burglary conviction had sufficient probative value for the purpose of impeachment on whether the defendant intended to commit the charged theft and that the probative value of the burglary conviction substantially outweighed the conviction's prejudicial effect. Hopkins v. State, 309 Ga. App. 298, 709 S.E.2d 873 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Defendant's prior convictions for felony forgery, O.C.G.A. § 16-9-1(a), misdemeanor theft by deception, O.C.G.A. § 16-8-3(a), and misdemeanor giving a false name to a law enforcement officer, O.C.G.A. § 16-10-25, were all less than 10 years old and involved dishonesty or false statements. Therefore, those convictions were admissible in the defendant's child molestation trial under former O.C.G.A. § 24-9-84.1(b). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011) (decided under former O.C.G.A. § 24-9-84.1).

In a forgery prosecution, the trial court properly admitted for impeachment purposes the defendant's prior conviction for felony cocaine possession as the court correctly applied the standard set forth in former O.C.G.A. § 24-9-84.1(a)(2) and expressly found that the probative value of the prior conviction substantially outweighed the prejudicial effect. Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597 (2011), cert. denied, No. S11C1861, 2011 Ga. LEXIS 985 (Ga. 2011) (decided under former O.C.G.A. § 24-9-84.1).

Trial court did not err in admitting the defendant's prior felony convictions to im-

peach the defendant pursuant to former O.C.G.A. § 24-9-84.1(a)(2) because the trial court conducted the proper balancing test when the court admitted the prior felony convictions, and the trial court did not abuse the court's discretion in determining that the probative value of evidence of the prior convictions substantially outweighed their prejudicial effect; former § 24-9-84.1(a)(2), which applied to prior felony convictions, did not require that the crimes involve dishonesty or making a false statement. Hogues v. State, 313 Ga. App. 717, 722 S.E.2d 430 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Admission of evidence of the defendant's prior aggravated assault conviction for impeachment purposes was not erroneous as the defendant's credibility was under attack by the state since the defendant claimed that the defendant was justified in the shooting death of the victim. Jones v. State, 318 Ga. App. 105, 733 S.E.2d 407 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Prior conviction improperly admitted. — No independent ground pursuant to the impeachment rules of former O.C.G.A. § 24-9-84.1(a)(2) authorized the introduction of evidence that the defendant was previously convicted of aggravated assault since defendant did not testify. Furthermore, the statements regarding defendant's criminal record were inherently prejudicial, and, as a result of the admission of those statements, defendant's convictions had to be reversed. Pelowski v. State, 306 Ga. App. 41, 701 S.E.2d 529 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Erroneous admission of prior conviction harmless. — While the appellate court was unable to determine whether the trial court engaged in any meaningful analysis of the relevant factors or balanced the probative value of the admission of the defendant's prior burglary conviction against the prejudicial effect to the defendant, any error was harmless because there was no reasonable probability that the results of the trial would have differed if the evidence of the defendant's burglary conviction had been excluded given that the defendant's DNA was obtained from blood on a screwdriver inside the victim's home and the broken window in the victim's bedroom. Crosby v. State, 319 Ga. App. 459, 735 S.E.2d 588 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Prior convictions admitted when defendant placed character in evidence. — Trial court properly admitted impeachment evidence of the defendant's convictions of vehicular homicide that were over 10 years old. Defendant's testimony regarding the defendant's charitable activities resulted in the defendant's placing the defendant's character into issue. McNabb v. State, 292 Ga. App. 395, 664 S.E.2d 800 (2008), cert. denied, No. S08C1910, 2008 Ga. LEXIS 927 (Ga. 2008) (decided under former O.C.G.A. § 24-9-84.1).

Prior conviction properly admitted. — Defendant impeached a plumbing contractor's testimony to the fullest extent allowed by former O.C.G.A. § 24-9-84.1 by introducing and reading into the record a certified copy of the felony conviction of the witness. LN West Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Trial court did not abuse the court's discretion in allowing the state to introduce evidence of the defendant's prior aggravated assault conviction under former O.C.G.A. § 24-9-84.1 because the trial court specifically addressed the relevant factors including the kind of felony involved, the date of the conviction, and the importance of the witness's credibility and properly considered the specific facts and circumstances of the defendant's prior aggravated assault conviction, as required by former § 24-9-84.1(b), before concluding that the probative value of evidence of the conviction substantially outweighed the evidence's prejudicial effect; the former statute itself contained no distinction between defendants and witnesses when more than ten years had passed since the applicable conviction or release. Dozier v. State, 311 Ga. App. 713, 716 S.E.2d 802 (2011), overruled on other grounds, Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Defendant failed to prove that defense counsel was ineffective for failing to ask an inmate witness about the witness's numerous prior convictions because the record showed that the defendant's lawyer did ask the inmate about convictions that were not too old to be admitted pursuant to former O.C.G.A. § 24-9-84.1 and the defendant did not come forward with any legal theory under which the remaining convictions about which the defendant's lawyer did not ask would have been admissible. Sears v. State, 292 Ga. 64, 734 S.E.2d 345 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Trial court did not err in refusing to allow the defendant to impeach a state's witness with a prior drug conviction that was over 10 years old and was not relevant to the witness's capacity as an eyewitness to an automobile accident. Smith v. State, 319 Ga. App. 164, 735 S.E.2d 153 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Failure to apply balancing test was harmless error. — During a defendant's trial for obstruction of a police officer and other related crimes, a trial court erred by failing to consider the balancing test required under former O.C.G.A. § 24-9-84.1(a)(1) with regard to allowing the state to impeach all of the defendant's defense witnesses with prior convictions, However, the error was harmless since the convictions involved moral turpitude and were admissible regardless. Whatley v. State, 296 Ga. App. 72, 673 S.E.2d 510 (2009) (decided under former O.C.G.A. § 24-9-84.1).

No duty to conduct balancing test absent objection. — Absent an objection by the defendant, the trial court had no duty to conduct the balancing test of former O.C.G.A. § 24-9-84.1(a)(1) sua sponte. Moreover, since the jury was authorized to believe the testimony of officers over that of the witnesses in question, there was no reasonable probability that the verdict would have been different had the trial court conducted the balancing test. Thomas v. State, 291 Ga. App. 795, 662 S.E.2d 849 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Listing specific factors considered in weighing probative value of prior conviction against risk of prejudice not required. — While under former O.C.G.A. § 24-9-84.1(a)(2), a trial court must make an on-the-record finding that the probative value of admitting a prior conviction substantially outweighed its prejudicial effect, there was no requirement in the language of former § 24-9-84.1(a)(2) that the trial court must list the specific factors the court considered in ruling on the probity of convictions that were not more than ten years old. To the extent that Abercrombie v. State, 297 Ga. App. 522 (2009), and Dozier v. State, 311 Ga. App. 713 (2011), hold otherwise, those cases are overruled. Clay v. State, 290 Ga. 822, 725 S.E.2d 260 (2012) (decided under former O.C.G.A. § 24-9-84.1).

Prior conviction of witness properly excluded. — In convictions of child molestation, aggravated child molestation, and aggravated sexual battery, a trial court properly excluded for impeachment purposes prior convictions of a motel clerk, who testified that the clerk recalled renting a room to defendant and the victim, since the prior convictions were more than 10 years old. Woods v. State, 304 Ga. App. 403, 696 S.E.2d 411 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Credibility determination for trier of fact. — Evidence was sufficient to support the defendant's conviction for forgery because whatever purported inconsistencies could have existed in a witness's testimony were for the finder of fact to weigh and pass upon, and the trial court found that although the witness was not the most credible of witnesses, the witness's testimony was an inculpatory statement against the witness's penal interests, and there was no reason not to believe the testimony; the trial court considered the validity of the witness's testimony in light of the impeaching evidence, and it was not within the purview of the court of appeals to upset that judgment. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Questioning defendant about convictions allowed. — Trial court did not err by denying defendant's motion in limine, which sought to prevent the state, for the purpose of impeachment, from

questioning defendant, if defendant testified at trial, regarding defendant's prior convictions for burglary, statutory rape, and failure to register as a sex offender as former O.C.G.A. § 24-9-84.1 specifically applied to the situation and permitted the questioning regarding defendant's prior convictions. Whitaker v. State, 283 Ga. 521, 661 S.E.2d 557 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Probation did not qualify as confinement. — Trial court did not err when the court declined to permit the defendant to impeach a witness under former O.C.G.A. § 24-9-84.1 with prior convictions because more than ten years had elapsed since the witness was released from the confinement resulting from the convictions, and defense counsel did not provide specific facts and circumstances demonstrating that the probative value of the convictions outweighed their prejudicial effect; probation did not qualify as confinement under former § 24-9-84.1(b), and the legislature distinguished "confinement" from release on parole and suspended and probated sentences. Allen v. State, 286 Ga. 392, 687 S.E.2d 799 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Federal interpretation of confinement. — Because former O.C.G.A. § 24-9-84.1 does not define 'confinement', and the Georgia appellate courts had not had the opportunity to construe that portion of the statute, and because the language of former § 24-9-84.1(b) mirrors that of Rule 609(b) of the Federal Rules of Evidence and the statutes based on Rule 609 (b) that have been enacted by several other states, the Georgia Supreme Court cited United States v. Rogers, 542 F.3d 197 (7th Cir. 2008), United States v. Lorenzo, 43 F.3d 1303 (9th Cir. 1995), United States v. Lopez, 979 F.2d 1024 (5th Cir. 1992), and the courts of states that have enacted statutes modeled on Rule 609(b) and that have followed the lead of the federal courts in holding that 'confinement' does not include that portion of a sentence served while on probation or parole, in concluding that probation does not qualify as confinement under former § 24-9-84.1(b). Allen v. State, 286 Ga. 392, 687 S.E.2d 799 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Notice to the state was insufficient. — There was no error in refusing to admit a victim's prior conviction for purposes of impeachment because under the circumstances, which included very little, if any, "advance" notification and the state's claim that the state did not have time to prepare, the trial court did not abuse the court's discretion in finding that the notice to the state was not sufficient when the defendant's counsel served the state with the notice of intent to introduce the victim's conviction the day after the jury had been selected but before the presentation of evidence to the jury; given the lack of any facts and circumstances, absent speculation, that illegal drugs were involved in the altercation at issue, the trial court did not abuse the court's discretion in determining that irrespective of the timeliness of the notice, the prejudicial effect of the victim's prior conviction outweighed any probative value and that the evidence of the conviction was therefore inadmissible. Crowder v. State, 305 Ga. App. 647, 700 S.E.2d 642 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Effective assistance of counsel. — Defense counsel did not perform deficiently when defense counsel failed to make a meritless objection to the evidence of defendant's conviction for giving false information that was less than 10 years old because former O.C.G.A. § 24-9-84.1(a)(3) and (b) authorized the admission of convictions 10 years old or less for crimes involving dishonesty or making a false statement, and the trial court did not have to weigh the probative value of the old conviction against the prejudicial effect since the conviction at issue was less than 10 years old. Habersham v. State, 289 Ga. App. 718, 658 S.E.2d 253 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Defense counsel's failure to object or move for a mistrial based on the state's introduction of evidence relating to a witness's misconduct that fell short of a conviction was not ineffective assistance under circumstances in which counsel's decisions not to object to the state's pursuit of the topic of the witness's misdemeanor driving violations, and to attempt to rehabilitate the defendant by showing

the minor nature of one of the violations, were objectively reasonable. Defense counsel could not have been faulted for failing to complete the state's work for it, or for declining to highlight any of this testimony. Noellien v. State, 298 Ga. App. 47, 679 S.E.2d 75 (2009) (decided under former O.C.G.A. § 24-9-84.1).

With regard to a defendant's conviction for aggravated assault, although the prosecutor was impermissibly permitted to impeach a defense witness by asking the witness about a recent guilty plea to two counts of theft by taking, which was not a felony or a crime which involved dishonesty or making a false statement, the defendant failed to establish that defense counsel's failure to object rendered defense counsel ineffective. At the hearing on the defendant's motion for a new trial, defense counsel was not questioned on whether the failure to object was strategic and, given the overwhelming evidence of the defendant's guilt, the defendant failed to show that there was a reasonable probability that the verdict would have been different if defense counsel had objected. Jacobs v. State, 299 Ga. App. 368, 683 S.E.2d 64 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Defendant failed to establish that the defendant received ineffective assistance of trial counsel due to counsel's failure to provide the state with written notice of the defendant's intent to use evidence of a witness's prior conviction for impeachment purposes pursuant to former O.C.G.A. § 24-9-84.1(b) because even if the conviction had been admitted and the jury had disregarded the witness's testimony, there remained evidence sufficient to convict the defendant; the witness's trial testimony conflicted with the witness's prior statements, and the witness admitted on the stand being a crack dealer. Lanier v. State, 288 Ga. 109, 702 S.E.2d 141 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Defendant did not show a reasonable probability that the trial would have ended differently if trial counsel had uncovered all the details about the victim's first offender plea and cross-examined the victim about the victim's possible bias toward the state because five witnesses separately testified that the defendant assaulted the victims with a gun; thus, even if the jury decided to completely disregard the victim's testimony based on successful cross-examination, the testimony of four other eyewitnesses remained. Strong v. State, 308 Ga. App. 558, 707 S.E.2d 914 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Trial court's conclusion that trial counsel's failure to obtain certified copies of the victim's prior felony convictions and first offender plea, which the defendant asserted would have been admissible to impeach the victim and show bias under former O.C.G.A. § 24-9-84.1, did not constitute ineffective assistance was not clearly erroneous because counsel made a strategic decision not to expend the limited resources of the office to obtain the certified copies, choosing instead to focus on other avenues of defense. Strong v. State, 308 Ga. App. 558, 707 S.E.2d 914 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Trial counsel did not erroneously fail to impeach a state's witness under former O.C.G.A. § 24-9-84.1(a)(3) with evidence of the witness's prior misdemeanor convictions for theft by receiving stolen property and theft by taking because the defendant failed to show that the theft convictions would have been admitted for impeachment purposes at trial; the evidence the defendant presented at the motion for new trial hearing did not show that the misdemeanor theft convictions involved fraud or deceit within the meaning of former § 24-9-84.1(a)(3). Boatright v. State, 308 Ga. App. 266, 707 S.E.2d 158 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Trial counsel was not ineffective for failing to impeach the victim with felony convictions under former O.C.G.A. § 24-9-84.1 because the defendant did not show that, but for counsel's failure to introduce the victim's earlier convictions, there was a reasonable probability that the outcome of the trial would have been different; the victim was referred to as "not trustworthy" and "a thief" during the trial, and the victim's conviction for burglary was admitted and referenced repeatedly during the trial. Askew v. State, 310 Ga. App. 746, 713 S.E.2d 925 (2011)

(decided under former O.C.G.A. § 24-9-84.1).

Trial counsel was not ineffective for failing to object when the prosecuting attorney offered certified copies of the defendant's prior felony conviction to impeach the defendant's testimony under former O.C.G.A. § 24-9-84.1(a) because the trial court properly could have concluded that the probative value of the conviction substantially outweighed any prejudicial effect so the failure to object was not unreasonable; the prior conviction was recent, probative of the defendant's credibility as a testifying witness, and involved conduct dissimilar to the burglary for which the defendant was on trial. Robinson v. State, 312 Ga. App. 110, 717 S.E.2d 694 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Counsel not ineffective. — While trial counsel might have been deficient by failing to contend that the probative value of admitting the defendant's prior convictions for impeachment purposes did not substantially outweigh the prejudicial effect of the evidence, given that the defendant failed to show prejudice, this claim failed. Miller v. State, 283 Ga. 412, 658 S.E.2d 765 (2008) (decided under former O.C.G.A. § 24-9-84.1).

Defense counsel properly advised a defendant in the defendant's prosecution for, inter alia, malice murder that, if the defendant testified at trial, the state could attempt to introduce prior convictions into evidence as the state was permitted to do so under former O.C.G.A. § 24-9-84.1(a)(2), even if the defendant's character was not placed in issue, so long as the probative value of admitting the evidence substantially outweighed the prejudicial effect of the evidence. Brooks v. State, 285 Ga. 246, 674 S.E.2d 871 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Defendant failed to demonstrate ineffective assistance of counsel in the defendant's prosecution for, inter alia, robbery by force because it was a reasonable strategy to agree to the admission under former O.C.G.A. § 24-9-84.1(b) of a prior 1992 Texas conviction for possession of cocaine, even though the conviction was over 10 years old, as the defendant testified on the defendant's own behalf and wanted to put it all out there. Everett v. State, 297 Ga. App. 351, 677 S.E.2d 394 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Limiting instruction on prior convictions not required. — In a defendant's prosecution for malice murder and armed robbery, the trial court did not err in failing to instruct the jury without request that the jurors limit their consideration of the defendant's prior convictions to the purpose of impeachment only under former O.C.G.A. § 24-9-84.1(a) as information regarding the defendant's prior convictions was not obtained in violation of the defendant's constitutional rights against self-incrimination under U.S. Const., amend. 5. Phillips v. State, 285 Ga. 213, 675 S.E.2d 1 (2009) (decided under former O.C.G.A. § 24-9-84.1).

Jury charge not required if impeached witness was not primary witness. — Trial court did not err in refusing a defendant's requested charge on impeachment of an accomplice witness by proof of a crime of moral turpitude pursuant to former O.C.G.A. § 24-9-84.1(a)(1), although an instruction on impeachment by proof of a prior conviction was warranted. Any failure to give such an instruction was harmless because the witnesses were not "primary" witnesses; the defendant was the primary witness. Stewart v. State, 286 Ga. 669, 690 S.E.2d 811 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Issue waived on appeal. — Defendant waived for purposes of appeal defendant's claim that the defendant did not have to provide advance written notice to the state of defendant's intent to introduce the victim's prior conviction to impeach the victim since the conviction was not more than ten years old for purposes of former O.C.G.A. § 24-9-84.1 because the defendant's trial counsel did not present that argument to the trial court but told the trial court that the defendant filed the notice of intent for the reason that the conviction was more than ten years in age; counsel then argued that defendant's advance written notice to the state was sufficient, but the defendant did not argue that the notice did not need to be given

under former § 24-9-84.1(b), and in light of trial counsel's actions, the defendant could not claim on appeal that the trial court erred in considering the sufficiency of the advance notice to the state for purposes of former § 24-9-84.1(b). Crowder v. State, 305 Ga. App. 647, 700 S.E.2d 642 (2010) (decided under former O.C.G.A. § 24-9-84.1).

Supreme court was precluded from reviewing on appeal the defendant's claim that the trial court violated former O.C.G.A. § 24-9-84.1 by admitting into evidence the defendant's prior convictions for drug offenses and by failing to enter express findings in the record because although the defendant testified and admitted the drug convictions on direct examination, the record did not contain any previous motion in limine, objection, hearing, or ruling regarding the admissibility of those prior convictions; those omissions were not cured by trial counsel's testimony that, although counsel was not looking at the transcripts and was speaking strictly from memory, counsel had been under the impression that the prior convictions would come in, and even if the defendant had previously moved for exclusion of the prior convictions and a hearing had been held, the absence of any ruling on the record would take the case out of the usual rule that the record was preserved and the defendant was not required to object to the evidence during trial. Collier v. State, 288 Ga. 756, 707 S.E.2d 102 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Defendant could not claim on appeal that the trial court erred in considering the sufficiency of the advance notice to the state for purposes of former O.C.G.A. § 24-9-84.1(b) because the trial court held that evidence of the victim's three older convictions was inadmissible since the convictions were more than ten years old, and the defendant had not provided written notice within ten days of trial; no objection was made to the trial court's ruling, and the defendant did not at any point argue that the convictions were less than ten years old. Askew v. State, 310 Ga. App. 746, 713 S.E.2d 925 (2011) (decided under former O.C.G.A. § 24-9-84.1).

Cited in Buchanan v. State of Ga., 319 Ga. App. 525, 737 S.E.2d 321 (2013).

24-6-610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion shall not be admissible for the purpose of proving that by reason of the nature of the beliefs or opinions the witness's credibility is impaired or enhanced. (Code 1981, § 24-6-610, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Religious beliefs or opinions, Fed. R. Evid. 610.

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5268 and former Code 1933, § 38-1602 are included in the annotations for this Code section.

Belief in supreme being. — Although desirable, it was not essential to the witness's competency that the witness believe in a supreme being, or that the witness be aware of God's existence. Smith v. State, 247 Ga. 511, 277 S.E.2d 53 (1981) (decided under former Code 1933, § 38-1602).

Individual acts of witness. — It was not competent to take up individual acts of a witness and inquire of the witness as to the significance of such acts when viewed from a religious standpoint. Otherwise, practically every act of a man's life

might be taken up and examined into. Eugee v. State, 159 Ga. 604, 126 S.E. 471 (1925) (decided under former Civil Code 1910, § 5268).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 162.

C.J.S. — 98 C.J.S. (Rev), Witnesses, § 191 et seq.

ALR. — Propriety and prejudicial effect of impeaching witness by reference to religious belief or lack of it, 76 ALR3d 539.

24-6-611. Mode and order of witness interrogation and presentation.

(a) The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(b) A witness may be cross-examined on any matter relevant to any issue in the proceeding. The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against the party. If several parties to the same proceeding have distinct interests, each party may exercise the right to cross-examination.

(c) Leading questions shall not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions shall be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. (Code 1981, § 24-6-611, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Cross-examination of defendant at pretrial proceedings, § 17-7-28. Privilege against self-incrimination and testimony of an accused in a criminal case, § 24-5-506. Mode and order of examining witnesses and presenting evidence, Fed. R. Evid. 611.

Law reviews. — For article, "The Right of Confrontation: Its History and Modern Dress," see 8 J. of Pub. L. 381 (1959). For article discussing cross-examination techniques, see 16 Ga. St. B.J. 117 (1980). For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

For note, "Impeachment of One's Own Witness in Georgia," see 9 Ga. St. B.J. 355 (1973). For note discussing party's right to impeach own witness in light of Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975), see 28 Mercer L. Rev. 389 (1976).

For comment on Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955), holding that a defendant has the right to cross-examine all witnesses called against him in all material matters, including the past conduct of the prosecutrix in an action for

rape, see 19 Ga. B.J. 95 (1956). For comment discussing the use of treatises in cross-examining an expert, in light of Hopkins v. Gromovsky, 198 Va. 389, 94 S.E.2d 190 (1956), see 20 Ga. B.J. 109 (1957). For comment on Bacon v. State, 222 Ga. 151, 149 S.E.2d 111 (1966), see 18 Mercer L. Rev. 506 (1967). For comment on Smith v. State, 225 Ga. 328, 168 S.E.2d 587 (1969) and the right to probe relationship of a witness to a party, see 21 Mercer L. Rev. 347 (1969). For comment on Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448 (1968), see 5 Ga. St. B.J. 377 (1969). For comment on Smith v. State, 225 Ga. 328, 168 S.E.2d 587 (1969), see 6 Ga. St. B.J. 294 (1970). For comment on Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974), appearing below, see 8 Ga. L. Rev. 973 (1974).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Code 1873, §§ 3864, 3865, 3869, former Code 1882, §§ 3864, 3865, 3869, former Ga. L. 1890-91, p. 78, § 1, former Civil Code 1895, §§ 5281, 5282, 5283, 5290, former Penal Code 1895, §§ 1018, 1019, 1024, former Civil Code 1910, §§ 5870, 5871, 5872, 5879, former Penal Code 1910, §§ 1044, 1045, 1050, former Code 1933, §§ 38-1704, 38-1705, 38-1706, 38-1801, and former O.C.G.A. §§ 24-9-62, 24-9-63, 24-9-64, 24-9-81 are included in the annotations for this Code section.

Balancing witness interest with right to cross examine. — Right of a witness to be protected from improper questioning must be balanced against the right of parties to a thorough and sifting cross-examination. White v. Knapp, 31 Ga. App. 344, 120 S.E. 796 (1923) (decided under former Civil Code 1910, § 5870); Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130 (1931) (decided under former Civil Code 1910, § 5870); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-1704); Thomas v. State, 85 Ga. App. 868, 70 S.E.2d 131 (1952) (decided under former Code 1933, § 38-1704); Cochran v. Neely, 123 Ga. App. 500, 181 S.E.2d 511 (1971)

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(decided under former Code 1933, § 38-1704); Wanzer v. State, 232 Ga. 523, 207 S.E.2d 466 (1974) (decided under former Code 1933, § 38-1704); Crawford v. State, 144 Ga. App. 622, 241 S.E.2d 492 (1978), overruled on other grounds, Stephens v. State, 245 Ga. 835, 268 S.E.2d 330 (1980) (decided under former Code 1933, § 38-1704).

Witness's rights must be balanced with the party's right to a thorough and sifting cross-examination. Carco Supply Co. v. Clem, 194 Ga. App. 566, 391 S.E.2d 134 (1990) (decided under former O.C.G.A. §§ 24-9-62 and 24-9-64); Palmer v. Taylor, 215 Ga. App. 546, 451 S.E.2d 486 (1994) (decided under former O.C.G.A. §§ 24-9-62 and 24-9-64).

Failure to charge former statute was not error in absence of a timely written request. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

Cross Examination

Purpose of cross-examination is to provide a searching test of the intelligence, memory, accuracy, and veracity of the witness, and it is better for cross-examination to be too free than too restricted. Carroll v. Hill, 80 Ga. App. 576, 56 S.E.2d 821 (1949) (decided under former Code 1933, § 38-1705); Russell v. Bass, 82 Ga. App. 659, 62 S.E.2d 456 (1950) (decided under former Code 1933, § 38-1705); Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832 (1952) (decided under former Code 1933, § 38-1705); Ledford v. State, 89 Ga. App. 683, 80 S.E.2d 828 (1954) (decided under former Code 1933, § 38-1705).

General rule favors freedom. — As a general rule, it is better that cross-examination should be too free than too restricted. Cochran v. Neely, 123 Ga. App. 500, 181 S.E.2d 511 (1971) (decided under former Code 1933, § 38-1704).

Exposure of blundering witness. — There must be allowed some degree of skill, if not sharpness, in conducting cross-examinations because a witness, however fair and honest and truthful, may not be careful enough; and it is to the interest of justice to expose the blundering of a witness, as well as the witness's willful departures from veracity. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-1705).

Exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Hines v. State, 249 Ga. 257, 290 S.E.2d 911 (1982) (decided under former O.C.G.A. § 24-9-64).

State's right to cross-examine. — State, like any other party, has the right to conduct a thorough and sifting cross-examination of a witness. Gentry v. State, 226 Ga. App. 216, 485 S.E.2d 824 (1997) (decided under former O.C.G.A. § 24-9-64).

More than one party examining witness. — Appellate court will not interfere with the action of the trial judge in allowing "double" or "multiple" cross-examination of witnesses, particularly in a situation involving more than two parties, absent a showing of manifest abuse of discretion. Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972) (decided under former Code 1933, § 38-1705).

Second sentence, applicable in cases when there is more than one party on one side, requires only that those parties have "distinct interests," not necessarily opposing interests. Lavender v. Wilkins, 237 Ga. 510, 228 S.E.2d 888 (1976) (decided under former Code 1933, § 38-1705).

Depositions. — When a witness is examined by commission, the party cross-examining may withdraw the party's cross questions if the party chooses — the other party having the liberty to read them at that party's option. Williams v. C. & G.H. Kelsey & Halsted, 6 Ga. 365 (1849) (decided under former law).

Prior thorough cross-examination of a witness unavailable at a trial. — When the preliminary hearing testimony of an unavailable witness is subject to extensive cross-examination, its admission at trial does not abridge the defendant's right of cross-examination. Moody v. State, 273 Ga. 24, 537 S.E.2d 666 (2000) (decided under former O.C.G.A. § 24-9-64).

Ex parte affidavits should not be allowed in evidence in any trial since the evidence is finally adjudicated because admission denies the privilege of cross-examination. Camp v. Camp, 213 Ga. 65, 97 S.E.2d 125 (1957) (decided under former Code 1933, § 38-1705); Hunsucker v. Balkcom, 220 Ga. 73, 137 S.E.2d 43 (1964) (decided under former Code 1933, § 38-1705); Hartley v. Caldwell, 233 Ga. 333, 155 S.E.2d 389 (1967) (decided under former Code 1933, § 38-1705).

Records in regular course of business. — Trial courts of the state may not consider reports of the welfare departments of the counties in the trial of a case involving the custody of minors, and it is reversible error to consider such matter. Rather, the person or persons who made the investigation should be produced in court and submitted to cross-examination. Camp v. Camp, 213 Ga. 65, 97 S.E.2d 125 (1957) (decided under former Code 1933, § 38-1705).

Ga. L. 1952, p. 177, §§ 1-3 (see now O.C.G.A. § 24-8-803) did not authorize the admission of a written record without cross-examination of the author under former Code 1933, § 38-1705. Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370 (1957) (decided under former Code 1933, § 38-1705).

Former statute set forth the right of every party to cross-examination, thorough and sifting, of the witnesses called against that party, and a trial court's consideration of an ex parte report submitted by a psychiatrist of the psychiatrist's evaluation of defendant denied the defendant of this right. Rudd v. State, 150 Ga. App. 255, 257 S.E.2d 348 (1979) (decided under former Code 1933, § 38-1705).

Interrogatory procedure wherein a plaintiff propounded interrogatories to be answered by the plaintiff, with both the defendant and defendant's counsel excluded, thus denying the defendant the right to cross-examination, is wholly void. Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1961), overruled on other grounds, Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982) (decided under former Code 1933, § 38-1705).

Assignment of error. — Rule that a party who complains of the rejection of oral testimony must show that the court was informed as to what the witness would answer does not apply to cross-examination. Macon Union Coop. Ass'n v. Chance, 31 Ga. App. 636, 122 S.E. 66 (1924) (decided under former Civil Code 1910, § 5871); City of La Grange v. Pound, 50 Ga. App. 219, 177 S.E. 762 (1934) (decided under former Code 1933, § 38-1705); McKoy v. Enterkin, 181 Ga. 447, 182 S.E. 518 (1935) (decided under former Code 1933, § 38-1705); Harrison v. Regents of Univ. Sys., 99 Ga. App. 762, 109 S.E.2d 854 (1959) (decided under former Code 1933, § 38-1705); Cambron v. Canal Ins. Co., 246 Ga. 147, 269 S.E.2d 426 (1980) (decided under former Code 1933, § 38-1705).

State's cross-examination of defendant's spouse does not put the defendant's character in evidence. There is no prejudice to the defendant arising from such cross-examination; thus, no rebuke of the district attorney, instruction of the jury, or mistrial is required. Beasley v. State, 168 Ga. App. 255, 308 S.E.2d 560 (1983) (decided under former O.C.G.A. § 24-9-64).

Allowing witness not within purview of former statute to be called for purposes of cross-examination was harmful error. Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448 (1968) (decided under former Code 1933, § 38-1801); Jackson v. State, 124 Ga. App. 488, 184 S.E.2d 185 (1971) (decided under former Code 1933, § 38-1801).

Right of Cross-Examination

In general. — Right of cross-examination is a substantial right, the preservation of which is essential to a proper administration of justice, and extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy; and being a substantial right, it should never be abridged or denied by the court. Lunday v. Thomas, 26 Ga. 537 (1858) (decided under former law); News Publishing Co. v. Butler, 95 Ga. 559, 22 S.E. 282 (1895) (decided under former Code 1882, § 3864); Barnwell v. Hannegan, 105 Ga. 396, 31

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S.E. 116 (1898) (decided under former Civil Code 1895, § 5282); Huff v. State, 106 Ga. 432, 32 S.E. 348 (1899) (decided under former Penal Code 1895, § 1018); Atlanta & B. Air-Line Ry. v. McManus, 1 Ga. App. 302, 58 S.E. 258 (1907) (decided under former Civil Code 1895, § 5282); Becker v. Donalson, 133 Ga. 864, 67 S.E. 92 (1910) (decided under former Civil Code 1910, § 5871); Brundage v. State, 14 Ga. App. 460, 81 S.E. 384 (1914) (decided under former Penal Code 1910, § 1044); Faulk v. State, 47 Ga. App. 804, 171 S.E. 570 (1933) (decided under former Penal Code 1910, § 1044); Herndon v. State, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935) (decided under former Code 1933, § 38-1705); McGinty v. State, 59 Ga. App. 675, 2 S.E.2d 134 (1939) (decided under former Code 1933, § 38-1705); Owens v. Shugart, 61 Ga. App. 177, 6 S.E.2d 121 (1939) (decided under former Code 1933, § 38-1705); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237 (1947) (decided under former Code 1933, § 38-1705); Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955) (decided under former Code 1933, § 38-1705); Pittman v. West, 95 Ga. App. 149, 97 S.E.2d 387 (1957) (decided under former Code 1933, § 38-1705); Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1961) (decided under former Code 1933, § 38-1705); Salisbury v. State, 222 Ga. 549, 150 S.E.2d 819 (1966) (decided under former Code 1933, § 38-1705); Gunnells v. Cotton States Mut. Ins. Co., 117 Ga. App. 123, 159 S.E.2d 730 (1968) (decided under former Code 1933, § 38-1705); Miller v. Smith, 302 F. Supp. 385 (N.D. Ga. 1968) (decided under former Code 1933, § 38-1705); Boyles v. State, 120 Ga. App. 852, 172 S.E.2d 637 (1969) (decided under former Code 1933, § 38-1705); Georgia Power Co. v. Sinclair, 122 Ga. App. 305, 176 S.E.2d 639 (1970) (decided under former Code 1933, § 38-1705); Metts v. Easters, 229 Ga. 754, 194 S.E.2d 450 (1972) (decided under former Code 1933, § 38-1705); Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972) (decided under former Code 1933, § 38-1705); Geiger v. State, 129 Ga. App. 488, 199 S.E.2d 861 (1973) (decided under former Code 1933, § 38-1705); Gordon v. Gordon, 133 Ga. App. 520, 211 S.E.2d 374 (1974) (decided under former Code 1933, § 38-1705); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585 (1975) (decided under former Code 1933, § 38-1705); Johnson v. State, 137 Ga. App. 308, 223 S.E.2d 500 (1976) (decided under former Code 1933, § 38-1705); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48 (1976) (decided under former Code 1933, § 38-1705); Hornsby v. State, 139 Ga. App. 254, 228 S.E.2d 152 (1976) (decided under former Code 1933, § 38-1705); Fair v. State, 140 Ga. App. 281, 231 S.E.2d 1 (1976) (decided under former Code 1933, § 38-1705); Birge v. State, 143 Ga. App. 632, 239 S.E.2d 395 (1977) (decided under former Code 1933, § 38-1705); Bramblett v. State, 139 Ga. App. 745, 229 S.E.2d 484 (1976), aff'd, 239 Ga. 336, 236 S.E.2d 580 (1977), cert. denied, 434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978) (decided under former Code 1933, § 38-1705); Crawford v. State, 144 Ga. App. 622, 241 S.E.2d 492 (1978) (decided under former Code 1933, § 38-1705); Goldgar v. Galbraith, 155 Ga. App. 429, 270 S.E.2d 833 (1980) (decided under former Code 1933, § 38-1705); Miller v. State, 155 Ga. App. 587, 271 S.E.2d 719 (1980) (decided under former Code 1933, § 38-1705).

When a witness is sworn by one party, the other party has the right to cross-examine the witness at large. Lunday v. Thomas, 26 Ga. 537 (1858) (decided under former law); Brown v. State, 28 Ga. 199 (1859) (decided under former law); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936) (decided under former Code 1933, § 38-1705).

Although the defendant's plea had been stricken, and although the defendant had no right to introduce any evidence, yet when the plaintiff, in order to make out plaintiff's case and secure a verdict, found it necessary to impanel a jury and to introduce witnesses to testify to facts not appearing on the face of the notes sued upon, the defendant, through defense counsel, had a right to cross-examine the

witnesses. Daniel v. Georgia R.R. Bank, 44 Ga. App. 787, 163 S.E. 311 (1932) (decided under former Civil Code 1910, § 5871).

Although the scope of the cross-examination is not unlimited, every party has a right to a thorough and sifting cross-examination of opposing witnesses, the scope of which examination rests largely within the discretion of the trial judge. Jackson v. State, 157 Ga. App. 604, 278 S.E.2d 5 (1981) (decided under former Code 1933, § 38-1705).

Party has the right to a thorough and sifting cross-examination of the witnesses called against the party and, usually, to conduct that examination by use of leading questions. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210, cert. denied, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984) (decided under former O.C.G.A. § 24-9-64).

Witness's rights under former O.C.G.A. § 24-9-62 (see now O.C.G.A. §§ 24-6-611 and 24-6-623) must be balanced with the party's right under former O.C.G.A. § 24-9-64 to a thorough and sifting cross-examination. Carco Supply Co. v. Clem, 194 Ga. App. 566, 391 S.E.2d 134 (1990) (decided under former O.C.G.A. § 24-9-64); Palmer v. Taylor, 215 Ga. App. 546, 451 S.E.2d 486 (1994) (decided under former O.C.G.A. § 24-9-64).

Child witness's unresponsiveness to a number of questions as put by defendant did not constitute a deprivation of defendant's constitutional confrontation right so as to require that the witness's out-of-court statements be stricken since the defendant was not denied the right to a thorough and sifting cross-examination of a witness who appeared to answer as well as the witness was capable of answering. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18 (1990) (decided under former O.C.G.A. § 24-9-64).

Trial court committed plain error by improperly bolstering the victims' credibility when the judge asked a witness specific questions regarding the victims, in violation of O.C.G.A. § 17-8-57, and the error was compounded when the trial court denied defendant the right to cross-examine the witness, pursuant to former O.C.G.A. § 24-9-64, in an attempt to rebut the bolstering of the victims' credibility that was performed by the trial court. Craft v. State, 274 Ga. App. 410, 618 S.E.2d 104 (2005) (decided under former O.C.G.A. § 24-9-64).

Employer entitled to cross-examine in workers' compensation case. — In a worker's compensation case, the administrative law judge erred in preventing the employer from pursuing the employer's right to a thorough and sifting cross-examination of the claimant because, as a defense, evidence tending to show a motive for malingering was relevant. David Jordan Logging Co. v. Sales, 203 Ga. App. 410, 416 S.E.2d 803, cert. denied, 203 Ga. App. 905, 416 S.E.2d 803 (1992) (decided under former O.C.G.A. § 24-9-64).

Right does not apply to irrelevant information. — Judgment in favor of the plaintiffs in a medical malpractice action was affirmed; trial court did not prevent defendants from cross-examining plaintiffs' expert as to plaintiff's expert's mental illnesses in violation of former O.C.G.A. § 24-9-64, but only from cross-examining the expert as to a prior suit for disability benefits which was irrelevant. Fredericks v. Hall, 275 Ga. App. 412, 620 S.E.2d 638 (2005) (decided under former O.C.G.A. § 24-9-64).

Reliance of expert on report. — By giving a report written by the defendant and sent to plaintiff's counsel for "informational purposes" to plaintiff's expert, the defendant violated the agreement between the parties not to use it in the litigation, and reliance on the report by defendant's expert required allowing the plaintiff to cross-examine that expert using the report. Lewis v. Emory Univ., 235 Ga. App. 811, 509 S.E.2d 635 (1998) (decided under former O.C.G.A. § 24-9-64).

No cross-examination when no direct examination. — Trial court did not err in preventing the defendant from cross-examining the investigating officer about an incriminating statement made by the defendant after the state introduced evidence concerning the statement. former O.C.G.A. § 24-3-38 (see now O.C.G.A. § 24-8-822) ("When an admission is given in evidence by one party, it

Right of Cross-Examination (Cont'd)

shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence") and former O.C.G.A. § 24-9-64 were inapplicable because there had been no direct examination relating to any part of the statement by the state. Davis v. State, 261 Ga. 382, 405 S.E.2d 648 (1991) (decided under former O.C.G.A. § 24-9-64).

Designation of witness as hostile. — It was not error for trial judge to refuse to permit the defendant to have a police officer designated a hostile witness so that the officer could be called as a witness for cross-examination, when it was not shown that the witness was hostile; and when it appeared from the record that counsel was allowed to ask leading questions substantially identical to the question counsel complained was not permitted. Williams v. State, 164 Ga. App. 562, 298 S.E.2d 282 (1982) (decided under former O.C.G.A. § 24-9-64).

New trial for denial of right. — Substantial denial of the right of cross-examination is good cause for the grant of a new trial. Hall v. State, 117 Ga. 263, 43 S.E. 718 (1903) (decided under former Penal Code 1895, § 1018); Becker v. Donalson, 133 Ga. 864, 67 S.E. 92 (1910) (decided under former Civil Code 1910, § 5871); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936) (decided under former Code 1933, § 38-1705); Thompson v. State, 181 Ga. 620, 183 S.E. 566 (1936) (decided under former Code 1933, § 38-1705); Clifton v. State, 187 Ga. 502, 2 S.E.2d 102 (1939) (decided under former Code 1933, § 38-1705); Corley v. State, 64 Ga. App. 841, 14 S.E.2d 121 (1941) (decided under former Code 1933, § 38-1705); Cameron v. State, 66 Ga. App. 414, 18 S.E.2d 16 (1941) (decided under former Code 1933, § 38-1705); Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139 (1943) (decided under former Code 1933, § 38-1705); Hyde v. State, 70 Ga. App. 823, 29 S.E.2d 820 (1944) (decided under former Code 1933, § 38-1705); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237 (1947) (decided under former Code 1933, § 38-1705); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-1705); Western & Atl. R.R. v. Burnett, 79 Ga. App. 530, 54 S.E.2d 357 (1949) (decided under former Code 1933, § 38-1705); Russell v. Bass, 82 Ga. App. 659, 62 S.E.2d 456 (1950) (decided under former Code 1933, § 38-1705); Griffin v. State, 85 Ga. App. 602, 69 S.E.2d 665 (1952) (decided under former Code 1933, § 38-1705); Chambers v. State, 88 Ga. App. 57, 76 S.E.2d 84 (1953) (decided under former Code 1933, § 38-1705); Harrison v. Regents of Univ. Sys., 99 Ga. App. 762, 109 S.E.2d 854 (1959) (decided under former Code 1933, § 38-1705); Sutton v. State Hwy. Dep't, 103 Ga. App. 29, 118 S.E.2d 285 (1961) (decided under former Code 1933, § 38-1705); Morris v. State, 150 Ga. App. 94, 256 S.E.2d 674 (1979) (decided under former Code 1933, § 38-1705).

Motion for new trial was not granted when defendant learned after the trial that a witness who testified at trial but was not cross-examined had information of value to defendant's case. Hall v. State, 117 Ga. 263, 43 S.E. 718 (1903) (decided under former Penal Code 1895, § 1018).

Curing refusal to allow cross-examination. — Error in refusing to allow defendant to cross-examine a witness is not cured because the witness is subsequently introduced by defendant and examined as to the facts. White v. Dinkins, 19 Ga. 285 (1856) (decided under former law).

Personal examination by defendant. — Prisoner's rights are not violated if the prisoner is refused the privilege of personally cross-examining a hostile witness after the prisoner has stood by approvingly while the prisoner's counsel has conducted a thorough cross-examination. Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528 (1853) (decided under former law).

Codefendant's cross-examination of witness. — Trial court's sustaining of an objection by defendant's codefendant to the former's cross-examination of a police officer regarding a prior consistent statement made to the officer did not violate defendant's right to cross-examination since the court indicated that if the defen-

dant testified the defendant could then cross-examine the officer on the statement. Wilson v. State, 227 Ga. App. 59, 488 S.E.2d 121 (1997) (decided under former O.C.G.A. § 24-9-64).

Right to subpoena crime lab work product. — Broad right of cross-examination afforded by former O.C.G.A. § 24-9-64 allowed a defendant the right to subpoena data relied upon by the state crime lab chemist, including graphs generated from gas chromatography. Price v. State, 269 Ga. 222, 498 S.E.2d 262 (1998) (decided under former O.C.G.A. § 24-9-64).

Calling witnesses. — It does not abridge the defendant's right of confrontation and cross-examination for the court to refuse to require the state to summon a witness not relied on by the state to make out its case before the jury as a witness. Bonds v. State, 232 Ga. 694, 208 S.E.2d 561 (1974) (decided under former Code 1933, § 38-1705).

Witness not called to testify. — Trial court did not err in refusing to allow the defendant to cross-examine an officer who was present when the defendant made defendant's incriminating statement since this witness was not called to testify and did not present any direct testimony against the defendant. Billings v. State, 212 Ga. App. 125, 441 S.E.2d 262 (1994) (decided under former O.C.G.A. § 24-9-64).

Opposite party. — Defendant in a criminal case may be cross-examined with defendant's consent, but if defendant offers oneself for cross-examination there is no obligation upon the prosecution to conduct it. Roberson v. State, 12 Ga. App. 102, 76 S.E. 752 (1912) (decided under former Penal Code 1910, § 1044); Jones v. State, 18 Ga. App. 285, 89 S.E. 303 (1916) (decided under former Penal Code 1910, § 1044).

When counsel for the plaintiff calls defendant as a witness against oneself in order to prove only one point, the law permits the counsel for defendant to cross-examine the client. National Land & Coal Co. v. Zugar, 171 Ga. 228, 155 S.E. 7 (1930) (decided under former Civil Code 1910, § 5871).

When a party to a suit calls the opposing party to the stand as a witness, it is within the discretion of the judge to refuse to prohibit the counsel for the opposing party from asking leading questions on cross-examination, and the fact that the court allowed the cross-questions complained of does not show such abuse of discretion as to authorize the grant of a new trial. Akridge v. Atlanta Journal Co., 56 Ga. App. 812, 194 S.E. 590 (1937) (decided under former Code 1933, § 38-1705).

Right of cross-examination of the opposite party does not include the right to require that party's presence in court, and such party may not be compelled to attend court except in the manner as other witnesses are required to attend court by subpoena. Johnston v. Dollar, 89 Ga. App. 876, 81 S.E.2d 502 (1954) (decided under former Code 1933, § 38-1705).

Right to cross examine guardian ad litem. — Trial court erred in depriving one parent and grandparent of the opportunity to question the guardian ad litem regarding the results of an investigation as the burden was theirs to establish that the child would be harmed if returned to the other parent and that it was in the best interest of the child to remain with the grandparent. Thus, the trial court's order deprived them of the opportunity to establish facts in support of their position that the child should remain in the grandparent's custody. Simmons v. Williams, 290 Ga. App. 644, 660 S.E.2d 435 (2008) (decided under former O.C.G.A. § 24-9-64).

Admission of hearsay evidence violates right to cross-examination. — When officer testified that witness told the officer that the defendant had sold the witness drugs, this hearsay evidence was improperly admitted and deprived defendant of the right to cross-examination. Welch v. State, 231 Ga. App. 74, 498 S.E.2d 555 (1998) (decided under former O.C.G.A. § 24-9-64).

Hearsay evidence. — Excluding testimony that was purely hearsay did not deny the right of a thorough and sifting cross-examination. Bell v. State, 71 Ga. App. 430, 31 S.E.2d 109 (1944) (decided under former Code 1933, § 38-1705).

Scope of Cross-Examination

1. In General

Thorough and sifting cross-examination. — Right of thorough and sifting cross-examination extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy. Huff v. State, 106 Ga. 432, 32 S.E. 348 (1899) (decided under former Penal Code 1895, § 1018); White v. State, 121 Ga. 191, 48 S.E. 941 (1904) (decided under former Penal Code 1895, § 1018); Hagood v. State, 5 Ga. App. 80, 62 S.E. 641 (1908) (decided under former Penal Code 1895, § 1018); Hart v. State, 14 Ga. App. 364, 80 S.E. 909 (1913) (decided under former Penal Code 1910, § 1044); Richards v. Harpe, 42 Ga. App. 123, 155 S.E. 85 (1930) (decided under former Civil Code 1910, § 5871); Faulk v. State, 47 Ga. App. 804, 171 S.E. 570 (1933) (decided under former Code 1933, § 38-1705); Williamson, Inman & Co. v. Thompson, 50 Ga. App. 564, 179 S.E. 289 (1935) (decided under former Code 1933, § 38-1705); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936) (decided under former Code 1933, § 38-1705); McGinty v. State, 59 Ga. App. 675, 2 S.E.2d 134 (1939) (decided under former Code 1933, § 38-1705); Mickle v. Moore, 188 Ga. 444, 4 S.E.2d 217 (1939) (decided under former Code 1933, § 38-1705); Owens v. Shugart, 61 Ga. App. 177, 6 S.E.2d 121 (1939) (decided under former Code 1933, § 38-1705); Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139 (1943) (decided under former Code 1933, § 38-1705); First Nat'l Bank v. Carmichael, 198 Ga. 309, 31 S.E.2d 811 (1944) (decided under former Code 1933, § 38-1705); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237 (1947) (decided under former Code 1933, § 38-1705); Griffin v. State, 85 Ga. App. 602, 69 S.E.2d 665 (1952) (decided under former Code 1933, § 38-1705); Thomas v. State, 85 Ga. App. 868, 70 S.E.2d 131 (1952) (decided under former Code 1933, § 38-1705); Evans v. State, 210 Ga. 375, 80 S.E.2d 157 (1954) (decided under former Code 1933, § 38-1705); Ledford v. State, 89 Ga. App. 683, 80 S.E.2d 828 (1954) (decided under former Code 1933, § 38-1705); Morgan v. State, 211 Ga. 172, 84 S.E.2d 365 (1954) (decided under former Code 1933, § 38-1705); Rooker v. State, 211 Ga. 361, 86 S.E.2d 307 (1955) (decided under former Code 1933, § 38-1705); Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955) (decided under former Code 1933, § 38-1705); Faircloth v. State, 95 Ga. App. 265, 97 S.E.2d 641 (1957) (decided under former Code 1933, § 38-1705); Bass v. Bass, 222 Ga. 378, 149 S.E.2d 818 (1966) (decided under former Code 1933, § 38-1705); Sullivan v. State, 222 Ga. 691, 152 S.E.2d 382 (1966) (decided under former Code 1933, § 38-1705); Millhollan v. Watkins Motor Lines, 116 Ga. App. 452, 157 S.E.2d 901 (1967) (decided under former Code 1933, § 38-1705); Miller v. Smith, 302 F. Supp. 385 (N.D. Ga. 1968) (decided under former Code 1933, § 38-1705); State Hwy. Dep't v. Owens, 120 Ga. App. 647, 171 S.E.2d 770 (1969) (decided under former Code 1933, § 38-1705); Boyles v. State, 120 Ga. App. 852, 172 S.E.2d 637 (1969) (decided under former Code 1933, § 38-1705); Georgia Power Co. v. Sinclair, 122 Ga. App. 305, 176 S.E.2d 639 (1970) (decided under former Code 1933, § 38-1705); Locke v. State, 229 Ga. 110, 189 S.E.2d 410 (1972) (decided under former Code 1933, § 38-1705); Saks Fifth Ave. v. Edwards, 128 Ga. App. 380, 196 S.E.2d 879 (1973) (decided under former Code 1933, § 38-1705); Geiger v. State, 129 Ga. App. 488, 199 S.E.2d 861 (1973) (decided under former Code 1933, § 38-1705); Casey v. State, 133 Ga. App. 161, 210 S.E.2d 375 (1974) (decided under former Code 1933, § 38-1705); Gordon v. Gordon, 133 Ga. App. 520, 211 S.E.2d 374 (1974) (decided under former Code 1933, § 38-1705); Luke v. McGuire Ins. Agency of Ga., Inc., 133 Ga. App. 948, 212 S.E.2d 889 (1975) (decided under former Code 1933, § 38-1705); Hobbs v. State, 134 Ga. App. 850, 216 S.E.2d 674 (1975) (decided under former Code 1933, § 38-1705); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585 (1975) (decided under former Code 1933, § 38-1705); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48 (1976) (decided under former Code 1933, § 38-1705); Hornsby v. State, 139 Ga. App. 254, 228 S.E.2d 152

(1976) (decided under former Code 1933, § 38-1705); Fair v. State, 140 Ga. App. 281, 231 S.E.2d 1 (1976) (decided under former Code 1933, § 38-1705); Southwire Co. v. Department of Transp., 147 Ga. App. 606, 249 S.E.2d 650 (1978) (decided under former Code 1933, § 38-1705); Canady v. State, 147 Ga. App. 640, 249 S.E.2d 690 (1978) (decided under former Code 1933, § 38-1705); Williams v. Ricks, 152 Ga. App. 555, 263 S.E.2d 457 (1979) (decided under former Code 1933, § 38-1705); Henderson v. State, 153 Ga. App. 801, 266 S.E.2d 522 (1980) (decided under former Code 1933, § 38-1705); Crawford v. State, 154 Ga. App. 362, 268 S.E.2d 414 (1980) (decided under former Code 1933, § 38-1705); Goldgar v. Galbraith, 155 Ga. App. 429, 270 S.E.2d 833 (1980) (decided under former Code 1933, § 38-1705); Plemons v. State, 155 Ga. App. 447, 270 S.E.2d 836 (1980) (decided under former Code 1933, § 38-1705); Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981) (decided under former Code 1933, § 38-1705); McDaniel v. DOT, 200 Ga. App. 674, 409 S.E.2d 552 (1991) (decided under former O.C.G.A. § 24-9-64); Sawyers v. State, 211 Ga. App. 668, 440 S.E.2d 256 (1994) (decided under former O.C.G.A. § 24-9-64); Kier v. State, 247 Ga. App. 431, 543 S.E.2d 801 (2000) (decided under former O.C.G.A. § 24-9-64).

When one side calls and examines a witness, though only on a single point, the other has the right to cross-examine the witness on every point. Dawson v. Callaway, 18 Ga. 573 (1855) (decided under former law); Aiken v. Cato, 23 Ga. 154 (1857) (decided under former law); News Publishing Co. v. Butler, 95 Ga. 559, 22 S.E. 282 (1895) (decided under former Code 1882, § 3864); National Land & Coal Co. v. Zugar, 171 Ga. 228, 155 S.E. 7 (1930) (decided under former Civil Code 1910, § 5871); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936) (decided under former Code 1933, § 38-1705).

Right of cross examination is a substantial right, the preservation of which is essential to the proper administration of justice and extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy; this right should not be abridged. James v. State, 260 Ga. App. 536, 580 S.E.2d 334 (2003) (decided under former O.C.G.A. § 24-9-64).

Right not unlimited. — Although it is true that the right to a thorough and sifting cross-examination may not be abridged, that right is not unlimited. Anderson v. State, 165 Ga. App. 885, 303 S.E.2d 57 (1983), rev'd on other grounds, 252 Ga. 103, 312 S.E.2d 113 (1984) (decided under former O.C.G.A. § 24-9-64).

Court did not improperly restrict defendant's right of cross-examination of a state's witness since the testimony sought to be elicited would have been cumulative of other testimony. Gaither v. State, 259 Ga. 200, 378 S.E.2d 464 (1989) (decided under former O.C.G.A. § 24-9-64).

Victim's probation status improperly examined. — Trial court did not abuse the court's discretion in limiting the scope of defendant's cross-examination of the alleged crime victim to exclude questioning the victim as to the victim's probation status. Bogan v. State, 206 Ga. App. 696, 426 S.E.2d 392 (1992) (decided under former O.C.G.A. § 24-9-64).

Inquiry into domestic dispute disallowed in kidnapping case. — Trial court properly restricted defendant's cross-examination of wife's alleged affair as the cause of the couple's separation was not relevant to the issues before the jury. Williams v. State, 207 Ga. App. 371, 427 S.E.2d 846 (1993) (decided under former O.C.G.A. § 24-9-64).

Limiting examination to relevant matters by proper questioning. — Right of cross-examination is not abridged when examination is limited by trial court to relevant matters by proper questioning. Johnson v. State, 158 Ga. App. 333, 280 S.E.2d 379 (1981) (decided under former Code 1933, § 38-1705); Palmer v. State, 186 Ga. App. 892, 369 S.E.2d 38, cert. denied, 186 Ga. App. 918, 369 S.E.2d 38 (1988) (decided under former O.C.G.A. § 24-9-64); Mitchell v. State, 200 Ga. App. 146, 407 S.E.2d 115 (1991) (decided under former O.C.G.A. § 24-9-64).

Cross-examination covers relevant subjects and not just matters elicited

Scope of Cross-Examination (Cont'd)
1. In General (Cont'd)

on direct examination. — Right of cross-examination in Georgia includes questioning a witness about subjects relevant to any of the issues in the case, not simply those matters elicited on direct examination. James v. State, 260 Ga. App. 536, 580 S.E.2d 334 (2003) (decided under former O.C.G.A. § 24-9-64).

Privilege. — Right of cross-examination must be tempered and restricted so as not to infringe on privileged areas. Hornsby v. State, 139 Ga. App. 254, 228 S.E.2d 152 (1976) (decided under former Code 1933, § 38-1705).

Redirect examination. — Whether or not new matter is introduced on redirect and even though no reason shown why, through inadvertence or mistake, certain questions have been omitted, it is entirely within the discretion of the trial judge to permit further examination by either side. King v. Thompson, 59 Ga. 380 (1877) (decided under former Code 1873, § 3864); Faulk v. State, 47 Ga. App. 804, 171 S.E. 570 (1933) (decided under former Penal Code 1910, § 1044).

Redirect examination and recross are, strictly speaking, not for the purpose of introducing new matter, but the judge in the judge's discretion may permit the questioner to inquire about something which the judge should have asked about during an earlier step but which was overlooked. Goodrum v. State, 158 Ga. App. 602, 281 S.E.2d 254 (1981) (decided under former Code 1933, § 38-1705).

Documents. — When the relevancy of documents which may be used as evidence appears, it is error to unduly restrict the cross-examination relating to such documents. Ledford v. State, 89 Ga. App. 683, 80 S.E.2d 828 (1954) (decided under former Code 1933, § 38-1705); Snelling v. State, 215 Ga. App. 263, 450 S.E.2d 299 (1994) (decided under former O.C.G.A. § 24-9-64).

Prior drug sales. — Trial court did not err in permitting cross-examination of the defendant regarding prior drug sales held admissible to prove identity. Nuckles v. State, 207 Ga. App. 63, 427 S.E.2d 54 (1993) (decided under former O.C.G.A. § 24-9-64).

Conduct exceeding authorized scope. — Conduct of defense counsel exceeded the authorized scope of cross-examination after counsel injected independent non-testimonial evidence by lifting defendant's shirt to show defendant's body brace. State v. Battaglia, 221 Ga. App. 283, 470 S.E.2d 755 (1996) (decided under former O.C.G.A. § 24-9-64).

2. Discretion of Judge

In general. — Scope of cross-examination rests largely within the discretion of the trial judge to control this right within reasonable bounds, and this discretion will not be reviewed unless it is abused. Woolfolk v. State, 85 Ga. 69, 11 S.E. 814 (1890) (decided under former Code 1882, § 3864); News Publishing Co. v. Butler, 95 Ga. 559, 22 S.E. 282 (1895) (decided under former Code 1882, § 3864); Fouraker v. State, 4 Ga. App. 692, 62 S.E. 116 (1908) (decided under former Penal Code 1895, § 1018); Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130 (1931) (decided under former Civil Code 1910, § 5871); Fields v. State, 46 Ga. App. 287, 167 S.E. 337 (1932) (decided under former Penal Code 1910, § 1044); Clifton v. State, 187 Ga. 502, 2 S.E.2d 102 (1939) (decided under former Code 1933, § 38-1705); Sweat v. State, 63 Ga. App. 299, 11 S.E.2d 40 (1940) (decided under former Code 1933, § 38-1705); Corley v. State, 64 Ga. App. 841, 14 S.E.2d 121 (1941) (decided under former Code 1933, § 38-1705); Cameron v. State, 66 Ga. App. 414, 18 S.E.2d 16 (1941) (decided under former Code 1933, § 38-1705); Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139 (1943) (decided under former Code 1933, § 38-1705); Hyde v. State, 70 Ga. App. 823, 29 S.E.2d 820 (1944) (decided under former Code 1933, § 38-1705); Post v. State, 201 Ga. 81, 39 S.E.2d 1 (1946) (decided under former Code 1933, § 38-1705); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237 (1947) (decided under former Code 1933, § 38-1705); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-1705); Western & Atl. R.R. v. Burnett, 79 Ga. App. 530, 54 S.E.2d 357 (1949) (decided under former Code 1933, § 38-1705); Owens v. State, 81 Ga. App.

182, 58 S.E.2d 550 (1950) (decided under former Code 1933, § 38-1705); Griffin v. State, 85 Ga. App. 602, 69 S.E.2d 665 (1952) (decided under former Code 1933, § 38-1705); Rozar v. State, 93 Ga. App. 207, 91 S.E.2d 131 (1956) (decided under former Code 1933, § 38-1705); Pittman v. West, 95 Ga. App. 149, 97 S.E.2d 387 (1957) (decided under former Code 1933, § 38-1705); Gordy v. Powell, 95 Ga. App. 822, 99 S.E.2d 313 (1957) (decided under former Code 1933, § 38-1705); Sutton v. State Hwy. Dep't, 103 Ga. App. 29, 118 S.E.2d 285 (1961) (decided under former Code 1933, § 38-1705); Meeks v. Lunsford, 106 Ga. App. 154, 126 S.E.2d 531 (1962) (decided under former Code 1933, § 38-1705); Gravitt v. State, 220 Ga. 781, 141 S.E.2d 893 (1965) (decided under former Code 1933, § 38-1705); Mitchell v. Gay, 111 Ga. App. 867, 143 S.E.2d 568 (1965) (decided under former Code 1933, § 38-1705); Moore v. State, 221 Ga. 636, 146 S.E.2d 895 (1966) (decided under former Code 1933, § 38-1705); Sullivan v. State, 222 Ga. 691, 152 S.E.2d 382 (1966) (decided under former Code 1933, § 38-1705); Miller v. Smith, 302 F. Supp. 385 (N.D. Ga. 1968) (decided under former Code 1933, § 38-1705); Metts v. Easters, 229 Ga. 754, 194 S.E.2d 450 (1972) (decided under former Code 1933, § 38-1705); Goober v. Nix, 128 Ga. App. 578, 197 S.E.2d 486 (1973) (decided under former Code 1933, § 38-1705); Howington v. Puckett, 130 Ga. App. 584, 203 S.E.2d 916 (1974) (decided under former Code 1933, § 38-1705); Weaver v. Georgia Power Co., 134 Ga. App. 696, 215 S.E.2d 503 (1975) (decided under former Code 1933, § 38-1705); Hobbs v. State, 134 Ga. App. 850, 216 S.E.2d 674 (1975) (decided under former Code 1933, § 38-1705); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585 (1975) (decided under former Code 1933, § 38-1705); Franklin v. State, 136 Ga. App. 47, 220 S.E.2d 60 (1975) (decided under former Code 1933, § 38-1705); Whitley v. State, 137 Ga. App. 68, 223 S.E.2d 17 (1975) (decided under former Code 1933, § 38-1705); Johnson v. State, 137 Ga. App. 308, 223 S.E.2d 500 (1976) (decided under former Code 1933, § 38-1705); Mitchell v. State, 236 Ga. 251, 223 S.E.2d 650 (1976) (decided under former Code 1933, § 38-1705); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48 (1976) (decided under former Code 1933, § 38-1705); McCarty v. State, 139 Ga. App. 101, 227 S.E.2d 898 (1976) (decided under former Code 1933, § 38-1705); Hornsby v. State, 139 Ga. App. 254, 228 S.E.2d 152 (1976) (decided under former Code 1933, § 38-1705); Lindsey v. Guhl, 237 Ga. 567, 229 S.E.2d 354 (1976) (decided under former Code 1933, § 38-1705); Birge v. State, 143 Ga. App. 632, 239 S.E.2d 395 (1977) (decided under former Code 1933, § 38-1705); Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978), rev'd on other grounds sub nom. Green v. Georgia, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979) (decided under former Code 1933, § 38-1705); Southwire Co. v. Department of Transp., 147 Ga. App. 606, 249 S.E.2d 650 (1978) (decided under former Code 1933, § 38-1705); Canady v. State, 147 Ga. App. 640, 249 S.E.2d 690 (1978) (decided under former Code 1933, § 38-1705); Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979) (decided under former Code 1933, § 38-1705); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565 (1980) (decided under former Code 1933, § 38-1705); Mullins v. State, 157 Ga. App. 204, 276 S.E.2d 877 (1981) (decided under former Code 1933, § 38-1705); Hines v. State, 160 Ga. App. 546, 287 S.E.2d 584 (1981) (decided under former Code 1933, § 38-1705); Hines v. State, 249 Ga. 257, 290 S.E.2d 911 (1982) (decided under former Code 1933, § 38-1705); Anderson v. State, 165 Ga. App. 885, 303 S.E.2d 57 (1983), rev'd on other grounds, 252 Ga. 103, 312 S.E.2d 113 (1984) (decided under former O.C.G.A. § 24-9-64); Price v. State, 179 Ga. App. 691, 347 S.E.2d 365 (1986) (decided under former O.C.G.A. § 24-9-64).

Extent of cross-examination can be curtailed if the inquiry is not relevant or material, and such restriction lies within the discretion of the trial court which will not be disturbed on appeal unless manifestly abused. Fitzgerald v. State, 166 Ga. App. 307, 304 S.E.2d 114 (1983) (decided under former O.C.G.A. § 24-9-64); Opatut v. Guest Pond Club, Inc., 188 Ga. App. 478, 373 S.E.2d 372 (1988) (decided under former O.C.G.A. § 24-9-64); Stevens v.

Scope of Cross-Examination (Cont'd)
2. Discretion of Judge (Cont'd)

State, 213 Ga. App. 293, 444 S.E.2d 840 (1994) (decided under former O.C.G.A. § 24-9-64).

Although a defendant is entitled to a thorough and sifting cross-examination of a witness, the scope of such cross-examination is within the sound discretion of the trial court. White v. State, 253 Ga. 106, 317 S.E.2d 196 (1984) (decided under former O.C.G.A. § 24-9-64); Scott v. State, 178 Ga. App. 222, 343 S.E.2d 117 (1986) (decided under former O.C.G.A. § 24-9-64).

Scope of cross-examination is within the sound discretion of the trial judge. This discretion will not be disturbed by an appellate court unless manifestly abused. Thomas v. Clark, 188 Ga. App. 606, 373 S.E.2d 668 (1988) (decided under former O.C.G.A. § 24-9-64).

Although a defendant is entitled to a thorough and sifting cross-examination of the state's witnesses, within carefully protected legal parameters, the scope of cross-examination lies within the sound discretion of the trial court and this discretion will not be disturbed by an appellate court absent manifest abuse. There was no error in a trial court's restrictions of cross examination of the victims of sexual abuse relating to whether defendant had molested other children. Pope v. State, 266 Ga. App. 602, 597 S.E.2d 632 (2004) (decided under former O.C.G.A. § 24-9-64).

Scope of cross-examination is not unlimited; the extent necessarily must rest largely within the discretion of the trial judge in order to keep the questioning within reasonable bonds. The extent of cross examination can be curtailed if the inquiry is not relevant nor material. Harris v. State, 168 Ga. App. 159, 308 S.E.2d 406 (1983) (decided under former O.C.G.A. § 24-9-64); Williamson v. State, 186 Ga. App. 589, 367 S.E.2d 863 (1988) (decided under former O.C.G.A. § 24-9-64).

Trial court can exercise the court's discretion in keeping the defendant's cross-examination of the state's witnesses within reasonable bounds and in curtailing the cross-examination if the inquiry is not relevant or material. Samuels v. State, 174 Ga. App. 684, 331 S.E.2d 62 (1985) (decided under former O.C.G.A. § 24-9-64).

Regulation of scope of cross-examination is within sound discretion of trial court and this discretion will not be controlled unless it is manifestly abused. DOT v. 2.734 Acres of Land, 168 Ga. App. 541, 309 S.E.2d 816 (1983) (decided under former O.C.G.A. § 24-9-64).

Extent of cross-examination can be curtailed if the inquiry is not relevant or material, and such restriction lies within the discretion of the trial court, which will not be disturbed on appeal unless manifestly abused. Fletcher v. State, 197 Ga. App. 112, 397 S.E.2d 605 (1990) (decided under former O.C.G.A. § 24-9-64); Stevens v. State, 213 Ga. App. 293, 444 S.E.2d 840 (1994) (decided under former O.C.G.A. § 24-9-64).

Trial court abused the court's discretion in refusing to allow the defendant to use a videotape of the defendant's daughter, concerning the defendant's alleged sexual abuse of the defendant's daughter, in the cross-examination of the defendant's daughter; however, the error was harmless because the subject matter was covered later during the trial when the entirety of the videotape was played and because the defendant had the opportunity to verbally cross-examine the daughter during the state's case regarding the daughter's former statements to authorities. Courrier v. State, 270 Ga. App. 622, 607 S.E.2d 221 (2004) (decided under former O.C.G.A. § 24-9-64).

Trial court did not abuse the court's discretion under former O.C.G.A. § 24-9-64 in limiting the defendant's ability to cross-examine a police officer as the limits were within the scope of the trial court's discretion and did not violate defendant's confrontation rights; the trial court allowed the defendant to cross-examine the officer as to the officer's experience and training, but limited the questioning as to other DUI arrests that the officer had made. Drogan v. State, 272 Ga. App. 645, 613 S.E.2d 195 (2005) (decided under former O.C.G.A. § 24-9-64).

Trial court judge did not abuse the court's discretion in limiting the defendant's cross-examination of a detective who had taken a statement from the defendant shortly after being apprehended because, even assuming the restriction was erroneous during the defendant's trial for involuntary manslaughter and reckless conduct, the overwhelming evidence established the defendant's guilt, including the uncontroverted evidence that the defendant brandished and fired the weapon at the deceased victim, which made the error harmless. Anaya-Plasencia v. State, 283 Ga. App. 728, 642 S.E.2d 401 (2007) (decided under former O.C.G.A. § 24-9-64).

Trial court did not improperly limit the defendant's cross-examination to matters material to the issues as: (1) whether the victim had a boyfriend that a parent disapproved of was irrelevant; (2) there was no indication by the evidence that the victim was trying to explain away evidence of a relationship with one man by attributing that evidence to another; and (3) it was illogical for the victim to have fabricated a claim of child molestation. Gaines v. State, 285 Ga. App. 654, 647 S.E.2d 357 (2007) (decided under former O.C.G.A. § 24-9-64).

There was sufficient evidence to support a defendant's convictions on two counts of armed robbery, and the trial court did not err by failing to grant the defendant's motion for a directed verdict, based on both victims' identification of the defendant; the defendant being found in a nearby location to the truck stop where the attacks occurred walking rapidly away; and the defendant being found with exactly the amount of cash taken from one victim. The trial court properly limited the defendant's cross-examination of the arresting officer to the length of the police report and the lack of details therein, and did not abuse the court's discretion by refusing to allow defense counsel to ask the officer about the length of time that suspects may spend in custody pre-trial, as that issue was irrelevant to any issue in the case. Burden v. State, 296 Ga. App. 441, 674 S.E.2d 668 (2009) (decided under former O.C.G.A. § 24-9-64).

There was no reversible error in a trial court's limitation of the cross-examination of a key state's witness and of a child victim when the defendant failed to show that the substance of the defendant's questions was limited, or how any of the trial court's actions affected the cross-examination or the defendant's ability to impeach the witnesses. Kerdpoka v. State, 314 Ga. App. 400, 724 S.E.2d 419 (2012), cert. denied, No. S12C1112, 2012 Ga. LEXIS 603 (Ga. 2012) (decided under former O.C.G.A. § 24-9-64).

Trial court may restrict scope of cross-examination to matters relevant to issues being tried, and results of the exercise of that discretion will not be interfered with unless the discretion was manifestly abused. Ayers v. Carter, 159 Ga. App. 680, 285 S.E.2d 55 (1981) (decided under former Code 1933, § 38-1705); Fowler v. State, 171 Ga. App. 491, 320 S.E.2d 219 (1984) (decided under former O.C.G.A. § 24-9-64); Banks v. State, 178 Ga. App. 54, 341 S.E.2d 859 (1986) (decided under former O.C.G.A. § 24-9-64); Walker v. State, 198 Ga. App. 422, 401 S.E.2d 613 (1991) (decided under former O.C.G.A. § 24-9-64).

Trial court did not abuse the court's discretion by excluding reference to emails, admittedly containing mostly irrelevant material, between the victim and the victim's friend, the witness, but nevertheless allowed defense counsel to explore the subject areas desired, with the witness conceding the points raised. Courrier v. State, 270 Ga. App. 622, 607 S.E.2d 221 (2004) (decided under former O.C.G.A. § 24-9-64).

Trial court did not abuse the court's discretion in rejecting the defendant's proposed line of cross-examination questioning as the trial court ruled that testimony involving a totally unrelated arrest was irrelevant to the defendant's case after first giving the defendant the opportunity to establish its relevance. Schlanger v. State, 290 Ga. App. 407, 659 S.E.2d 823 (2008) (decided under former O.C.G.A. § 24-9-64).

3. Specific Applications

Impeachment. — If the purpose in cross-examination is to impeach or discredit a witness, great latitude should be

Scope of Cross-Examination (Cont'd)
3. Specific Applications (Cont'd)

allowed for a thorough and sifting cross-examination. Goodwyn v. Goodwyn, 20 Ga. 600 (1856) (decided under former law); Floyd v. Wallace, 31 Ga. 688 (1861) (decided under former law); Mitchell v. State, 71 Ga. 128 (1883) (decided under former Code 1882, § 3864); Atlanta & B. Air-Line Ry. v. McManus, 1 Ga. App. 302, 58 S.E. 258 (1907) (decided under former Civil Code 1895, § 5282); Kimbrough v. State, 9 Ga. App. 301, 70 S.E. 1127 (1911) (decided under former Penal Code 1910, § 1044); Smith v. State, 12 Ga. App. 13, 76 S.E. 647 (1912) (decided under former Penal Code 1910, § 1044); Glover v. State, 15 Ga. App. 44, 82 S.E. 602 (1914) (decided under former Penal Code 1910, § 1044); Boyett v. State, 16 Ga. App. 150, 84 S.E. 613 (1915) (decided under former Penal Code 1910, § 1044); Griffin v. State, 18 Ga. App. 462, 89 S.E. 537 (1916) (decided under former Penal Code 1910, § 1044); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-1705); Western & Atl. R.R. v. Burnett, 79 Ga. App. 530, 54 S.E.2d 357 (1949) (decided under former Code 1933, § 38-1705); Wyatt v. State, 206 Ga. 613, 57 S.E.2d 914 (1950) (decided under former Code 1933, § 38-1705); Salisbury v. State, 222 Ga. 549, 150 S.E.2d 819 (1966) (decided under former Code 1933, § 38-1705); Bramblett v. State, 139 Ga. App. 745, 229 S.E.2d 484 (1976), aff'd, 239 Ga. 336, 236 S.E.2d 580 (1977), cert. denied, 434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978) (decided under former Code 1933, § 38-1705); Toney v. Johns, 153 Ga. App. 880, 267 S.E.2d 298 (1980) (decided under former Code 1933, § 38-1705); Horne v. State, 155 Ga. App. 851, 273 S.E.2d 193 (1980) (decided under former Code 1933, § 38-1705).

On cross-examination the opposing party is entitled to a thorough and sifting examination of the witness, and, when the defendant's alibi witnesses were under cross-examination, the trial court correctly refused to grant a mistrial with reference to an effort to impeach those witnesses as to whether or not the testimony was fabricated before trial since the object of all legal investigation is the discovery of truth. Mitchell v. State, 157 Ga. App. 683, 278 S.E.2d 192 (1981) (decided under former Code 1933, § 38-1705).

Prosecutor's cross-examination of witness did not constitute impeachment of the witness by proof of a criminal conviction since the prosecutor was cross-examining the witness concerning the criminal charges surrounding incarceration, in order to reveal possible biases, prejudices, or ulterior motives of the witness as they might relate to the witness's testimony on direct examination. Harrison v. State, 259 Ga. 486, 384 S.E.2d 643 (1989) (decided under former O.C.G.A. § 24-9-64).

Use of cross-examination in a good faith attempt to impeach a defendant, who on direct examination has voluntarily given testimony on direct examination obviously calculated to impress the jury as to certain traits of defendant's character, is not prohibited. Butts v. State, 193 Ga. App. 824, 389 S.E.2d 395 (1989) (decided under former O.C.G.A. § 24-9-64).

When a defendant was charged with aggravated assault, but claimed self defense, the trial court erred in prohibiting the defendant from eliciting from the victim that the victim had pending a civil action against the defendant for the victim's injuries. The defendant wished to cross-examine the victim to establish this fact to prove the victim's interest in the outcome of the criminal trial and so attack the victim's credibility, and was entitled to show the state of the witness's feelings toward the defendant and the witness's relationship to the defendant. Boggs v. State, 195 Ga. App. 605, 394 S.E.2d 401 (1990) (decided under former O.C.G.A. § 24-9-64).

Expert witnesses. — Permitting cross-examination directed specifically to testing the accuracy of an expert's opinion stated on direct examination was not an abuse of discretion as to scope of cross-examination. Lane Drug Stores v. Brooks, 70 Ga. App. 878, 29 S.E.2d 716 (1944) (decided under former Code 1933, § 38-1705); Rozar v. State, 93 Ga. App. 207, 91 S.E.2d 131 (1956) (decided under former Code 1933, § 38-1705); Wooten v. Department of Human Resources, 152 Ga.

App. 304, 262 S.E.2d 583 (1979) (decided under former Code 1933, § 38-1705).

In a medical malpractice case, it was error to prevent plaintiffs from cross-examining defense experts about their personal practices, as such evidence, unless excludable on other evidentiary grounds, was admissible as substantive evidence and to impeach the experts' opinion as to the applicable standard of care. Condra v. Atlanta Orthopaedic Group, P.C., 285 Ga. 667, 681 S.E.2d 152 (2009) (decided under former O.C.G.A. § 24-9-64).

Trial court did not err in overruling the defendant's objection to the state's cross-examination of defendant's expert witness, who opined about an alleged failure to properly document the preliminary interview of the victim, on the ground that the defendant previously impeached a deputy by showing the deputy the deputy's report and eliciting testimony that the deputy did ask and the victim did answer more substantive questions because the state's question did not inaccurately characterize the prior testimony, nor refer to facts not in evidence, since there was testimony that the interview consisted of nothing more than asking the victim the victim's name and other preliminary information; that the defendant was able to later educe testimony to the contrary did not make the question improper as stated. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010) (decided under former O.C.G.A. § 24-9-64).

Juvenile court did not err in prohibiting defense counsel from asking an officer, who was qualified as an expert, how many shoe print comparisons the officer had actually performed because the officer testified on the first day of the hearing that the officer had handled other cases involving shoe-print matching, and the juvenile court already had qualified the officer as an expert witness. In the Interest of J.D., 305 Ga. App. 519, 699 S.E.2d 827 (2010) (decided under former O.C.G.A. § 24-9-64).

Police officer's training in field sobriety testing. — In a case in which the defendant was tried for driving under the influence of alcohol to the extent of being a less safe driver, the trial court abridged the defendant's substantial right to cross-examination under former O.C.G.A. § 24-9-64 by precluding defendant from cross-examining the arresting officer about the officer's National Highway Traffic Safety Administration (NHTSA) training and NHTSA requirements for field sobriety evaluations like the horizontal gaze nystagmus (HGN) test, as the officer gave detailed testimony about the defendant's involuntary jerking of the defendant's eyes during a prescribed pattern of HGN testing and asserted that this showed that the defendant was under the influence of alcohol; the officer's NHTSA training and the NHTSA standards for conducting HGN testing were clearly material to the officer's opinion and to the controversy before the court, and the error was not harmless since the state's case relied entirely on the officer's testimony regarding the field sobriety tests. James v. State, 260 Ga. App. 536, 580 S.E.2d 334 (2003) (decided under former O.C.G.A. § 24-9-64).

Character witnesses. — While the general character of the parties, and especially their conduct in other transactions, are irrelevant matters, it is proper on cross-examination to question a character witness regarding particular matters so as to test the extent and basis for the opinion given. Haire v. State, 209 Ga. 378, 72 S.E.2d 707 (1952) (decided under former Code 1933, § 38-1705); Compher v. Georgia Waste Sys., 155 Ga. App. 819, 273 S.E.2d 200 (1980) (decided under former Code 1933, § 38-1705); Curry v. State, 155 Ga. App. 829, 273 S.E.2d 411 (1980) (decided under former Code 1933, § 38-1705).

Use of videotape. — In a prosecution for criminal attempt to process cocaine, stemming from a reverse sting operation, it would have been proper to allow defense counsel to play a videotape of the attempted purchase during the cross-examination of a police officer. Givens v. State, 264 Ga. 522, 448 S.E.2d 687 (1994) (decided under former O.C.G.A. § 24-9-64).

Repetitious questions. — Exclusion of unnecessarily repetitious questions in the cross-examination which have been previously propounded and answered

Scope of Cross-Examination (Cont'd)
3. Specific Applications (Cont'd)

does not constitute an abuse of discretion. Clifton v. State, 187 Ga. 502, 2 S.E.2d 102 (1939) (decided under former Code 1933, § 38-1705); Griffin v. State, 85 Ga. App. 602, 69 S.E.2d 665 (1952) (decided under former Code 1933, § 38-1705); Hamilton v. State, 91 Ga. App. 295, 85 S.E.2d 496 (1954) (decided under former Code 1933, § 38-1705); Pittman v. West, 95 Ga. App. 149, 97 S.E.2d 387 (1957) (decided under former Code 1933, § 38-1705); Harrison v. Regents of Univ. Sys., 99 Ga. App. 762, 109 S.E.2d 854 (1959) (decided under former Code 1933, § 38-1705); Bass v. Bass, 222 Ga. 378, 149 S.E.2d 818 (1966) (decided under former Code 1933, § 38-1705); Sullivan v. State, 222 Ga. 691, 152 S.E.2d 382 (1966) (decided under former Code 1933, § 38-1705); Goober v. Nix, 128 Ga. App. 578, 197 S.E.2d 486 (1973) (decided under former Code 1933, § 38-1705); Geiger v. State, 129 Ga. App. 488, 199 S.E.2d 861 (1973) (decided under former Code 1933, § 38-1705); Reid v. State, 129 Ga. App. 660, 200 S.E.2d 456 (1973) (decided under former Code 1933, § 38-1705); Luther v. DeKalb County, 131 Ga. App. 25, 205 S.E.2d 70 (1974) (decided under former Code 1933, § 38-1705); Jones v. State, 135 Ga. App. 893, 219 S.E.2d 585 (1975) (decided under former Code 1933, § 38-1705); Johnson v. State, 137 Ga. App. 308, 223 S.E.2d 500 (1976) (decided under former Code 1933, § 38-1705); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48 (1976) (decided under former Code 1933, § 38-1705).

When a question has been asked of and answered by a witness, the trial court does not unduly limit the right to a thorough cross-examination by disallowing its repetition. Fitzgerald v. State, 166 Ga. App. 307, 304 S.E.2d 114 (1983) (decided under former O.C.G.A. § 24-9-64).

Argumentative questions. — Questions which are argumentative are properly excluded. Haralson v. State, 234 Ga. 406, 216 S.E.2d 304 (1975), overruled on other grounds, White v. State, 273 Ga. 787, 546 S.E.2d 514 (2001) (decided under former Code 1933, § 38-1705).

Hypothetical questions to determine the witnesses' knowledge must embody the facts offered in evidence. Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936) (decided under former Code 1933, § 38-1705); Curry v. State, 155 Ga. App. 829, 273 S.E.2d 411 (1980) (decided under former Code 1933, § 38-1705).

Conclusion of witness. — Right to a thorough and sifting cross-examination is not abridged if the question propounded calls for a conclusion by the witness. Proctor v. State, 235 Ga. 720, 221 S.E.2d 556 (1975) (decided under former Code 1933, § 38-1705).

Victim's state of mind. — In a prosecution for child molestation, the trial court properly limited the cross-examination of witnesses as to the victim's state of mind, use of drugs, and psychiatric treatment because such inquiry had no relevance to the charges against defendant. Davidson v. State, 232 Ga. App. 250, 501 S.E.2d 510 (1998) (decided under former O.C.G.A. § 24-9-64).

Prior sexual activity. — Victim of an alleged rape may not be cross-examined as to specific acts of prior sexual intercourse with men other than the accused. Thomas v. State, 234 Ga. 635, 217 S.E.2d 152 (1975) (decided under former Code 1933, § 38-1705).

Since defendant had known the victim for only one hour before the alleged rape occurred, and since in that time, it was unlikely that the defendant discovered any past sexual activity on the part of his victim that could justify his claim that she consented to intercourse, the trial court's refusal to admit evidence as to the victim's prior sexual experience was not a denial of defendant's right to a thorough and sifting cross-examination. Lamar v. State, 243 Ga. 401, 254 S.E.2d 353 (1979) (decided under former Code 1933, § 38-1705).

In a child molestation case, defendant was properly precluded from inquiring into the victim's family lifestyle and sexual history. Schwindler v. State, 254 Ga. App. 579, 563 S.E.2d 154 (2002), cert. denied, 538 U.S. 1016, 123 S. Ct. 1935, 155 L. Ed. 2d 854 (2003) (decided under former O.C.G.A. § 24-9-64).

Seduction. — On trial of the defendant under an indictment charging him with seduction of the prosecutor by persuasion and promise of marriage, where such

prosecutor was the only witness for the state and her testimony was self-contradictory as to whether or not she knew, at the time of the alleged seduction, that the defendant was a married man, it was error to deny to defendant's counsel the right to a thorough and sifting cross-examination as provided by statute. Chambers v. State, 88 Ga. App. 57, 76 S.E.2d 84 (1953) (decided under former Code 1933, § 38-1705).

Admission of crime. — In a trial for murder, since the state has introduced an admission by the accused of a willful and intentional killing unaccompanied with any justification or mitigation, it is the accused's right, by cross-examination, to elicit a previous conversation with the same witness in which the admission of the homicide was accompanied by a statement giving the reason therefor. West v. State, 200 Ga. 566, 37 S.E.2d 799, later appeal, 74 Ga. App. 423, 40 S.E.2d 98 (1946) (decided under former Code 1933, § 38-1705).

Prior convictions. — After the defendant's sister testified on direct examination that her brothers were often accused of doing things they did not do, such testimony opened the door to cross-examination about convictions of the defendant's brothers. Pye v. State, 269 Ga. 779, 505 S.E.2d 4 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1767, 143 L. Ed. 2d 797 (1999) (decided under former O.C.G.A. § 24-9-64).

Codefendant's plea agreement. — Cross-examination of an accomplice regarding a deal the accomplice made with the prosecution, including the potential sentence the accomplice could receive and the fact that the accomplice would not be eligible for parole, is constitutionally protected because it shows the witness's motive, bias or interest in cooperating with the state and testifying against defendant. The fact that a witness faces a sentence without eligibility for parole, or a mandatory minimum sentence, gives the witness much more incentive to give favorable testimony. Vogleson v. State, 250 Ga. App. 555, 552 S.E.2d 513 (2001) (decided under former O.C.G.A. § 24-9-64).

Defendant has a constitutionally protected right to explore on cross-examination a codefendant's or an accomplice's agreement with the state, including the amount of prison time the codefendant or accomplice would avoid by agreeing to cooperate with the state and testify against the defendant. Perez v. State, 254 Ga. App. 872, 564 S.E.2d 208 (2002) (decided under former O.C.G.A. § 24-9-64).

Fact that counsel abandons line of inquiry presents nothing for review. — Since the trial court did not curtail proper examination but simply exercised the court's discretion to require counsel to obtain the information through proper questions, the fact that counsel abandoned the line of inquiry presents nothing for review. Johnson v. State, 158 Ga. App. 333, 280 S.E.2d 379 (1981) (decided under former Code 1933, § 38-1705).

When the plaintiff is called as a defense witness upon an objection to the witness being recalled for further cross-examination, this tactic entitles counsel for the plaintiff to cross-examine the witness just like any other defense witness, and while the court can, in the court's discretion, prohibit counsel from posing leading questions, there is no abuse of discretion in allowing the questions. Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475 (1983) (decided under former O.C.G.A. § 24-9-64).

State is not required to reveal the identity of an informant. Montford v. State, 168 Ga. App. 394, 309 S.E.2d 650 (1983) (decided under former O.C.G.A. § 24-9-64).

Defendant's testimony on direct examination that defendant had previously been in "some trouble" did not place defendant's character in issue, but it was not error to allow defendant to be cross-examined as to the specific circumstances surrounding the "trouble" to which defendant testified. Richardson v. State, 173 Ga. App. 695, 327 S.E.2d 813 (1985) (decided under former O.C.G.A. § 24-9-64).

Defendant's intent. — State's objection to defendant's cross-examination under former O.C.G.A. § 24-9-64 of the victim was properly sustained as defendant's intent to commit the crime was a jury question; even if there were error, it was

Scope of Cross-Examination (Cont'd)
3. Specific Applications (Cont'd)

harmless, as defendant obtained the requested information through another line of questioning. Burdette v. State, 259 Ga. App. 59, 576 S.E.2d 47 (2002) (decided under former O.C.G.A. § 24-9-64).

Generally, the wealth or worldly circumstances of a party litigant is never admissible, except in those cases when position or wealth is necessarily involved. First Fed. Sav. & Loan Ass'n v. Jones, 173 Ga. App. 356, 326 S.E.2d 554 (1985) (decided under former O.C.G.A. § 24-9-64).

Minors as witnesses. — Trial court did not abuse court's discretion in refusing to allow defense counsel, while cross-examining a 16-year-old witness, to repeat questions that had been asked and fully answered or from asking questions in a "rapid-fire" method, especially in light of the witness's youth. Phyfer v. State, 259 Ga. App. 356, 577 S.E.2d 56 (2003) (decided under former O.C.G.A. § 24-9-64).

Testimony from witness with immunity. — Any error in limiting a defendant's cross-examination of a witness who had been granted immunity from prosecution was harmless given that the state informed the jury that: the witness had received testimonial immunity; at the time the witness gave the witness's statement to police, the witness was charged only with criminal attempt to commit armed robbery; the detective told the witness then that other charges might be added, or the witness may be offered a plea agreement; the witness was jailed after giving a statement; and the witness was later charged with felony murder and possession of a firearm during the commission of a felony. Younger v. State, 288 Ga. 195, 702 S.E.2d 183 (2010) (decided under former O.C.G.A. § 24-9-64).

Victim's mother. — Because the defendant did not perfect the record with a sufficient proffer of the testimony of the victim's mother, the court of appeals was unable to reach the merits of the defendant's claim that the defendant's cross-examination of the mother would have shown that she had a possible bias or motive for testifying against the defendant and that the mother had made prior allegations that one of her children had been molested; even if review of the alleged error had not been waived, the defendant did not show how the trial court's ruling prevented the defendant from showing any bias or prejudice against the defendant on the part of the mother because the defendant was not prohibited from cross-examining the mother about the state of her feelings toward the defendant pursuant to former O.C.G.A. § 24-9-68 (see now O.C.G.A. § 24-6-622) and about the defendant's relationship with her, and the evidence at trial included the direct testimony of the victim, who testified as to the offenses the defendant committed against her, as well as the chemical evidence of the defendant's semen on the victim's bed sheets. Miceli v. State, 308 Ga. App. 225, 707 S.E.2d 141 (2011) (decided under former O.C.G.A. § 24-9-64).

Relationship with victim. — In defendant's trial on a charge of aggravated assault under O.C.G.A. § 16-5-21(a), the trial court did not abuse the court's discretion under former O.C.G.A. § 24-9-64 in precluding the defendant from cross-examining the victim about what the victim meant when the victim said that there was tension in the victim's relationship with the defendant and that the victim was going through a transitional period in the victim's life; while the defendant contended that the defendant wanted to examine the victim about the victim's failure to comply with a drug rehabilitation program in which the victim was enrolled and that the defendant was upset about the possibility that the victim would leave Georgia if the victim failed to complete the program, thereby ending the relationship, such evidence was irrelevant to the defendant's justification defense because it was not evidence either of the victim's general reputation for violence or of specific acts of violence perpetrated by the victim. Evidence about the status of the couple's relationship and the nature of their arguments in the week leading up to their fight would not have shed any light on whether the defendant was in reasonable fear of suffering immediate serious harm to the defendant when

the defendant choked the victim and threatened to kill the victim. As such, the trial court did not err in ruling that the evidence was irrelevant. Chambers v. State, 308 Ga. App. 748, 708 S.E.2d 651 (2011) (decided under former O.C.G.A. § 24-9-64).

Specific questions. — In a suit on an account, in which the defendant denied receiving a certain portion of the goods, defendant's evidence was self-contradictory and in some degree inconsistent with the testimony of other witnesses, the trial judge did not abuse the judge's discretion in permitting counsel for the plaintiff to state to the defendant, by way of cross-examination, "I want to give you one more opportunity to correct your statement that you did not receive these two shipments of merchandise." Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130 (1931) (decided under former Civil Code 1910, § 5871).

If upon cross-examination of a hostile witness it is shown that the witness has testified to a contradictory statement on a former trial of a codefendant, and the attention of the witness is called to the alleged contradictions and the contradictory statements are admitted by the witness, it is within the legitimate scope of the right of cross-examination to ask the witness upon which occasion the witness was testifying to the truth. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-1705).

Questions involving prior crimes are not admissible when the sole purpose is to show that defendant is guilty of such other crimes; however, questions as to other offenses may be asked in rebuttal to testimony of another witness. Wyatt v. State, 206 Ga. 613, 57 S.E.2d 914 (1950) (decided under former Code 1933, § 38-1705); Casey v. State, 133 Ga. App. 161, 210 S.E.2d 375 (1974) (decided under former Code 1933, § 38-1705).

It was not error for the court, in cross-examination of a police officer, to refuse to require the officer to disclose the name of the person who had given the officer information which led to the arrest of defendant. Morgan v. State, 211 Ga. 172, 84 S.E.2d 365 (1954) (decided under former Code 1933, § 38-1705).

Judgment of the trial court refusing to permit the condemnee to cross-examine witness as to whether the witness had testified as a witness in all other condemnation cases tried in the same court was error and the judgment overruling the motion for new trial on such ground would be reversed. Sutton v. State Hwy. Dep't, 103 Ga. App. 29, 118 S.E.2d 285 (1961) (decided under former Code 1933, § 38-1705).

It is not error to permit the defendant's trial attorney as witness to answer the question why the attorney did not raise the issue of insanity as a defense. Chaffin v. State, 227 Ga. 327, 180 S.E.2d 741 (1971) (decided under former Code 1933, § 38-1705).

Questions which are a misstatement of the witnesses' testimony or matters not within the witnesses' knowledge are properly excluded. Haralson v. State, 234 Ga. 406, 216 S.E.2d 304 (1975), overruled on other grounds, White v. State, 273 Ga. 787, 546 S.E.2d 514 (2001) (decided under former Code 1933, § 38-1705).

Right to a thorough and sifting cross-examination is not abridged since the question propounded calls for a conclusion by the witness as to matters which can be determined only by the jury, such as whether there was provocation or justification of a homicide. Proctor v. State, 235 Ga. 720, 221 S.E.2d 556 (1975) (decided under former Code 1933, § 38-1705).

It is error to permit cross-examination of a defendant for impeachment purposes regarding defendant's silence, or failure to offer an exculpatory statement, at the time of defendant's arrest, including a defendant who was not apprised of defendant's Miranda rights. Harrison v. State, 154 Ga. App. 343, 268 S.E.2d 396 (1980) (decided under former Code 1933, § 38-1705).

On cross-examination, the state may inquire with particularity to test the witness's basis for the opinion given, and may inquire if the witness has not heard particular persons speak ill of the witness, or if the witness has not been known to be accused of particular crimes. Horne v. State, 155 Ga. App. 851, 273 S.E.2d 193 (1980) (decided under former Code 1933, § 38-1705).

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In action for deceit in connection with purchase of used car, where purchase and resale of trade-in vehicle were already in evidence, there was no error in allowing jury to know monetary details of that transaction. Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E.2d 533 (1982) (decided under former O.C.G.A. § 24-9-64).

In prosecution for criminal trespass at welcome center, trial court acted incorrectly when the court curtailed attempts of appellant's counsel to impeach a witness by means of the witness's apparent prior inconsistent statements on issue, on issue of whether the witness had authorized a police officer to act as the witness's representative in giving notice to appellant that appellant was not to return to the center. Joiner v. State, 163 Ga. App. 521, 295 S.E.2d 219 (1982) (decided under former O.C.G.A. § 24-9-64).

As one need not be the owner of premises in order to be deemed in possession of the goods contained therein, the right to a thorough and sifting cross-examination is not abridged by the sustaining of an objection when counsel is trying to elicit from a witness the extent of the witness's knowledge as to the proof of ownership of a home where stolen property was found. Brady v. State, 169 Ga. App. 316, 312 S.E.2d 632 (1983) (decided under former O.C.G.A. § 24-9-64).

In an action seeking damages for injuries sustained when a motorcycle collided with an automobile, the trial court did not abuse the court's discretion in excluding a merely speculative, suggested line of questioning of the defendant, whose defense was that the plaintiff's own negligence caused the injury, about why defendant had failed or chosen not to instigate legal process against the plaintiff. Corley v. Harris, 171 Ga. App. 688, 320 S.E.2d 833 (1984) (decided under former O.C.G.A. § 24-9-64).

When on cross-examination an agent was asked if the agent occupied the lowest position, as far as salary was concerned, in the GBI, there was no abuse of discretion in sustaining the state's objection on the ground of relevancy. Anderson v. State, 165 Ga. App. 885, 303 S.E.2d 57 (1983), rev'd on other grounds, 252 Ga. 103, 312 S.E.2d 113 (1984) (decided under former O.C.G.A. § 24-9-64).

In view of the evidence connecting a witness with the crime and the witness's prior inconsistent statements, the defendant properly inquired into the witness's veracity and the extent of the witness's actual participation. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210, cert. denied, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984) (decided under former O.C.G.A. § 24-9-64).

When the defendant's attorney "opened the door" regarding the defendant's status as a licensed insurance agent in this state, the state's attorney was entitled to a thorough and sifting cross-examination regarding this issue. The fact that the defendant's insurance license was temporarily revoked by an administrative order issued by the Insurance Commissioner may have incidentally placed the defendant's character in issue; however, since the defendant's attorney "opened the door" to this issue, the testimony was not inadmissible. Mason v. State, 180 Ga. App. 235, 348 S.E.2d 754 (1986) (decided under former O.C.G.A. § 24-9-64).

Trial court's refusal to allow defendant to ask a witness, who had entered a guilty plea and was cooperating with the prosecution prior to defendant's sentencing, if the defendant had been told what period of time Georgia law prescribed as the mandatory minimum sentence for defendant's crime, was not error since the court did allow defendant to establish the basis for possible bias or interest of the witness. Matthews v. State, 194 Ga. App. 386, 390 S.E.2d 873 (1990) (decided under former O.C.G.A. § 24-9-64).

In a prosecution for violating the Georgia Controlled Substances Act, O.C.G.A. § 16-13-1 et seq., and obstruction of an officer, the court did not abuse the court's discretion by restricting defendant's cross-examination of the state's crime lab witness when the court refused to allow defendant to examine the witness regarding another crime lab scientist who testified at a hearing in another county in an

unrelated case that a substance was cocaine when in fact it was soap, since the crime lab witness testified, during proffer, that the witness had "no personal knowledge" of the incident and all the information be possessed about it was "secondary information" which was told to the witness at a crime lab meeting conducted by the witness's supervisor. Stephens v. State, 207 Ga. App. 645, 428 S.E.2d 661 (1993) (decided under former O.C.G.A. § 24-9-64).

When the trial court did not restrict defendant's counsel from questioning police officers regarding any bias the officer had toward black males, but merely restricted defendant's counsel from questioning police officers regarding an alleged prior brutality incident, in which no formal complaint had apparently been filed, there was no abuse of the trial court's decision. Harris v. State, 216 Ga. App. 297, 454 S.E.2d 146 (1995) (decided under former O.C.G.A. § 24-9-64).

State was entitled to cross-examine the defendant about why defendant had been in jail prior to defendant's prosecution for burglary and kidnapping, since the defendant introduced the topic of defendant's incarceration by testifying that the defendant had told the gunmen, who allegedly forced the defendant to accompany them to the victims' apartment, that the defendant could not have sold drugs for the victim because the defendant had been in jail. Cosby v. State, 234 Ga. App. 723, 507 S.E.2d 551 (1998) (decided under former O.C.G.A. § 24-9-64).

In a malpractice action, the court properly excluded the following question put to defendants' expert, i.e., "whether hospitals all over the country admit people to find out what is causing abdominal pain" because the expert had earlier answered a similar question that asked "whether people were admitted to a hospital to find out what was causing a problem." Cornelius v. Macon-Bibb County Hosp. Auth., 243 Ga. App. 480, 533 S.E.2d 420 (2000) (decided under former O.C.G.A. § 24-9-64).

When defendant was charged with raping a victim who accepted defendant's offer of a ride as the victim was on her way to return a jacket to a former boyfriend, the rape shield law, former O.C.G.A. § 24-2-3(a) (see now O.C.G.A. § 24-4-412), did not prohibit the defendant from inquiring of the victim about a theory that the victim fabricated the rape charge to explain semen stains on the boyfriend's jacket, resulting from the sexual encounter, because she wanted to reestablish a romantic relationship with the boyfriend, because the defendant was not seeking to inquire about the victim's character for sexual behavior. Richardson v. State, 276 Ga. 639, 581 S.E.2d 528 (2003) (decided under former O.C.G.A. § 24-9-64).

Trial court did not abuse the court's discretion in limiting the defendant's cross-examination of one detective about how another detective, who was unavailable at trial, formed that detective's opinions and impressions regarding how the defendant's spouse was killed as such questioning was beyond the detective's personal knowledge. Rowe v. State, 276 Ga. 800, 582 S.E.2d 119 (2003) (decided under former O.C.G.A. § 24-9-64).

In a suit brought for specific performance of a contract provision and damages, the trial court did not err in preventing the defendant from cross-examining the plaintiff regarding the fairness of the provision; the suit involved a single provision in a written contract reflecting an arm's length transaction terminating a business relationship, and it was not incumbent upon the plaintiff to prove the fairness of the provision. Hibbard v. McMillan, 284 Ga. App. 753, 645 S.E.2d 356 (2007) (decided under former O.C.G.A. § 24-9-64).

Trial court did not err in sustaining the state's objection to defense counsel's questioning of a police officer regarding the officer's observation of other men on a defendant's property at the time the police began watching the property because the officer had not testified that the officer saw other men at the time the officer began the surveillance. Price v. State, 303 Ga. App. 859, 694 S.E.2d 712 (2010) (decided under former O.C.G.A. § 24-9-64).

Trial court did not manifestly abuse the court's discretion in limiting the defendant's crossexamination of a police officer by restricting the defendant from asking the officer about criminal charges brought

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against other persons involved in the underlying incident because the defendant did not show that allowing cross-examination about whether another party was charged with the offense of selling cocaine would have raised a reasonable inference that the defendant was not guilty of the separate offense of possession of cocaine with intent to distribute. Bush v. State, 305 Ga. App. 617, 699 S.E.2d 899 (2010) (decided under former O.C.G.A. § 24-9-64).

Trial court did not abuse the court's discretion in curtailing the defendant's cross-examination of a Department of Family and Children Services (DFCS) employee about whether the Department at some point thought the evidence was not sufficient to warrant referring a victim's case to the district attorney and whether the victim's mother laughed when the mother was told of the victim's allegations because even if DFCS had initially concluded that a referral was not warranted or that the mother had laughed, such evidence could have no relevance to any issue in the defendant's child molestation case. Kay v. State, 306 Ga. App. 666, 703 S.E.2d 108 (2010) (decided under former O.C.G.A. § 24-9-64).

Trial court did not err in requiring defense counsel to voir dire defendant's wife, who had accused defendant of child molestation, prior to questioning her as to possible motives to fabricate her testimony in order to obtain a special visa for victims of domestic violence under the immigration laws. Defense counsel was permitted to cross-examine the wife in these areas, but not to ask questions regarding how the wife came into the United States. Gonzalez v. State, 310 Ga. App. 348, 714 S.E.2d 13 (2011) (decided under former O.C.G.A. § 24-9-64).

Trial court did not err in sustaining the state's objection to a defendant's request that a police officer come down from the stand and describe the defendant's tattoos because what the defendant sought was not related to a legitimate purpose of cross-examination, but to introduce evidence from the defendant without the burden of subjecting the defendant to cross-examination. Jefferson v. State, 312 Ga. App. 842, 720 S.E.2d 184 (2011) (decided under former O.C.G.A. § 24-9-64).

Leading Questions

1. In General

In general. — For a question to be objectionable it must be necessarily leading. Allgood v. State, 87 Ga. 668, 13 S.E. 569 (1891) (decided under former Code 1882, § 3865).

Question was leading when it was so framed as to suggest to the witness the answer which was desired; on the other hand, a question not suggesting the desired answer was not leading if the question inquired only into a single fact. Denson v. Miller, 33 Ga. 275 (1862) (decided under former law); James v. State, 215 Ga. 213, 109 S.E.2d 735 (1959) (decided under former Code 1933, § 38-1706); Ealey v. State, 139 Ga. App. 110, 227 S.E.2d 902 (1976) (decided under former Code 1933, § 38-1706).

Judge was given latitude and discretion in permitting leading questions, and unless there was an abuse thereof resulting in prejudice and injury there was no reversible error. Hill v. State, 41 Ga. 484 (1871) (decided under former Code 1868, § 309); Burrus & Williams v. Kyle & Co., 56 Ga. 24 (1876) (decided under former Code 1873, § 3865); Parker v. Georgia Pac. Ry., 83 Ga. 539, 10 S.E. 233 (1889) (decided under former Code 1873, § 3865); Doster v. State, 93 Ga. 43, 18 S.E. 997 (1893) (decided under former Civil Code 1895, § 5283); Georgia R.R. & Banking Co. v. Churchill, 113 Ga. 12, 38 S.E. 336 (1901) (decided under former Civil Code 1895, § 5283); City of Rome v. Stewart, 116 Ga. 738, 42 S.E. 1011 (1902) (decided under former Civil Code 1895, § 5283); McBride v. Georgia Ry. & Elec. Co., 125 Ga. 515, 54 S.E. 674 (1906) (decided under former Civil Code 1895, § 5283); Lauchheimer & Sons v. Jacobs, 126 Ga. 261, 55 S.E. 55 (1906) (decided under former Civil Code 1895, § 5283); Lyles v. State, 130 Ga. 294, 60 S.E. 578 (1908) (decided under former Civil Code 1895, § 5283); Peterson v. State, 6 Ga. App. 491, 65 S.E. 311 (1909) (decided

under former Civil Code 1895, § 5283); Ethridge v. State, 163 Ga. 186, 136 S.E. 72 (1926) (decided under former Civil Code 1910, § 5872); Peretzman v. Simon, 185 Ga. 681, 196 S.E. 471 (1938) (decided under former Code 1933, § 38-1706); Hanson v. State, 86 Ga. App. 313, 71 S.E.2d 720 (1952) (decided under former Code 1933, § 38-1706); English v. State, 234 Ga. 602, 216 S.E.2d 851 (1975) (decided under former Code 1933, § 38-1706); Hudson v. State, 137 Ga. App. 439, 224 S.E.2d 48 (1976) (decided under former Code 1933, § 38-1706); Clary Appliance & Furn. Ctr., Inc. v. Butler, 139 Ga. App. 233, 228 S.E.2d 211 (1976) (decided under former Code 1933, § 38-1706); Tucker v. Mappin, 149 Ga. App. 847, 256 S.E.2d 135 (1979) (decided under former Code 1933, § 38-1706); Booker v. State, 156 Ga. App. 40, 274 S.E.2d 84 (1980), rev'd on other grounds, 247 Ga. 74, 274 S.E.2d 334 (1981) (decided under former Code 1933, § 38-1706); Hamby v. State, 158 Ga. App. 265, 279 S.E.2d 715 (1981) (decided under former Code 1933, § 38-1706); Rutland v. State, 158 Ga. App. 315, 279 S.E.2d 757 (1981) (decided under former Code 1933, § 38-1706).

Court may, in the exercise of the court's discretion, permit a party calling a witness to propound leading questions. Hamby v. State, 158 Ga. App. 265, 279 S.E.2d 715 (1981) (decided under former Code 1933, § 38-1706).

Trial court was permitted to exercise the court's discretion in granting the right to the party calling the witness to ask leading questions, and reversible error occurred only if that discretion was abused to the extent that the appealing party was prejudiced and injured. Blue Cross of Georgia/Columbus, Inc. v. Whatley, 180 Ga. App. 93, 348 S.E.2d 459 (1986) (decided under former O.C.G.A. § 24-9-63).

2. Permitted

Bill for discovery. — Leading questions may be propounded in a bill for discovery. Cade v. Hatcher, 72 Ga. 359 (1884) (decided under former Code 1882, § 3865).

Leading questions were permitted on cross-examination, and a trial court did not err in allowing questions to a defendant on cross-examination about whether defendant had heard the testimony of an earlier witness. Brown v. State, 265 Ga. App. 613, 594 S.E.2d 770 (2004) (decided under former O.C.G.A. § 24-9-63).

Judge may personally ask leading questions. Smith v. State, 11 Ga. App. 89, 74 S.E. 711 (1912) (decided under former Penal Code 1910, § 1045). See also White v. State, 56 Ga. 358 (1876) (decided under former law).

Interest adverse to questioning party. — When the vouchee was subpoenaed by plaintiff and sworn as the plaintiff's witness, the vouchee's interest was adverse to that of the defendant, and the vouchee's testimony was material and relevant to the defendant's defense, there was no abuse of discretion of the trial court in permitting the voucher to cross-examine the vouchee. Clary Appliance & Furn. Ctr., Inc. v. Butler, 139 Ga. App. 233, 228 S.E.2d 211 (1976) (decided under former Code 1933, § 38-1706).

Unfriendly witnesses may be asked leading questions. Moore v. State, 130 Ga. 322, 60 S.E. 544 (1908) (decided under former Penal Code 1895, § 1019); Morgan v. State, 17 Ga. App. 124, 86 S.E. 281 (1915) (decided under former Penal Code 1910, § 1045). See also Nalley v. State, 11 Ga. App. 15, 74 S.E. 567 (1912) (decided under former Penal Code 1910, § 1045).

Unwilling witnesses may be led, as a rule, especially when contumacious or equivocal. Durham v. State, 70 Ga. 264 (1883) (decided under former Code 1882, § 3865).

Nervous, ignorant, or hostile witness. — Trial court hads the discretion to allow leading questions on direct examination when, for example, the witness was nervous, ignorant, or hostile. Fugate v. State, 263 Ga. 260, 431 S.E.2d 104 (1993) (decided under former O.C.G.A. § 24-9-63); Crowder v. State, 222 Ga. App. 351, 474 S.E.2d 246 (1996) (decided under former O.C.G.A. § 24-9-63); Smith v. State, 243 Ga. App. 331, 533 S.E.2d 431 (2000) (decided under former O.C.G.A. § 24-9-63).

Leading Questions (Cont'd)
2. Permitted (Cont'd)

Favorable and willing witnesses. — Trial judge was given great latitude and discretion in permitting counsel to examine and lead a witness in an effort to get to the true facts, even though the witness may be a favorable and willing one; and, therefore, ordinarily, and unless there was a palpable and illegal abuse of the above discretion resulting in prejudice and injury to the complaining party in a material manner, reversible error will not be predicated by this court upon rulings of the trial court as to allowance of leading questions in examination of a witness. Hawthorne v. Pope, 51 Ga. App. 498, 180 S.E. 920 (1935) (decided under former Code 1933, § 38-1706).

Favorable witness who has repudiated testimony. — When an alleged co-conspirator was sworn and testified as a witness for the state, but on cross-examination repudiated the witness's testimony given on direct examination, and testified that the witness's evidence on direct examination had been given on account of threats and intimidation made by a police officer who had told the witness what to say, it was proper to permit the prosecutor to cross-examine the witness for the purpose of showing entrapment, and in this way to prove that the accomplice witness had made statements after the pendency of the alleged conspiracy, but prior to the date of the witness's alleged intimidation, which corroborated the witness's testimony given on direct examination by the state. Mitchell v. State, 202 Ga. 247, 42 S.E.2d 767 (1947) (decided under former Code 1933, § 38-1706).

Witness sworn but not examined. — Witness who was sworn but not examined by a party may be asked leading questions by the opposing party. Brown v. State, 28 Ga. 199 (1859). See also Lunday v. Thomas, 26 Ga. 537 (1858) (decided under former law).

Children and like minded persons. — Judge, when need appeared, will ordinarily permit leading questions to children, or to witnesses so ignorant, timid, weakminded, or deficient in the English language that the witnesses cannot otherwise be brought to understand what information was sought. McCrary v. State, 137 Ga. 784, 74 S.E. 536 (1912) (decided under former Penal Code 1910, § 1045); Hayslip v. State, 154 Ga. App. 835, 270 S.E.2d 61 (1980) (decided under former Code 1933, § 38-1706).

In a defendant's prosecution for aggravated child molestation under O.C.G.A. § 16-6-4(b), the prosecutor was properly permitted to use leading questions under former O.C.G.A. § 24-9-63 during the victim's direct examination as the victim was only 14 at the time of trial, was often non-responsive, spoke very softly, and exhibited signs of timidity and fear. Bell v. State, 294 Ga. App. 779, 670 S.E.2d 476 (2008) (decided under former O.C.G.A. § 24-9-63).

Questioning a young female relating to matters of a sexual character. Keller v. State, 102 Ga. 506, 31 S.E. 92 (1897) (decided under former Penal Code 1895, § 1019); Wade v. State, 11 Ga. App. 411, 75 S.E. 494 (1912), later appeal, 13 Ga. App. 142, 78 S.E. 863 (1913) (decided under former Penal Code 1910, § 1045); Hanson v. State, 86 Ga. App. 313, 71 S.E.2d 720 (1952) (decided under former Code 1933, § 38-1706).

Parties as witnesses. — Leading questions may be allowed although the witness called may be one of the opposite parties to the case. Cade v. Hatcher, 72 Ga. 359 (1884) (decided under former Code 1882, § 3865); Cotton States Life Ins. Co. v. Edwards, 74 Ga. 220 (1884) (decided under former Code 1882, § 3865).

Even though a witness was not hostile but was favorable, as if the witness was a party, or was the injured female in a criminal prosecution for seduction, the reviewing court would not control the trial judge's discretion in allowing leading questions, and a new trial would not be granted in such case unless it was plainly apparent that the judge in the exercise of that discretion manifestly abused the discretion, and that thereby the defendant suffered harm. Hanson v. State, 86 Ga. App. 313, 71 S.E.2d 720 (1952) (decided under former Code 1933, § 38-1706).

It was not objectionable as a leading question to ask a witness, "Do you

know that boy over there?" pointing at the prisoner. Paschal v. State, 89 Ga. 303, 15 S.E. 322 (1892) (decided under former Code 1882, § 3865).

It was held not a leading question to ask a witness whether or not designated language was used in a given occasion. Fountain v. State, 7 Ga. App. 559, 67 S.E. 218 (1910) (decided under former Penal Code 1895, § 1019).

Question, "You know anything about making up any money to buy whiskey?" was held not objectionable. Hinsman v. State, 14 Ga. App. 481, 81 S.E. 367 (1914) (decided under former Penal Code 1910, § 1045).

When the plaintiff was called as a defense witness upon an objection to the witness being recalled for further cross-examination, this tactic entitled counsel for the plaintiff to cross-examine the witness just like any other defense witness, and while the court can, in the court's discretion, prohibit counsel from posing leading questions, there was no abuse of discretion in allowing the questions. Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475 (1983) (decided under former O.C.G.A. § 24-9-63).

Witness with speech impediment. — It was not an abuse of the trial court's discretion to permit one instance of leading a witness who testified that the witness suffered from a speech impediment. Parker v. State, 172 Ga. App. 540, 323 S.E.2d 826 (1984) (decided under former O.C.G.A. § 24-9-63).

Language barrier. — When a witness exhibited a language barrier, to the extent that the court reporter had a hard time understanding the witness's answers to be able to adequately transcribe the answers, despite the fact that the witness spoke English, the trial court properly allowed the state to ask the witness leading questions. Dumas v. State, 283 Ga. App. 279, 641 S.E.2d 271 (2007) (decided under former O.C.G.A. § 24-9-63).

Insurer's cross-examination of own witness. — Insurer was entitled to cross-examine insurer's own witness when the witness was determined to have played a key part in a case by, inter alia, finding items of importance matchable to plaintiff's car. Although the witness did not concededly fall within the expressly authorized categories in former O.C.G.A. § 24-9-81, former O.C.G.A. § 24-9-63 permitted such testimony in the interests of justice. Hicks v. Doe, 206 Ga. App. 596, 426 S.E.2d 174 (1992) (decided under former O.C.G.A. § 24-9-63).

Treatment of hostile witness. — When a state's witness was nervous, attempted to evade the prosecutor's questions, and, when asked if the witness would tell the jury what happened at the time of the shooting, the witness said the witness would "rather not," the trial court properly allowed the state to treat the witness as a hostile witness and ask the witness leading questions. Culler v. State, 277 Ga. 717, 594 S.E.2d 631 (2004) (decided under former O.C.G.A. § 24-9-63).

Cross-examination of one's own witness. — Trial court properly allowed a wife to cross-examine two of her own witnesses to show that the husband fraudulently conveyed marital assets to a close friend and to a sister in anticipation of the divorce as such a determination was within the trial court's discretion pursuant to former O.C.G.A. § 24-9-63. Lanier v. Lanier, 278 Ga. 881, 608 S.E.2d 213 (2005) (decided under former O.C.G.A. § 24-9-63).

3. Not Permitted

Party's own witness. — When the question to which an objection was sustained was leading in nature, it was not properly propounded on redirect examination of defendant's own witness. P.D. v. State, 151 Ga. App. 662, 261 S.E.2d 413 (1979) (decided under former Code 1933, § 38-1706).

After unfavorable answer. — Mere fact that an unfavorable answer was given by the witness would not demand that counsel be allowed to ask leading questions of such witness so that a refusal to permit such questions would be an abuse of discretion. Perkins v. Edwards, 228 Ga. 470, 186 S.E.2d 109 (1971) (decided under former Code 1933, § 38-1706); Tucker v. Mappin, 149 Ga. App. 847, 256 S.E.2d 135 (1979) (decided under former Code 1933, § 38-1706).

On trial for assault with intent to rape, a question asked by the prosecutor,

Leading Questions (Cont'd)
3. Not Permitted (Cont'd)

"Did defendant attempt to strip up your clothes," was held too leading. Wade v. State, 12 Ga. 25 (1852) (decided under former law).

Relevant Matter

Discretion of judge. — Trial judge had discretion to control the scope and manner of cross-examination and this discretion will not be curtailed absent some clear abuse. Cochran v. Neely, 123 Ga. App. 500, 181 S.E.2d 511 (1971) (decided under former Code 1933, § 38-1704); Whitley v. State, 137 Ga. App. 68, 223 S.E.2d 17 (1975) (decided under former Code 1933, § 38-1704); Redd v. State, 141 Ga. App. 888, 234 S.E.2d 812 (1977) (decided under former Code 1933, § 38-1704).

Relevancy and materiality of a line of question rests, even on cross-examination, largely within the discretion of the trial judge. Lancette v. State, 151 Ga. App. 740, 261 S.E.2d 405 (1979) (decided under former Code 1933, § 38-1704).

Trial court judge did not abuse the judge's discretion by refusing to allow the defendant to cross-examine robbery victims as to their immigration status because such testimony was not relevant to the case and there was no pending immigration proceedings against the victims. Lemons v. State, 270 Ga. App. 743, 608 S.E.2d 15 (2004) (decided under former O.C.G.A. § 24-9-62).

Question for jury. — Evidence of doubtful relevancy or competency should be admitted and the weight left to the jury. Crass v. State, 150 Ga. App. 374, 257 S.E.2d 909 (1979) (decided under former Code 1933, § 38-1704).

Highway land condemnation. — When the question to be determined by the jury in condemnation proceedings was the value of the property at the time of the property's taking for public purposes on the date that the property was taken, which was the date that the property was condemned, the court did not err in restricting counsel in counsel's direct, rebuttal, and cross-examination of the witnesses with reference to knowledge of the condemnees that the highway was to be located at or near their property at the time they purchased the property, and in refusing to allow final argument thereon by counsel. State Hwy. Dep't v. Owens, 120 Ga. App. 647, 171 S.E.2d 770 (1969) (decided under former Code 1933, § 38-1704).

Improper Questions

Testing intelligence, memory, accuracy, or veracity. — Question propounded by counsel on cross-examination is allowable for the purpose of testing the intelligence of the witness, or memory, accuracy, and veracity, but must not be argumentative. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-1704).

Illegal or immoral conduct. — Until a foundation showing the relevancy of a line of questioning is established so as to come within the "other crime" exception, one may not, under the guise of attacking the witness's credibility, ask questions suggesting illegal or immoral conduct in areas other than that before the court. Lancette v. State, 151 Ga. App. 740, 261 S.E.2d 405 (1979) (decided under former Code 1933, § 38-1704).

Accuracy. — When in a suit on an account, in which the defendant denied receiving a certain portion of the goods, defendant's evidence was self-contradictory and in some degree inconsistent with the testimony of other witnesses, the trial judge did not abuse the judge's discretion in permitting counsel for the plaintiff to state to the defendant, by way of cross-examination, "I want to give you one more opportunity to correct your statement that you did not receive these two shipments of merchandise." Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130 (1931) (decided under former Civil Code 1910, § 5870).

Chastity. — Witnesses cannot be impeached by showing their lack of chastity since this bears no relevance to the case. Smith v. State, 235 Ga. 327, 219 S.E.2d 440 (1975) (decided under former Code 1933, § 38-1704).

Pregnancy of rape victim. — In a prosecution for rape, the trial court properly barred defendant's crossexamination

of a police officer about whether the victim's stepfather told the officer that someone had told the stepfather that the victim was pregnant. Lee v. State, 241 Ga. App. 182, 525 S.E.2d 426 (1999) (decided under former O.C.G.A. § 24-9-62).

Harsh or Insulting Demeanor

In general. — Courts will not violate the right of a witness to have excluded an irrelevant document, of an impeaching nature, for which no foundation has been laid for submission of this evidence to the jury. Taylor v. Marsh, 107 Ga. App. 575, 130 S.E.2d 770 (1963) (decided under former Code 1933, § 38-1704).

Speaking too loudly. — Trial court did not err by admonishing defendant's counsel for speaking too loudly when counsel questioned a 12-year old witness since the trial court did limit the type of questions that defendant could ask or in any way comment on the evidence, but rather, the trial court merely exercised the court's broad discretion to protect a witness from harsh or insulting demeanor. Schneider v. State, 267 Ga. App. 508, 603 S.E.2d 663 (2004) (decided under former .O.C.G.A. § 24-9-62).

Life style. — It is improper argument to infer that witnesses are not worthy of belief because the witnesses are living in the same apartment while unmarried. Smith v. State, 235 Ga. 327, 219 S.E.2d 440 (1975) (decided under former Code 1933, § 38-1704).

Questioning reluctant witnesses. — It is the privilege of counsel and the duty of courts to propound such questions to reluctant witnesses as will strip the witnesses of the subterfuges to which the witnesses resort to evade telling the truth. Kelly v. State, 19 Ga. 425 (1856) (decided under former law).

Repeated questions. — Trial court properly prevented a defendant from questioning a witness for the fourth time as to whether the witness would tell a lie after the witness had answered the first three times with some variant of the word "no." Butler v. State, 285 Ga. 518, 678 S.E.2d 92 (2009) (decided under former O.C.G.A. § 24-9-62).

Principles of Impeachment

Neither the arrest nor the indictment of a witness is impeaching, since, until proof of conviction, the witness is protected by the legal presumption of innocence. Hood v. State, 179 Ga. App. 387, 346 S.E.2d 867 (1986) (decided under former O.C.G.A. § 24-9-81).

Impeachment of Own Witness

1. In General

Former statute prohibited a party from impeaching the party's own witness. — See Ellenburg v. State, 239 Ga. 309, 236 S.E.2d 650 (1977) (decided under former Code 1933, § 38-1801).

Even if a trial court erred by allowing the state to impeach the state's own witness with a prior statement when the witness could not vouch for the statement's accuracy pursuant to former O.C.G.A. § 24-9-81, no harm resulted due to the overwhelming evidence of the defendant's guilt. Coleman v. State, 278 Ga. 486, 604 S.E.2d 151 (2004) (decided under former O.C.G.A. § 24-9-81).

Broad construction. — Right to impeach one's own witness is broadly construed. Canady v. State, 147 Ga. App. 640, 249 S.E.2d 690 (1978) (decided under former Code 1933, § 38-1801); Robinson v. State, 150 Ga. App. 642, 258 S.E.2d 294 (1979) (decided under former Code 1933, § 38-1801).

Strict construction. — Party may be "misled" but not "entrapped," since the former statute, which was in derogation of the common law and must be construed strictly, used the word "entrapped" and not "misled." Jeens v. Wrightsville & T.R.R., 144 Ga. 48, 85 S.E. 1055 (1915) (decided under former Civil Code 1910, § 5579). Jenkins v. State, 73 Ga. App. 515, 37 S.E.2d 230 (1946) (decided under former Code 1933, § 38-1801).

Applicability to state. — Former statute applied to the state as well as to the defendant. Dixon v. State, 86 Ga. 754, 13 S.E. 87 (1891) (decided under former Code 1882, § 3869).

Treatment as hostile witness. — Trial court did not err in declaring that defendant's cousin, who had earlier pled

Impeachment of Own Witness (Cont'd)
1. In General (Cont'd)

guilty to the theft for which defendant was on trial, was a hostile witness and in allowing the state to ask the cousin leading questions because the trial court had great latitude to allow the state to treat a person as a hostile witness and propound leading questions, and allowing it in the present case was proper because the state was not aware that the cousin would change the cousin's testimony at trial from earlier statements the cousin had made about the theft. Wilson v. State, 258 Ga. App. 166, 573 S.E.2d 432 (2002) (decided under former O.C.G.A. § 24-9-81).

Effect of exercising constitutional privilege. — After defendant's counsel pled entrapment but when called upon to testify, the defendant availed under oath the constitutional privilege of refusing to answer on the ground that to answer might tend to incriminate the defendant, and thereafter counsel attempted to cross-examine the witness as to what this witness told counsel about the circumstances surrounding this matter, the court erred in refusing to allow a thorough and sifting cross-examination of the witness as to the entrapment. Interstate Life & Accident Ins. Co. v. Wilmont, 123 Ga. App. 337, 180 S.E.2d 913 (1971) (decided under former Code 1933, § 38-1801).

Entrapment refers to the right of a party to impeach the party's own witness after the party testifies to matters which are contradictory to statements previously made, authorizing a thorough and sifting cross-examination of the party's own witness. Interstate Life & Accident Ins. Co. v. Wilmont, 123 Ga. App. 337, 180 S.E.2d 913 (1971) (decided under former Code 1933, § 38-1801).

Function of cross-examination. — When the introduction of earlier out-of-court statements might occasion confusion, it is the function of a thorough and sifting cross-examination to explore the circumstances of each of the witness's pronouncements in the ultimate quest for truth. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

Testimony cannot be withdrawn. — Witness who has delivered testimony hurtful to the party introducing the witness cannot be withdrawn; but if the party has been entrapped by the witness, the law permits the witness's impeachment by the party introducing the witness. Zipperer v. Mayor of Savannah, 128 Ga. 135, 57 S.E. 311 (1907) (decided under former Civil Code 1895, § 5290).

Showing contradictions of facts. — Although a party may not impeach the party's own witness, unless entrapped by the party, the party may show that the facts are different from the statement of the witness. Cronan v. Roberts & Co., 65 Ga. 678 (1880) (decided under former Code 1873, § 3869); Hollingsworth v. State, 79 Ga. 605, 4 S.E. 560 (1887) (decided under former Code 1882, § 3869); McElmurray v. Turner, 86 Ga. 215, 12 S.E. 359 (1890) (decided under former Code 1882, § 3869); Christian v. Macon Ry. & Light Co., 120 Ga. 314, 47 S.E. 923 (1904) (decided under former Civil Code 1895, § 5290); Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S.E. 143 (1904) (decided under former Civil Code 1895, § 5290); Robert R. Sizer & Co. v. G. T. Melton & Sons, 129 Ga. 143, 58 S.E. 1055 (1907) (decided under former Civil Code 1895, § 5290); Luke v. Cannon, 4 Ga. App. 538, 62 S.E. 110 (1908) (decided under former Civil Code 1895, § 5290); Sessions v. State, 6 Ga. App. 336, 64 S.E. 1101 (1909) (decided under former Penal Code 1895, § 1024); Carter & Martin v. Carter, 7 Ga. App. 216, 66 S.E. 630 (1909) (decided under former Civil Code 1895, § 5290); Southern Ry. v. Wessinger, 32 Ga. App. 551, 124 S.E. 100, cert. denied, 32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5879); Lewis v. American Rd. Ins. Co., 119 Ga. App. 507, 167 S.E.2d 729 (1969) (decided under former Code 1933, § 38-1801).

Refusal to respond to questions in discovery proceedings is not tantamount to making a statement or giving testimony contradictory to testimony on trial. Lewis v. American Rd. Ins. Co., 119 Ga. App. 507, 167 S.E.2d 729 (1969) (decided under former Code 1933, § 38-1801).

Putting witness up merely for purpose of discrediting the witness, or

merely to lay a foundation for the witness to be contradicted on a material point and thereby rendered unworthy of belief, is reversible error. Eberhart v. State, 121 Ga. App. 663, 175 S.E.2d 73 (1970) (decided under former Code 1933, § 38-1801).

Proof of bad character. — One who knows the general bad character of a witness by reason of previous felony convictions should not be allowed first to impliedly accredit the witness by offering the witness before a jury as worthy of belief, and then, when entrapped by the witness's testimony, prove, in addition to the contradictory statements by which the witness was surprised and deceived, the general bad character which neither surprised nor misled the witness. Kitchens v. Hall, 116 Ga. App. 41, 156 S.E.2d 920 (1967) (decided under former Code 1933, § 38-1801).

Trial court did not err by refusing to allow defendant to impeach the defendant's own witness, who had not been declared hostile, by proof of convictions of misdemeanors involving moral turpitude. Paradise v. State, 212 Ga. App. 166, 441 S.E.2d 497 (1994) (decided under former O.C.G.A. § 24-9-81).

Either party may waive the former statutory requirements and allow a party to impeach the party's own witness without first having shown the court that the witness had entrapped the party. O'Dell v. State, 120 Ga. 152, 47 S.E. 577 (1904) (decided under former Penal Code 1895, § 1024).

Directing witness to time and place of previous testimony. — Witness cannot be impeached by proof of contradictory statement until the witness's attention has been directed to the time, as well as the place, at which the alleged previous contradictory statements are alleged to have been made. Luke v. Cannon, 4 Ga. App. 538, 62 S.E. 110 (1908) (decided under former Civil Code 1895, § 5290).

Admission for impeachment only. — When impeachment is allowed, the prior inconsistent statement is admitted in evidence for impeachment purposes only. Kemp v. State, 214 Ga. 558, 105 S.E.2d 582 (1958) (decided under former Code 1933, § 38-1801); Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

Impeachment of prior testimony. — Trial court did not err in allowing one of the state's witnesses to testify that another state witness told the witness immediately before the shooting that the witness had seen the defendant get a gun from the car in which the defendant was a passenger that night because the statement was offered and admitted to impeach the other witness's prior testimony that the witness had never witnessed the defendant retrieve anything from the car after the concert. Anderson v. State, 286 Ga. 57, 685 S.E.2d 716 (2009) (decided under former O.C.G.A. § 24-9-81).

Improper admission of inconsistent statement harmless error. — In a divorce proceeding, admission of the testimony of a witness called by a spouse that impeached the testimony of the other spouse's lover, also called by the spouse, would have been proper as prior inconsistent statements under former O.C.G.A. §§ 24-9-81 and 24-9-83 (see now O.C.G.A. §§ 24-6-608 and 24-6-611), but the timing of the impeaching testimony before the lover's testimony made the admission improper; there was no harm in the error, however, because the spouse's lover was called as a witness and was questioned about the contradictory statements. Moxley v. Moxley, 281 Ga. 326, 638 S.E.2d 284 (2006) (decided under former O.C.G.A. § 24-9-81).

Deposition admitted for impeachment. — When it appears that the witness was questioned about the depositions while the witness was on the stand, and that the witness testified somewhat at variance from the depositions, it was not an abuse of discretion for the court to allow the depositions in evidence for the purpose of impeachment. Parker & Co. v. Glenn, 90 Ga. App. 500, 83 S.E.2d 263 (1954) (decided under former Code 1933, § 38-1801).

Admission of repudiated statement. — It was not erroneous to admit a written statement later repudiated by a witness, over the objection made to the state's admission, since the repudiation would tend to impeach the witness. Fincher v. State, 211 Ga. 89, 84 S.E.2d 76 (1954)

Impeachment of Own Witness (Cont'd)
1. In General (Cont'd)

(decided under former Code 1933, § 38-1801).

When, on direct examination, a witness testified that the witness had lied in a statement the witness gave the police, the trial court did not err in allowing the state to impeach the state's own witness by admitting the witness's prior inconsistent statement as substantive evidence. Willis v. State, 214 Ga. App. 659, 448 S.E.2d 755 (1994) (decided under former O.C.G.A. § 24-9-81).

No application to witness who must explain or deny contradictory statement. — First sentence of former O.C.G.A. § 24-9-81 was applicable to impeachment of witnesses by prior contradictory statements, but since a prior contradictory statement of a witness was admissible as substantive evidence, the first sentence was inapplicable to a witness who must be given an opportunity to explain or deny the prior contradictory statement. Riley v. State, 166 Ga. App. 369, 304 S.E.2d 497 (1983) (decided under former O.C.G.A. § 24-9-81).

Inconsistent statement admissible for impeachment purposes only. — When impeachment of one's own witness is allowed, the prior inconsistent statement is admitted in evidence for impeachment purposes only and not to prove the truth of the prior statement. Arnold v. State, 166 Ga. App. 313, 304 S.E.2d 118 (1983) (decided under former O.C.G.A. § 24-9-81).

Use of prior inconsistent statements. — Prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence and is not limited in value only to impeachment purposes. Ranger v. State, 249 Ga. 315, 290 S.E.2d 63 (1982) (decided under former O.C.G.A. § 24-9-81); Riley v. State, 166 Ga. App. 369, 304 S.E.2d 497 (1983) (decided under former O.C.G.A. § 24-9-81); Jackson v. Ensley, 168 Ga. App. 822, 310 S.E.2d 707 (1983) (decided under former O.C.G.A. § 24-9-81).

In defendant's trial on a charge that the defendant molested his 13-year-old stepdaughter by touching her "private area" and placing his hands under her shirt, the record did not support defendant's claim that the state called the stepdaughter's mother solely for the purpose of impeaching her, and the trial court properly allowed the state to call two investigators to testify that the mother gave them a statement that was not the same as her testimony at trial. Black v. State, 261 Ga. App. 263, 582 S.E.2d 213 (2003) (decided under former O.C.G.A. § 24-9-81).

Witness's testimony that the witness did not recall details included in a prior statement given to police was inconsistent with the prior statement about those details, and thus, the requirements of former O.C.G.A. § 24-9-81 were met; a trial court thus properly allowed the state to impeach the state's own witness who, inter alia, denied having previously identified the defendant as the shooter in a murder incident. Cummings v. State, 280 Ga. 831, 632 S.E.2d 152 (2006) (decided under former O.C.G.A. § 24-9-81).

Defendant as witness for state. — Introduction by state in a criminal prosecution of defendant's statement to police did not make defendant a witness for the state. Wiley v. State, 250 Ga. 343, 296 S.E.2d 714 (1982) (decided under former O.C.G.A. § 24-9-81).

When counsel elicits testimony unfavorable to a client, counsel will not be heard to object to the testimony, no matter how prejudicial the testimony may be, if the testimony is a direct and pertinent response to the question propounded. Rutland v. State, 158 Ga. App. 315, 279 S.E.2d 757 (1981) (decided under former Code 1933, § 38-1801).

2. What Must Be Shown

Statement made to party or attorney. — Party may not impeach party's own witness by proof of a previous contradictory statement, even if the party claims to have been surprised and entrapped, unless the statement was made directly to the party or the party's attorney, or was made to some third person with instruction to communicate it or for the purpose of being communicated to the party or the party's counsel. Jeens v. Wrightsville &

T.R.R., 144 Ga. 48, 85 S.E. 1055 (1915) (decided under former Civil Code 1910, § 5879); Carter v. State, 17 Ga. App. 244, 86 S.E. 413 (1915) (decided under former Penal Code 1910, § 1050); Burns v. State, 20 Ga. App. 77, 92 S.E. 548 (1917) (decided under former Penal Code 1910, § 1050); Allen v. State, 71 Ga. App. 517, 31 S.E.2d 107 (1944) (decided under former Code 1933, § 38-1801); Sparks v. State, 209 Ga. 250, 71 S.E.2d 608 (1952) (decided under former Code 1933, § 38-1801).

Statements made to others. — Prior inconsistent statements made by a witness called by the state were not limited to those given to police investigators or prosecuting attorneys. Park v. State, 230 Ga. App. 274, 495 S.E.2d 886 (1998) (decided under former O.C.G.A. § 24-9-81).

Showing of entrapment required. — Prosecutor must show to the court that the prosecutor has been entrapped by the witness by a previous contradictory statement. Jenkins v. State, 73 Ga. App. 515, 37 S.E.2d 230 (1946) (decided under former Code 1933, § 38-1801).

One's own witness may be impeached when one can show the court that one has been entrapped by that witness by a previous contradictory statement. James v. State, 157 Ga. App. 763, 278 S.E.2d 696 (1981) (decided under former Code 1933, § 38-1801).

Party may not impeach party's own witness without a showing of entrapment. Hood v. State, 179 Ga. App. 387, 346 S.E.2d 867 (1986) (decided under former O.C.G.A. § 24-9-81).

Impeachment error absent entrapment. — Admittance of a certified copy of a witness's prior felony conviction was harmful error if it was for the purpose of impeachment, no announcement having been made by the state that this witness was being called for the purpose of cross-examination and no entrapment on the part of the witness having been shown. Hicks v. State, 204 Ga. App. 232, 418 S.E.2d 794 (1992) (decided under former O.C.G.A. § 24-9-81).

Surprise and prejudice. — Term "entrapment" required that one desiring to impeach one's own witness show both surprise and prejudice by the actual testimony as opposed to the earlier statement. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

While a defendant was entitled to cross-examine a state's witness about pending criminal charges to show the witness's bias, that right did not extend to the defendant's own witness when the defendant failed to show surprise or entrapment by the witness's previous contradictory statement. Arnold v. State, 284 Ga. App. 598, 645 S.E.2d 68 (2007) (decided under former O.C.G.A. § 24-9-81).

Total surprise unnecessary. — To establish entrapment, it is not required that the witness's testimony be a total surprise or that it be affirmatively damaging. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801); Ellenburg v. State, 239 Ga. 309, 236 S.E.2d 650 (1977) (decided under former Code 1933, § 38-1801); Johnson v. State, 150 Ga. App. 405, 258 S.E.2d 22 (1979) (decided under former Code 1933, § 38-1801); Wofford v. State, 152 Ga. App. 739, 263 S.E.2d 707 (1979) (decided under former Code 1933, § 38-1801); Bryant v. State, 155 Ga. App. 652, 271 S.E.2d 904 (1980) (decided under former Code 1933, § 38-1801); Andrews v. State, 156 Ga. App. 734, 275 S.E.2d 782 (1980) (decided under former Code 1933, § 38-1801); Young v. State, 156 Ga. App. 865, 275 S.E.2d 804 (1981) (decided under former Code 1933, § 38-1801); Ingram v. State, 161 Ga. App. 5, 288 S.E.2d 842 (1982) (decided under former O.C.G.A. § 24-9-81); Davis v. State, 249 Ga. 309, 290 S.E.2d 273 (1982) (decided under former O.C.G.A. § 24-9-81).

Prior showing of surprise unnecessary. — Since it is not error for the trial judge to allow an attorney to cross-examine and lead the witness without first subjecting the attorney personally to an examination, any rule under which a showing of surprise and prejudice must first be made is wrong. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

What constitutes surprise. — Even though the state in a criminal case knows of a repudiation of an earlier statement by

Impeachment of Own Witness (Cont'd)
2. What Must Be Shown (Cont'd)

one of the state's witnesses before one testifies at trial, if it only goes to the details of the defendant's alleged confession, there is still sufficient "surprise" to admit into evidence the witness's prior statement for impeachment purposes only. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

Showing of surprise is no longer required before a party is allowed to impeach the party's own witness. Davis v. State, 249 Ga. 309, 290 S.E.2d 273 (1982) (decided under former O.C.G.A. § 24-9-81); Coleman v. State, 162 Ga. App. 340, 291 S.E.2d 402 (1982) (decided under former O.C.G.A. § 24-9-81).

Surprise or prejudice unnecessary. — To meet the requirement of establishing entrapment before one might impeach one's own witness, a showing of prejudice or surprise is no longer necessary. Peterson v. State, 166 Ga. App. 719, 305 S.E.2d 447 (1983) (decided under former O.C.G.A. § 24-9-81).

Refusing party opportunity to introduce further testimony. — There is no abuse of discretion if the trial court refuses party opportunity to introduce further evidence which would impeach the party's previous testimony absent surprise or entrapment. Gorrell v. Fowler, 248 Ga. 801, 286 S.E.2d 13, appeal dismissed, 457 U.S. 1113, 102 S. Ct. 2918, 73 L. Ed. 2d 1324 (1982) (decided under former O.C.G.A. § 24-9-81).

Belief of prosecutor. — To establish entrapment, it is sufficient that the prosecutor believed the witness would testify consistently with the earlier testimony. Johnson v. State, 150 Ga. App. 405, 258 S.E.2d 22 (1979) (decided under former Code 1933, § 38-1801); Bryant v. State, 155 Ga. App. 652, 271 S.E.2d 904 (1980) (decided under former Code 1933, § 38-1801).

Statement by district attorney that the district attorney has been surprised by the testimony is sufficient, in the absence of a showing to the contrary, to show entrapment. Thomas v. State, 239 Ga. 734, 238 S.E.2d 888 (1977) (decided under former Code 1933, § 38-1801); James v. State, 157 Ga. App. 763, 278 S.E.2d 696 (1981) (decided under former Code 1933, § 38-1801); Foskey v. State, 229 Ga. App. 209, 493 S.E.2d 595 (1997) (decided under former O.C.G.A. § 24-9-81).

Testimony failing to bolster case. — Trial court does not err in allowing the district attorney to impeach the state's own witness by introducing prior inconsistent statements, even though the witness's testimony did not damage the state's case save by failing to bolster it as hoped. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

Inconsistent testimony. — Impeachment is allowed when the testimony is merely "inconsistent" with a prior written statement. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-1801).

Although the requirements of surprise and prejudice have been removed from the element of entrapment in the former statute, the plain language of former O.C.G.A. § 24-9-81 still required as a threshold matter a showing that the witness made a statement inconsistent with the witness's testimony at trial. Jones v. State, 270 Ga. 25, 505 S.E.2d 749 (1998) (decided under former O.C.G.A. § 24-9-81).

Cross-examination not error. — When the prosecutor stated that the prosecutor had been entrapped by a witness called by the prosecutor and further proved the entrapment by introducing a written statement made by the witness which was contrary to the witness's testimony given upon the trial, it was not error for the trial court to permit the prosecutor to cross-examine the witness. Allen v. State, 71 Ga. App. 517, 31 S.E.2d 107 (1944) (decided under former Code 1933, § 38-1801); Anderson v. State, 103 Ga. App. 83, 118 S.E.2d 381 (1961) (decided under former Code 1933, § 38-1801); Lashley v. State, 132 Ga. App. 427, 208 S.E.2d 200 (1974) (decided under former Code 1933, § 38-1801).

No entrapment shown. — Evidence did not show that the prosecutor was entrapped by a witness. King v. State, 166 Ga. 10, 142 S.E. 160 (1928) (decided under

former Penal Code 1910, § 1050).

Examination of Opposite Party

1. In General

Real purpose of former statute was that of allowing a party to call for cross-examination those persons who by reason of a relationship existing at the time of the examination were subject to "all of the pressures and possible prejudices ... which that relationship would tend to engender," and when such relationship was no longer in existence it was not error, in the absence of any basis other than a former relationship, to refuse to allow the party calling the witness to treat such person as an adverse witness. Atlanta Americana Motor Hotel Corp. v. Sika Chem. Corp., 117 Ga. App. 707, 161 S.E.2d 342 (1968) (decided under former Code 1933, § 38-1801).

Use of former statute not presumed. — There was no presumption to the effect that when one party puts an opposing party on the stand, or puts an agent or officer of the opposing party on the stand, the witness was put on the stand for the purpose of cross-examination and not as a witness for the party putting such a witness on the stand. Wight Hdwe. Co. v. American Lubricants Co., 91 Ga. App. 339, 85 S.E.2d 507 (1954) (decided under former Code 1933, § 38-1801).

Balancing of rights. — Former statute, providing for the right of thorough and sifting cross-examination, must be balanced with the former statute, protecting the right of a witness to be examined only as to relevant matter and to be protected from improper questions and from harsh or insulting demeanor. Crawford v. State, 144 Ga. App. 622, 241 S.E.2d 492 (1978), overruled on other grounds, Stephens v. State, 245 Ga. 825, 268 S.E.2d 330 (1980) (decided under former Code 1933, §§ 38-1704 and 38-1801).

"Present" and "available" are not criteria for determining the qualification of witness for cross-examination. A person not a party may be called for such purpose only if such person is one for whose immediate benefit such suit is prosecuted or defended or is an agent of that party or agent of any person for whose immediate benefit such suit is prosecuted or defended or is an official or agent of a corporation when a corporation is such party, or for whose benefit such suit is prosecuted or defended. Logan v. Turner, 97 Ga. App. 866, 104 S.E.2d 627 (1958) (decided under former Code 1933, § 38-1801); Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448 (1968) (decided under former Code 1933, § 38-1801).

Calling opposite party for direct examination. — When the witness is called to the stand for cross-examination, it is to be understood that the opposite party is to be examined, but a plaintiff who merely calls a defendant as "a witness against himself" in order to prove a prima facie case is not proceeding under the provisions thereof. Jones v. Chambers, 94 Ga. App. 433, 95 S.E.2d 335 (1956) (decided under former Code 1933, § 38-1801).

Calling opposite party for purposes of impeachment. — When defendant was not permitted to recall the victim as the defendant's own witness for purposes of impeachment, since there was no showing of entrapment, this is not permitted. Mingo v. State, 195 Ga. App. 438, 394 S.E.2d 104 (1990) (decided under former O.C.G.A. § 24-9-81).

Belated announcement of calling adverse party as witness. — If the adverse party or agent as specified in former O.C.G.A. § 24-9-81 is called, and an announcement is made by the calling party that the witness was being called for cross-examination, but that announcement was not timely made, the calling party may cross-examine the adverse witness and the other party may or may not be allowed to cross-examine the witness, in the discretion of the trial court, depending upon when in the course of the witness's testimony the announcement was made, the relationship and attitude of the witness to the parties, and the nature of the testimony given or sought to be elicited. Colwell v. Voyager Cas. Ins. Co., 251 Ga. 744, 309 S.E.2d 617 (1983) (decided under former O.C.G.A. § 24-9-81).

Cross-examination within court's discretion. — When a witness had been called for cross-examination under former O.C.G.A. § 24-9-81, it was within the dis-

Examination of Opposite Party (Cont'd)
1. In General (Cont'd)

cretion of the trial court to allow the witness to be cross-examined by the attorney for the opposite party, as well as to ask leading questions. Thomas v. Baxter, 234 Ga. App. 663, 507 S.E.2d 766 (1998) (decided under former O.C.G.A. § 24-9-81).

Trial court erred in improperly limiting defense counsel's cross-examination of the alleged victim's financial interest in the trial based upon the victim's claim for financial assistance from the Georgia Crime Victims Emergency Fund. Bowen v. State, 252 Ga. App. 382, 556 S.E.2d 252 (2001) (decided under former O.C.G.A. § 24-9-81).

Subsequent examination by own attorney. — When the opposite party has been called as a witness for cross-examination, it is within the discretion of the court as to whether to allow the witness to be questioned by the witness's own attorney at the conclusion of the examination by the opposite party. Scarborough v. Wilson, 36 Ga. App. 428, 136 S.E. 830 (1927) (decided under former Civil Code 1910, § 5879); Akridge v. Atlanta Journal Co., 56 Ga. App. 812, 194 S.E. 590 (1937) (decided under former Code 1933, § 38-1801); Davis v. Wright, 194 Ga. 1, 21 S.E.2d 88 (1942) (decided under former Code 1933, § 38-1801); Barton v. Strickland, 208 Ga. 163, 65 S.E.2d 602 (1951) (decided under former Code 1933, § 38-1801); Southeastern Metal Prods., Inc. v. De Vaughn, 99 Ga. App. 569, 109 S.E.2d 305 (1959) (decided under former Code 1933, § 38-1801).

Cross-examination on irrelevant matters. — It is not error to refuse to allow a party to call for cross-examination of a former employee, even though while employed the employee may have been an agent of the opposite party within the sense of the term, although it may be error, as an abuse of discretion, to allow a party to call an employee of the other party for cross-examination on irrelevant matters, irrespective of whether the employee's actions were within or outside the employee's authority as an agent. Atlanta Americana Motor Hotel Corp. v. Sika Chem. Corp., 117 Ga. App. 707, 161 S.E.2d 342 (1968) (decided under former Code 1933, § 38-1801).

There was no prohibition about the prior inconsistent statement being lengthier than the in-court testimony; also, the fact that a witness admitted to making the inconsistent pre-trial statement did not render the statement inadmissible. Warner v. State, 281 Ga. 763, 642 S.E.2d 821 (2007) (decided under former O.C.G.A. § 24-9-81).

2. Who May Be Examined

Agent at time of trial. — Former statute was intended to apply only to those situations where the witness sought to be examined was, at the time of trial, an agent of an opposite party; for only at that time would such witness be subject to pressure and possible prejudice in favor of one's present employer. Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448 (1968) (decided under former Code 1933, § 38-1801).

Definition of agent. — Word "agent" meant any agent available to the party (principal) as a witness in a pending case, and did not refer merely to an agent who had some relation or connection with the transaction in litigation. Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448 (1968) (decided under former Code 1933, § 38-1801).

Agency can be proved by agent's sworn testimony. — See Terminal Transp. Co. v. Decatur Truck & Equip. Co., 90 Ga. App. 859, 84 S.E.2d 494 (1954) (decided under former Code 1933, § 38-1801).

Prosecution witness not agent or party. — Former statute did not permit a defendant to call a prosecution witness for cross-examination as an agent of the state or as a party for whom the suit was being prosecuted. Bentley v. State, 131 Ga. App. 425, 205 S.E.2d 904 (1974) (decided under former Code 1933, § 38-1801).

When plaintiff is called as defense witness. — When the plaintiff is called as a defense witness upon an objection to the plaintiff's being recalled for further cross-examination, this tactic entitles counsel for the plaintiff to cross-examine plaintiff just like any other defense wit-

ness, and while the court can, in the court's discretion, prohibit counsel from posing leading questions, there is no abuse of discretion in allowing those questions. Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475 (1983) (decided under former O.C.G.A. § 24-9-81).

Deponent as opposite party. — Mere fact that, prior to the trial, the plaintiff had taken a deposition of the president of the defendant corporation, who was subpoenaed "to testify and the truth say in behalf of the plaintiff," would not prevent the president being called by the plaintiff at the trial of the case for the purpose of cross-examination since the deposition was not introduced in evidence at the trial. Southeastern Metal Prods., Inc. v. De Vaughn, 99 Ga. App. 569, 109 S.E.2d 305 (1959) (decided under former Code 1933, § 38-1801).

Third-party defendant. — Trial court properly allowed party to call third-party defendant as witness for purposes of cross-examination. Ranger Constr. Co. v. Robertshaw Controls Co., 166 Ga. App. 679, 305 S.E.2d 361 (1983) (decided under former O.C.G.A. § 24-9-81); Wilson v. Childers, 174 Ga. App. 179, 329 S.E.2d 503 (1985) (decided under former O.C.G.A. § 24-9-81).

Agent of opposing party at time of trial. — When a witness called by the plaintiff was a former employee of the plaintiff and was employed by the defendant at the time of trial, under the provisions of former O.C.G.A. § 24-9-81 plaintiff had a right to cross-examine the witness as an agent of the opposite party, although there was no showing that the witness was a hostile witness. Henderson v. Glen Oak, Inc., 179 Ga. App. 380, 346 S.E.2d 842 (1986), aff'd, 256 Ga. 619, 351 S.E.2d 640 (1987) (decided under former O.C.G.A. § 24-9-81).

Effect of testimony. — When witness sworn by plaintiff testified as the defendant corporation's employee, the legal effect of the employee's testimony conflicting with that of another witness called by plaintiff would be the same as if they had both been sworn as the plaintiff's witnesses generally. Emory Univ. v. Lee, 97 Ga. App. 680, 104 S.E.2d 234 (1958) (decided under former Code 1933, § 38-1801).

Witness previously sworn. — When the firefighter was agent of the opposite party within the meaning of the former statute, the fact that this witness was previously sworn in behalf of the plaintiff would not prevent the witness being called by the plaintiff for the purpose of cross-examination. Thompson v. Central of Ga. Ry., 102 Ga. App. 5, 115 S.E.2d 471 (1960) (decided under former Code 1933, § 38-1801).

Witness not agent. — When witness called by plaintiff to testify under cross-examination was not an agent of the defendant individually and since the action was not prosecuted or defended for the witness's immediate benefit and since the witness was not an agent of any person for whose immediate benefit the suit was prosecuted or defended, the witness was not qualified as a witness for cross-examination. Logan v. Turner, 97 Ga. App. 866, 104 S.E.2d 627 (1958) (decided under former Code 1933, § 38-1801).

Employee as agent. — One in the employ of another is subject to all the pressure and possible prejudice in favor of one's employer which such relationship would tend to engender and therefore should be subject to cross-examination by the opposite party. Terminal Transp. Co. v. Decatur Truck & Equip. Co., 90 Ga. App. 859, 84 S.E.2d 494 (1954) (decided under former Code 1933, § 38-1801); Mullis v. Chaika, 118 Ga. App. 11, 162 S.E.2d 448 (1968) (decided under former Code 1933, § 38-1801).

Former employees. — Former statute did not allow the cross-examination of ex-employees of a party. Massey Junior College v. Taggart, 140 Ga. App. 591, 231 S.E.2d 540 (1976) (decided under former Code 1933, § 38-1801).

Corporation or individual as principal. — When an employee of the opposite party is called on the theory that such employee is the agent of that party, the procedure is equally proper whether the principal is in fact a corporation or an individual. Wall v. Rhodes, 112 Ga. App. 572, 145 S.E.2d 756 (1965) (decided under former O.C.G.A. § 24-9-81).

Operator of bus being used as a common carrier of passengers is the agent and

Examination of Opposite Party (Cont'd)
2. Who May Be Examined (Cont'd)

alter ego of the common carrier bus company, and as such is subject to cross-examination by the opposite party, and to refuse the opposite party such right is error. Huell v. Southeastern Stages, Inc., 78 Ga. App. 311, 50 S.E.2d 745 (1948) (decided under former Code 1933, § 38-1801).

Agents of school board. — Provisions of former statute were broad enough to include agents of a school board and the principal of a school which was destroyed by fire. Rodgers v. Styles, 100 Ga. App. 124, 110 S.E.2d 582 (1959) (decided under former Code 1933, § 38-1801).

Legatee. — Former statute was applicable on appeal from probate of a will in solemn form; person designated as a legatee in the will, whose interest would be adversely affected if the caveat should be sustained, may be called as a witness by the caveatrix for the purpose of cross-examination and impeachment. Peretzman v. Simon, 185 Ga. 681, 196 S.E. 471 (1938) (decided under former Code 1933, § 38-1801).

Endorser of check. — When one defendant was sued as an endorser and two other defendants as makers, and the case was in default as to the endorser, the court did not err in not permitting the plaintiff (holder of the check) to put the endorser on the stand for cross-examination for the purpose of making out a case against the makers. A.J. Cannon & Co. v. Collier, 91 Ga. App. 40, 84 S.E.2d 482 (1954) (decided under former Code 1933, § 38-1801).

Parent in termination proceeding. — Former O.C.G.A. § 24-9-81 applied to termination proceedings which were civil, not criminal, in nature; therefore, a mother had no right to refuse to be called as a witness for cross-examination by the Department of Family and Children Services. In the Interest of A.R.A.S., 278 Ga. App. 608, 629 S.E.2d 822 (2006) (decided under former O.C.G.A. § 24-9-81).

Defendant's mother questioned about prior inconsistent statement. — State properly questioned defendant's mother as to whether the mother believed that the crimes defendant was on trial for were gang-related as the question was asked for the purpose of laying a foundation to introduce the mother's prior inconsistent statement after the mother had testified in response to a defense question that the mother did not believe that the defendant was involved in gang activity, pursuant to former O.C.G.A. §§ 24-9-81 and 24-9-83 (see now O.C.G.A. §§ 24-6-608 and 24-6-611). Garrett v. State, 280 Ga. 30, 622 S.E.2d 323 (2005) (decided under former O.C.G.A. § 24-9-81).

Examination of Own Witness

Insurer's cross-examination of own witness. — Insurer was entitled to cross-examine insurer's own witness after witness was determined to have played a key part in the case by, inter alia, finding items of importance matchable to plaintiff's car. Although a witness did not concededly fall within the expressly authorized categories of former O.C.G.A. § 24-9-81, former O.C.G.A. § 24-9-63 permitted such testimony in the interests of justice. Hicks v. Doe, 206 Ga. App. 596, 426 S.E.2d 174 (1992) (decided under former O.C.G.A. § 24-9-81).

Use of inconsistent prior statements. — Because a state witness, who was also one of defendant's cohorts, was evasive concerning the facts stated in the witness's prior interview and also testified to facts that were inconsistent with those previously stated in the interview, the trial court did not err in permitting the state to ask leading questions or in allowing the taped interview to be introduced into evidence. Johnson v. State, 279 Ga. App. 489, 631 S.E.2d 720 (2006) (decided under former O.C.G.A. § 24-9-81).

Requirements for Appeal

Objection required. — If no objection was made to the asking of leading questions, the allowance of such questions will furnish no ground for a new trial. Cotton States Life Ins. Co. v. Edwards, 74 Ga. 220 (1884) (decided under former Code 1882, § 3865).

Defendant must demonstrate specific instances of abuse of discretion

on appeal. — When defendant failed to demonstrate that the trial court abused the court's discretion in permitting the state on specific occasions to lead the state's witnesses, this precluded the Court of Appeals from finding error in the trial court's exercise of discretion. Hammond v. State, 157 Ga. App. 647, 278 S.E.2d 188 (1981) (decided under former Code 1933, § 38-1706).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 447 et seq., 501, 506, 509, 771.

Am. Jur. Proof of Facts. — Criminal Law — Need for Disclosure of Identity of Informant, 33 POF2d 549.

C.J.S. — 32 C.J.S., Evidence, §§ 720, 735 et seq., 750, 757, 760, 769, 770.

ALR. — Abuse of witness by counsel as ground for new trial or reversal, 4 ALR 414.

Estoppel of party to contradict what he testified to, adversely to his present opponent, in a prior action to which he was not a party, 5 ALR 1505.

Cross-examination of witness called to testify on particular point or under order of court, 7 ALR 1116.

Right of defendant in a criminal case to cross-examine a codefendant who has taken the stand in his own behalf, 33 ALR 826.

Impeaching witness examined by both parties, 54 ALR 1374.

Cross-examination as to sexual morality for purpose of affecting credibility of witness, 65 ALR 410.

Right of defendant in criminal case to cross-examine police officials regarding conduct or practices by them calculated to contribute to delinquency of other persons, 68 ALR 1043.

Right of party surprised by unfavorable testimony of own witness to ask him concerning previous inconsistent statements, 74 ALR 1042.

Assumption by question put to witness of fact in issue, 100 ALR 1067.

Right to cross-examine witness in respect of facts not included in his direct examination, but which negative a prima facie case, presumption, or inference otherwise made by his testimony on direct examination, 108 ALR 167.

Proper practice and relief on development of hostility by party's own witness, 117 ALR 326.

Right to test qualifications of witness to testify as to genuineness of handwriting by cross-examining him as to the genuineness of other handwriting not the subject of his direct examination, 128 ALR 1329.

Motive in bringing action or choosing the forum or venue as proper matter for cross-examination, 157 ALR 604.

May a witness who testifies to facts be impeached by showing of prior inconsistent expressions of opinion by him, 158 ALR 820.

Cross-examination to dispel favorable inference which jury might draw from appearance of witness on witness-stand, 159 ALR 201.

Cross-examination of expert witness as to fees, compensation, and the like, 33 ALR2d 1170.

Federal Civil Procedure Rule 43(b), and similar state rule, relating to the calling and interrogation of adverse party as witness at trial, 35 ALR2d 756.

Cross-examination of witness in criminal case as to whether, and with whom, he has discussed facts of case, 35 ALR2d 1045.

Cross-examination by leading questions of witness friendly to or biased in favor of cross-examiner, 38 ALR2d 952.

Right of a defendant in personal injury or death action to cross-examine codefendant, 43 ALR2d 1000.

Right of counsel representing party at trial, but employed by his liability insurer, to cross-examine or impeach him for asserted contradictory statements, 48 ALR2d 1239.

Party litigant in civil personal injury or death case as bound by conflicting testimony of his own medical witnesses, 53 ALR2d 1229.

Who is "employee" within statute permitting examination, as adverse witness, of employee of party, 56 ALR2d 1108.

Preventing or limiting cross-examination of prosecution's witness as to his motive for testifying, 62 ALR2d 610.

Cross-examination of plaintiff in personal injury action as to his previous injuries, physical condition, claims, or actions, 69 ALR2d 593.

Propriety of hypothetical question to expert witness on cross-examination, 71 ALR2d 6.

Right to elicit expert testimony from adverse party called as witness, 88 ALR2d 1186.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 ALR3d 1203.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision, 59 ALR3d 1337.

Right to cross-examine witness as to his place of residence, 85 ALR3d 541.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family, 88 ALR3d 304.

Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction, 98 ALR3d 1060.

Admissibility and effect, on issue of party's credibility or merits of his case, of evidence of attempts to intimidate or influence witness in civil action, 4 ALR4th 829.

Cross-examination of character witness for accused with reference to particular acts or crimes — modern state rules, 13 ALR4th 796.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 ALR4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 ALR4th 469.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence, 83 ALR5th 277.

Propriety, under Uniform Rule of Evidence 607, of impeachment of party's own witness, 3 ALR6th 269.

24-6-612. Writing used to refresh memory.

(a) If a witness uses a writing to refresh his or her memory while testifying, an adverse party shall be entitled to have the writing produced at the hearing or trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness.

(b) If a witness uses a writing to refresh his or her memory before testifying at trial and the court in its discretion determines it is necessary in the interests of justice, an adverse party shall be entitled to have the writing produced at the trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness. If the writing used is protected by the attorney-client privilege or as attorney work product under Code Section 9-11-26, use of the writing to refresh recollection prior to testifying shall not constitute a waiver of that privilege or protection. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions of such writing not so related, and order delivery of the remainder of such writing to the party entitled to such writing. Any portion withheld over objections shall be preserved and made available to the appellate court in the

event of an appeal. If a writing is not produced or delivered pursuant to an order under this Code section, the court shall make any order justice requires; provided, however, that in criminal proceedings, when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial. (Code 1981, § 24-6-612, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 524, § 1-4/HB 78.)

The 2013 amendment, effective July 1, 2013, substituted "testifying" for "the trial" in the second sentence of subsection (b).

Cross references. — Writing used to refresh a witness's memory, Fed. R. Evid. 612.

Law reviews. — For article advocating admissibility of business entries, see 14 Ga. B.J. 7 (1951). For article analyzing Georgia business entries provisions, see 4 Mercer L. Rev. 313 (1953). For article, "The Need For a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984).

For note, "Hypnosis in Court: A Memory Aid for Witnesses," see 1 Ga. L. Rev. 268 (1967).

For comment on Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639 (1959), see 22 Ga. B.J. 380 (1960).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3810, former Code 1873, § 3866, former Code 1882, § 3866, former Civil Code 1895, § 5284, former Penal Code 1895, § 1020, former Civil Code 1910, § 5873, former Penal Code 1910, § 1046, former Code 1933, § 38-1707, and former O.C.G.A. § 24-9-69 are included in the annotations for this Code section.

Obvious purpose of the former statute was to allow proper and legitimate aid to a witness which will enable the witness to testify fully as to the witness's knowledge. Whitaker v. State, 199 Ga. 344, 34 S.E.2d 499 (1945) (decided under former Code 1933, § 38-1707).

Rule stated in Weldon v. State, 21 Ga. App. 330, 94 S.E. 326 (1917) (decided under former Civil Code 1910, § 5873).

Illegal evidence must not be allowed to reach the jury on the pretense that the evidence was offered in compliance with the former statute. Whitaker v. State, 199 Ga. 344, 34 S.E.2d 499 (1945) (decided under former Code 1933, § 38-1707); Hull v. State, 265 Ga. 757, 462 S.E.2d 596 (1995) (decided under former O.C.G.A. § 24-9-69).

Past and present recollections distinguished. — For discussion of the distinction between cases where the witness finally testifies to a "past" recollection, and where the witness finally testifies to a "present" recollection, see Stansall v. Columbian Nat'l Life Ins. Co., 32 Ga. App. 87, 122 S.E. 733, cert. denied, 32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5873).

Testimony must be based on memory and not on memorandum. — Witness may, for the purpose of refreshing the witness's recollection, use any memoranda useful for that purpose; and the witness's testimony will not be objectionable if it is not dependent upon the memoranda, but is based upon the memory of the witness, even though the memoranda

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may be necessary in order to refresh the witness's recollection. Southern Ry. v. Cowan, 52 Ga. App. 360, 183 S.E. 331 (1936) (decided under former Code 1933, § 38-1707).

Independent memory of contents not required. — Witness may testify from the witness's memory refreshed by a writing that the witness made, though the witness has no independent memory of the writing's contents. Bridges v. Mutual Benefit Health & Accident Ass'n, 49 Ga. App. 552, 176 S.E. 543 (1934) (decided under former Code 1933, § 38-1707); Steinmetz v. Chambley, 90 Ga. App. 519, 83 S.E.2d 318 (1954) (decided under former Code 1933, § 38-1707); Woodward v. City Council, 117 Ga. App. 857, 162 S.E.2d 304 (1968) (decided under former Code 1933, § 38-1707); State Hwy. Dep't v. Godfrey, 118 Ga. App. 560, 164 S.E.2d 340 (1968) (decided under former Code 1933, § 38-1707); Marby v. Henley, 123 Ga. App. 561, 181 S.E.2d 884 (1971) (decided under former Code 1933, § 38-1707).

Does not affect probative value. — Rule relates as to the admissibility of testimony, and not a rule for the determination of the testimony's probative value. Scott v. Gidelight Mfg. Co., 37 Ga. App. 240, 139 S.E. 686 (1927) (decided under former Civil Code 1910, § 5873); Kines v. State, 67 Ga. App. 314, 20 S.E.2d 89 (1942) (decided under former Code 1933, § 38-1707).

Reading record in hearing of jury. — Witness may not only read the witness's own deposition but it may be read to the witness in the presence and hearing of the jury to refresh the witness's memory. Burney v. Ball, 24 Ga. 505 (1858) (decided under former law).

Waiver. — When only part of the memorandum was admitted in evidence at the instance of the party who offered the witness, over objection urged by the opposite party that it was inadmissible, the putting in evidence later by the opposite party of the remainder of the memorandum amounted to a waiver of the party's objection. Scott v. Gidelight Mfg. Co., 37 Ga. App. 240, 139 S.E. 686 (1927) (decided under former Civil Code 1910, § 5873).

Error in allowing counsel to view witness's notes harmless. — Though the trial court erred in permitting the plaintiff's counsel to examine the notes used by defendant's witness to refresh the witness's memory, defendant failed to show how this error prejudiced the defense, therefore, the error was harmless. Seaboard Coastline R.R. v. Delahunt, 179 Ga. App. 647, 347 S.E.2d 627 (1986), overruled on other grounds, CSX Transp. v. Williams, 230 Ga. App. 573, 497 S.E.2d 66 (1998) (decided under former O.C.G.A. § 24-9-69).

Preserving error. — While it was true that under former O.C.G.A. § 24-9-69, a witness whose memory was refreshed with a document had to continue their testimony on the basis of recollection alone, when such was not the basis of the defendant's objection at trial, the claim was not preserved for review. Hunter v. State, 282 Ga. App. 355, 638 S.E.2d 804 (2006) (decided under former O.C.G.A. § 24-9-69).

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Either personal preparation or knowledge that facts true. — In order to testify positively from paper itself, the witness must either have made the paper personally, or, at some time when facts were fresh in the witness's memory, the witness must have known the facts stated in the paper to be correct. Bradshaw v. State, 162 Ga. App. 750, 293 S.E.2d 360 (1982) (decided under former O.C.G.A. § 24-9-69).

After a defendant was charged with DUI, the trial court did not err in allowing one of the police witnesses to refresh the witness's recollection from a written document without any showing that the witness had prepared the document personally; so long as a witness is testifying from personal recollection, the witness is entitled to have the witness's memory refreshed by a document which the witness personally did not prepare. Ussery v. State, 195 Ga. App. 394, 393 S.E.2d 522 (1990) (decided under former O.C.G.A. § 24-9-69).

Paper itself as evidence. — When a witness testifies from the witness's recollection refreshed as provided by statute,

the paper itself, where not otherwise binding upon the party against whom the witness testifies, is without probative value and is not admissible as documentary evidence for any purpose. Stansall v. Columbian Nat'l Life Ins. Co., 32 Ga. App. 87, 122 S.E. 733, cert. denied, 32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5873).

Excluding such memoranda as are admissible as business records or as part of the res gestae, it is generally held that the memorandum has no present evidentiary value, since it is not the memorandum that is the evidence, but the recollection of the witness. An exception is when the opposite side wished to introduce the memorandum in order to weaken the effect of the testimony. Woodward v. City Council, 117 Ga. App. 857, 162 S.E.2d 304 (1968) (decided under former Code 1933, § 38-1707); State Hwy. Dep't v. Godfrey, 118 Ga. App. 560, 164 S.E.2d 340 (1968) (decided under former Code 1933, § 38-1707); Mason v. State, 147 Ga. App. 179, 248 S.E.2d 302 (1978) (decided under former Code 1933, § 38-1707).

Memorandum prepared by another. — If the writing, instrument, document, or other thing from which the witness refreshes the witness's recollection was made in the witness's presence or at the witness's direction and if the witness knows that it contains true and correct information and is willing to swear positively to that effect, it is immaterial that the witness did not personally make the thing from which the witness testified. Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639 (1959), for comment, see 22 Ga. B.J. 380 (1960) (decided under former Code 1933, § 38-1707).

Although a witness may refresh the witness's memory from a writing prepared by another, the witness must nevertheless testify from the witness's memory thus refreshed. When the document is prepared by a third person not in the presence of a witness, the memory is not refreshed by such memorandum and such testimony is inadmissible. Zilinmon v. State, 234 Ga. 535, 216 S.E.2d 830 (1975), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006) (decided under former Code 1933, § 38-1707).

In view of a prosecution witness's averment that the witness was testifying from the witness's refreshed memory, the trial court did not err in permitting the witness to testify to the tag number on defendant's truck, even though the witness refreshed the witness's memory by viewing a computer printout bearing the tag number; since the witness was entitled to have the witness's memory refreshed by a document which the witness personally did not prepare. Byrd v. State, 182 Ga. App. 284, 355 S.E.2d 666 (1987) (decided under former O.C.G.A. § 24-9-69).

Trial court correctly allowed a testifying police officer to refresh the officer's memory of the incident using a report written by someone else; O.C.G.A. § 24-9-69, permitted a witness to refresh and assist the witness's memory by the use of any written instrument or memorandum. Penland v. State, 258 Ga. App. 659, 574 S.E.2d 880 (2002) (decided under former O.C.G.A. § 24-9-69).

Witness at some time must have had personal knowledge of the memorandum's correctness. Davis v. State, 91 Ga. 167, 17 S.E. 292 (1893) (decided under former Code 1882, § 3866); Hematite Mining Co. v. East Tenn., Va. & Ga. Ry., 92 Ga. 268, 18 S.E. 24 (1893) (decided under former Code 1882, § 3866); Jones v. State, 99 Ga. 46, 25 S.E. 617 (1896) (decided under former Civil Code 1895, § 5284); Lenney v. Finley, 118 Ga. 427, 45 S.E. 317 (1903) (decided under former Civil Code 1895, § 5284); Shrouder v. State, 121 Ga. 615, 49 S.E. 702 (1905) (decided under former Civil Code 1895, § 5284); Smith v. City of Atlanta, 22 Ga. App. 511, 96 S.E. 334 (1918) (decided under former Civil Code 1910, § 5873); Stansall v. Columbian Nat'l Life Ins. Co., 32 Ga. App. 87, 122 S.E. 733, cert. denied, 32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5873); Herring v. State, 122 Ga. App. 730, 178 S.E.2d 551 (1970) (decided under former Code 1933, § 38-1707); Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971), cert. denied, 405 U.S. 1050, 92 S. Ct. 1511, 31 L. Ed. 2d 786 (1972) (decided under former Code 1933, § 38-1707); Moore v. State, 240 Ga. 807, 243 S.E.2d 1, cert. denied, 439 U.S. 903, 99 S. Ct. 268, 58 L. Ed. 2d 249 (1978)

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(decided under former Code 1933, § 38-1707).

Investigation reports prepared by witness. — In a proceeding to terminate the parental rights of a parent who had been convicted of molesting the parent's children, the trial court did not err in allowing a probation official to use a confidential presentence investigation report to refresh the official's recollection about interviews the official had with the parent. In re S.M.L., 228 Ga. App. 81, 491 S.E.2d 186 (1997) (decided under former O.C.G.A. § 24-9-69).

It was not improper for an officer to use a police report to refresh the officer's recollection about a prior driving under the influence incident involving the defendant. Becker v. State, 280 Ga. App. 97, 633 S.E.2d 436 (2006) (decided under former O.C.G.A. § 24-9-69).

Investigation reports prepared by another witness. — An investigating officer's report can be used to refresh another witness's recollection. Brown v. State, 247 Ga. App. 741, 545 S.E.2d 114 (2001) (decided under former O.C.G.A. § 24-9-69).

Statement as past recollection recorded. — Although it is preferable to ask a witness specifically at trial whether the witness had told the truth as the witness then perceived it when the witness gave the witness's oral statement and whether a transcript thereof constituted an accurate recording in toto of what the witness had personally stated, since an adequate foundation was established, the transcribed statement may qualify as past recollection recorded under former O.C.G.A. § 24-9-69. Platt v. National Gen. Ins. Co., 205 Ga. App. 705, 423 S.E.2d 387, cert. denied, 205 Ga. App. 900, 423 S.E.2d 283 (1992) (decided under former O.C.G.A. § 24-9-69).

Statement was inadmissible as a past recollection recorded or under the medical diagnosis exception to the hearsay rule because after reviewing the typed statement, the social worker testified that the worker's memory was not refreshed and the worker was unwilling to swear that the statement accurately reflected the interview as required under former O.C.G.A. § 24-9-69. Sandlin v. State, 273 Ga. 440, 542 S.E.2d 496 (2001) (decided under former O.C.G.A. § 24-9-69).

Transcript allowed to go out with jury. — Transcript of statement by witness which was admissible as past recollection recorded should not have been allowed to go out with the jury during deliberation. Platt v. National Gen. Ins. Co., 205 Ga. App. 705, 423 S.E.2d 387, cert. denied, 205 Ga. App. 900, 423 S.E.2d 283 (1992) (decided under former O.C.G.A. § 24-9-69).

Cross-examination concerning contents. — Cross-examiner should and does possess the right to quiz the witness concerning the contents of the written instrument without introduction of the document. In doing so the witness is entitled to shed light on the relevant issues whether this be favorable or unfavorable to the client's cause. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860 (1972) (decided under former Code 1933, § 38-1707).

Examination of memorandum by opposing counsel. — Trial court does not err in refusing to allow defense counsel to examine all a police officer's notes in the officer's file, although defense counsel is allowed to cross-examine the officer with reference to the notes used to refresh the officer's recollection. Sprague v. State, 147 Ga. App. 347, 248 S.E.2d 711 (1978). See also Ellison v. Robinson, 96 Ga. App. 882, 101 S.E.2d 902 (1958) (decided under former Code 1933, § 38-1707).

Testimony is not subject to "best evidence" objections if the witness merely used records made, kept, and maintained in the regular course of business under the witness's supervision, direction, and control to refresh the witness's memory and the records were admitted into evidence. Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga. App. 380, 170 S.E.2d 724 (1969) (decided under former Code 1933, § 1106).

Use of codefendant's testimony prohibited. — Witness may not refresh witness's memory from testimony given at the trial of another defendant under the same indictment. Brown v. State, 28 Ga.

199 (1859) (decided under former law).

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Recollection refreshed. — Testimony was admissible in the following cases, where witness's recollection was refreshed by a memorandum: Veal v. Wood, 29 Ga. App. 94, 113 S.E. 818 (1922) (decided under former Civil Code 1910, § 5873); Lazar v. Black & White Cab Co., 50 Ga. App. 567, 179 S.E. 250 (1935) (decided under former Code 1933, § 38-1707).

Since the doctor was present when the plaintiff was brought into the hospital immediately after plaintiff's injury, was present when X-ray pictures were taken and developed, examined the x-rays immediately thereafter and ascertained therefrom that the nature of the plaintiff's injury was such that it was necessary to refer the plaintiff to an orthopedic surgeon, the refusal of the court to allow the witness to refresh the witness's memory under the circumstances shown was probably harmful error and required a reversal of the case. Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639 (1959), for comment, see 22 Ga. B. J. 380 (1960) (decided under former Code 1933, § 38-1707).

Trial court did not improperly allow a prosecutor to refresh a victim's recollection with a letter the victim wrote to the district attorney's office expressing fear of the defendant as: (1) the defense counsel asked to see the letter before the prosecutor handed the letter to the victim; (2) the prosecutor granted that request; (3) after previewing the letter, the defense counsel did not object to the victim using the letter to refresh the victim's memory; and (4) the letter was neither admitted into evidence nor read to the jury. Haggins v. State, 277 Ga. App. 742, 627 S.E.2d 448 (2006) (decided under former O.C.G.A. § 24-9-69).

Detective's use of a photograph to refresh that detective's recollection as to which of the codefendants was the defendant on trial went to the weight of the detective's testimony, but did not require that the identification of the defendant on trial be excluded due to a substantial likelihood of irreparable misidentification. Ford v. State, 285 Ga. App. 106, 645 S.E.2d 590 (2007) (decided under former O.C.G.A. § 24-9-69).

Trial court did not err in allowing an attorney to read a letter memorializing a conversation between the attorney and a decedent because a proper foundation was laid for the attorney to read the letter to the jury as a past recollection recorded when the attorney testified that the attorney personally prepared the letter and that the conversation concerning the scope of a receipt that was recounted in the letter occurred no more than three days before the letter was prepared; although the attorney could not presently recall being told by the decedent that the release from indebtedness contained in the receipt was intended to be limited in scope, the attorney testified that based on the wording of the letter the attorney believed that such a conversation with the decedent and the executor's two siblings had taken place, and that testimony established that the attorney memorialized the conversation in the letter when it was fresh in the attorney's mind and that the attorney believed that the letter was true and accurate when written. Jerkins v. Jerkins, 300 Ga. App. 703, 686 S.E.2d 324 (2009) (decided under former O.C.G.A. § 24-9-69).

Swearing positively from paper. — Testimony was admissible in the following cases when a witness swore positively from the paper that the facts contained therein were correct: Williams v. C. & G.H. Kelsey & Halsted, 6 Ga. 365 (1849) (decided under former law); Black v. Thornton, 30 Ga. 361 (1860) (decided under former law); Schmidt v. Wambacker & Weil, 62 Ga. 321 (1879) (decided under former Code 1868, § 3810). Scott v. Gidelight Mfg. Co., 37 Ga. App. 240, 139 S.E. 686 (1927) (decided under former Civil Code 1910, § 5873); Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936) (decided under former Code 1933, § 38-1707); Elliott v. Georgia Power Co., 58 Ga. App. 151, 197 S.E. 914 (1938) (decided under former Code 1933, § 38-1707); Brown-Rogers-Dixon Co. v. Southern Ry., 79 Ga. App. 449, 53 S.E.2d 702 (1949) (decided under former Code 1933, § 38-1707); Haskins v. Carson, 115 Ga. App. 336, 154 S.E.2d 626 (1967) (de-

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cided under former Code 1933, § 38-1707).

Before a witness may swear positively from a paper it is not necessary that the witness show a present recollection of the contents of the document. Mincey v. State, 257 Ga. 500, 360 S.E.2d 578 (1987) (decided under former O.C.G.A. § 24-9-69).

Reading from paper for rebuttal purposes. — Trial court properly permitted an arresting officer to read that portion of the form containing the Miranda warnings which the witness had administered to the defendant for the sole purpose of rebutting the defendant's contention that the defendant had not been advised of the defendant's Miranda rights. Adams v. State, 260 Ga. 298, 392 S.E.2d 866 (1990) (decided under former O.C.G.A. § 24-9-69).

Inadequate basis for use of memorandum. — Witness could not, over objection, testify to the contents of a typewritten signed memorandum which purported to be a statement of the witness's account with the plaintiff when on cross-examination the witness admitted that the witness did not prepare the memorandum, that the witness did not know who did, that the witness received the memorandum through the mail, but the witness did not recall even the return address on the envelope, that the memorandum was not signed, and that the witness had no independent knowledge of the memorandum's contents or that the items had in fact been charged back to the witness's account. Stalvey v. Varn Motors & Fin. Co., 56 Ga. App. 696, 193 S.E. 627 (1937) (decided under former Code 1933, § 38-1707).

No refreshment absent personal knowledge. — Trial court did not err by refusing to allow one of the prosecution witnesses (a police officer) to refresh the officer's recollection from a police report prepared by another officer since the officer testified that the officer had no such personal knowledge. Sweat v. State, 203 Ga. App. 290, 416 S.E.2d 845 (1992) (decided under former O.C.G.A. § 24-9-69).

Refusal to refresh recollection appropriate. — Refusal to allow defendant to use an officer's report to refresh a witness's recollection was harmless error since defendant's goal was to use the witness's refreshed recollection to impeach the witness in an impermissible manner — with a document created by one other than the witness and which the witness had not signed. Woods v. State, 269 Ga. 60, 495 S.E.2d 282 (1998) (decided under former O.C.G.A. § 24-9-69).

Pursuant to former O.C.G.A. § 24-9-69, a witness is allowed to refresh and assist the witness's memory by the use of any written instrument or memorandum; trial counsel's failure to object to the refreshing of a witness's recollection was not ineffective assistance of counsel. Usher v. State, 258 Ga. App. 459, 574 S.E.2d 580 (2002) (decided under former O.C.G.A. § 24-9-69).

Refreshing police officer's recollection on be on the lookout bulletin. — Trial court's refusal in a suppression hearing to allow a police officer to refresh the officer's recollection about the contents of a be on the lookout police dispatch was harmless error because, given the other evidence that was presented, it did not contribute either to the court's decision on the suppression motion or to the court's adjudication of a juvenile as delinquent. In re H.A., 308 Ga. App. 111, 706 S.E.2d 615 (2011) (decided under former O.C.G.A. § 24-9-69).

Failure to object to reading of transcript from preliminary hearing did not constitute ineffective assistance of counsel. — As counsel allowed a detective to read from a transcript of the defendant's preliminary hearing so that counsel could cross-examine the detective about a "blank" in the transcript and thus imply that it did not reflect the defendant's entire statement, counsel's strategic decision not to object to the reading of the transcript under former O.C.G.A. § 24-9-69 did not constitute ineffective assistance. Nesbitt v. State, 296 Ga. App. 139, 673 S.E.2d 652 (2009) (decided under former O.C.G.A. § 24-9-69).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 742.

ALR. — Use of memorandum by witness to refresh recollection as affected by the time when it was made, 65 ALR 1478; 125 ALR 19.

Refreshment of recollection by use of memoranda or other writings, 125 ALR 19; 82 ALR2d 473.

Admissibility of testimony of witness at former trial or in another case to cover gaps or omissions, due to faulty memory or other causes, in his present testimony given in person or by deposition, 129 ALR 843.

Refreshment of recollection by use of memoranda or other writings, 82 ALR2d 473.

Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification, 29 ALR4th 104.

Fact that witness undergoes hypnotic examination as affecting admissibility of testimony in civil case, 31 ALR4th 1239.

Admissibility of hypnotically refreshed or enhanced testimony, 77 ALR4th 927.

24-6-613. Prior statements of witnesses.

(a) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time; provided, however, upon request the same shall be shown or disclosed to opposing counsel.

(b) Except as provided in Code Section 24-8-806, extrinsic evidence of a prior inconsistent statement by a witness shall not be admissible unless the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the interests of justice otherwise require. This subsection shall not apply to admissions of a party-opponent as set forth in paragraph (2) of subsection (d) of Code Section 24-8-801.

(c) A prior consistent statement shall be admissible to rehabilitate a witness if the prior consistent statement logically rebuts an attack made on the witness's credibility. A general attack on a witness's credibility with evidence offered under Code Section 24-6-608 or 24-6-609 shall not permit rehabilitation under this subsection. If a prior consistent statement is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, the prior consistent statement shall have been made before the alleged recent fabrication or improper influence or motive arose. (Code 1981, § 24-6-613, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Witness's prior statement, Fed. R. Evid. 613.

Law reviews. — For article, "The Need For a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984).

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Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, §§ 3815, 3816, 3819, former Code 1873, §§ 3871, 3872, 3875, former Code 1882, §§ 3871, 3872, 3875, former Civil Code 1895, § 5292, former Penal Code 1895, § 1026, former Civil Code 1910, § 5881, former Penal Code 1910, § 1052, former Code 1933, § 38-1803, and former O.C.G.A. § 24-9-83 are included in the annotations for this Code section.

Witness impeached by disproving facts. — Witness can be impeached as to matters relevant to the witness's testimony and to the case, and by disproving facts testified to by the witness. Morris v. State Farm Mut. Auto. Ins. Co., 203 Ga. App. 839, 418 S.E.2d 119 (1992) (decided under former O.C.G.A. § 24-9-83).

Former Civil Code 1910, §§ 5881 and 5882 (see now O.C.G.A. §§ 24-4-608 and 24-6-613) were not exhaustive as to the manner in which a witness may be impeached. Yaryan Rosin & Turpentine Co. v. Haskins, 29 Ga. App. 753, 116 S.E. 913 (1923) (decided under former Civil Code 1910, §§ 5881 and 5882); McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936) (decided under former Code 1933, § 38-1803).

Pretrial statement does not prohibit trial testimony inconsistent therewith. Tommie v. State, 158 Ga. App. 216, 279 S.E.2d 510 (1981) (decided under former O.C.G.A. § 24-9-83).

Absence of prior statement at preliminary hearing fails to amount to a contradiction. Thomas v. State, 168 Ga. App. 587, 309 S.E.2d 881 (1983) (decided under former O.C.G.A. § 24-9-83).

Effect of inconsistent statement. — Inconsistency of statement does not render a witness's testimony inadmissible; it merely lays the witness open to impeachment. Carter v. State, 2 Ga. App. 254, 58 S.E. 532 (1907) (decided under former Penal Code 1895, § 1026).

Prior inconsistent statement of witness who takes stand and is subject to cross-examination is admissible as substantive evidence and is not limited to impeachment purposes. Brown v. State, 175 Ga. App. 246, 333 S.E.2d 124 (1985) (decided under former O.C.G.A. § 24-9-83).

With regard to a defendant's conviction for aggravated assault in a case that the defendant and the complainant reconciled and the complainant had recanted the allegations against the defendant by the time of trial, the defendant failed to prove that defense counsel was ineffective as a result of failing to object to attempted impeachment evidence of the complainant wherein the complainant was asked whether the officers the crime was reported to had lied at trial because the state's question was permissible as part of an attempt to impeach the complainant with the complainant's prior inconsistent statement. Jacobs v. State, 299 Ga. App. 368, 683 S.E.2d 64 (2009) (decided under former O.C.G.A. § 24-9-83).

Previous statements not proof of truth. — Evidence of previous contradictory statements made by a witness sought to be impeached is not affirmative proof of the truth of such previous statements. Luke v. Cannon, 4 Ga. App. 538, 62 S.E. 110 (1908) (decided under former Civil Code 1895, § 5292); Early v. Ramey, 119

Ga. App. 621, 168 S.E.2d 629 (1969) (decided under former Code 1933, § 38-1803); Morgan v. State, 135 Ga. App. 139, 217 S.E.2d 175, rev'd on other grounds, 235 Ga. 632, 221 S.E.2d 47, overruled on other grounds, Dent v. State, 136 Ga. App. 366, 221 S.E.2d 228, overruled on other grounds, Davis v. State, 136 Ga. App. 749, 222 S.E.2d 188 (1975) (decided under former Code 1933, § 38-1803).

Knowing and willful swearing. — To constitute impeachment, the witness must have knowingly and willfully sworn differently on the present trial from the witness's testimony on the former trial. Stanford v. State, 153 Ga. 219, 112 S.E. 130 (1922) (decided under former Penal Code 1910, § 1052).

Court determines materiality. — Party may be required to announce the statement the party seeks to contradict, that the court may judge of the statement's materiality. Williams v. Chapman, 7 Ga. 467 (1849) (decided under former law).

When prior inconsistent statement becomes admissible. — Prior inconsistent statement of a witness becomes admissible when the witness denies having made the statement. Pembrook Mgt., Inc. v. Cossaboon, 157 Ga. App. 675, 278 S.E.2d 100 (1981) (decided under former Code 1933, § 38-1803).

Prior contradictory statement of a witness does not become contradictory or exculpatory until the witness testifies. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982) (decided under former O.C.G.A. § 24-9-83).

Prior contradictory statement best used during cross examination. — Statement of a witness which does no more than show that the witness made a prior contradictory statement has its most effective use at trial in cross-examination. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982) (decided under former O.C.G.A. § 24-9-83).

Recalling of witness for further examination at the instance of either party is always within the discretion of the trial judge. Money v. State, 137 Ga. App. 779, 224 S.E.2d 783, cert. denied, 429 U.S. 858, 97 S. Ct. 158, 50 L. Ed. 2d 136 (1976) (decided under former Code 1933, § 38-1803).

Defendant's request to recall state's witnesses for further cross-examination for impeachment purposes is properly denied if the court is not informed of what statements are intended to be contradicted. Wehunt v. State, 168 Ga. App. 353, 309 S.E.2d 143 (1983) (decided under former O.C.G.A. § 24-9-83).

Cross-examination. — When it is sought to impeach a witness by a party in order to disparage the witness's testimony, this is properly done by cross-examination of the witness. McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936) (decided under former Code 1933, § 38-1803).

Alibi witnesses. — State was obligated to respond to the defendants' notification of the defendants' intention to rely upon alibi as a defense; neither the state's general witness list nor the state's entitlement to rebut or impeach a witness's testimony with conflicting testimony or statements under former O.C.G.A. §§ 24-9-82 and 24-9-83 (see now O.C.G.A. §§ 24-6-613 and 24-6-621) was a substitute for compliance with O.C.G.A. § 17-16-5(b). Hayes v. State, 249 Ga. App. 857, 549 S.E.2d 813 (2001) (decided under former O.C.G.A. § 24-9-83).

Impeaching memory. — It is not competent to impeach, by witnesses, the memory of the witness in order to disparage the witness's testimony. It must be done by cross-examination. Goodwyn v. Goodwyn, 20 Ga. 600 (1856) (decided under former law).

Because the defendant could have impeached the witnesses who allegedly contradicted themselves as a result of faded memories without losing any right to open and conclude closing argument before the jury, the defendant could not show that an alleged loss of memory caused by any delay in the proceedings amounted to prejudice. Parker v. State, 283 Ga. App. 714, 642 S.E.2d 111, cert. denied, 552 U.S. 995, 128 S. Ct. 496, 169 L.Ed.2d 347

General Consideration (Cont'd)

(2007) (decided under former O.C.G.A. § 24-9-83).

Criminal defendant, when a witness, stands before the court as any other witness. Klug v. State, 77 Ga. 734 (1886) (decided under former Code 1882, §§ 3871, 3872, and 3875); Coleman v. State, 141 Ga. 731, 82 S.E. 228 (1914) (decided under former Penal Code 1910, § 1052).

Prosecutor, when a witness, stands before the court as any other witness. Womack v. State, 72 Ga. 215 (1883) (decided under former Code 1882, §§ 3871, 3872, and 3875).

When allegations that defendant impeached were not supported by evidence, summary judgment was not precluded. — See Bonney Motor Express, Inc. v. Yates, 171 Ga. App. 754, 320 S.E.2d 844 (1984) (decided under former O.C.G.A. § 24-9-83).

Because admission of a booking photograph did not suggest guilt of a prior crime or enflame the jury, the admission did not place defendant's character into evidence or deprive the defendant of a fair trial. Hunter v. State, 273 Ga. App. 52, 614 S.E.2d 179 (2005) (decided under former O.C.G.A. § 24-9-83).

Inconsistent statements. — While the trial court erred in holding that a witness's prior inconsistent statement had to be admitted into evidence prior to the statement's use for impeachment, considering that the allegedly inconsistent statement concerned only a fine distinction whether, prior to the defendant's wife's arrival, the defendant and the murder victim argued with each other or the defendant alone yelled at the victim, the trial court's error did not contribute to the verdict and was, therefore, harmless. Holsey v. State, 281 Ga. 177, 637 S.E.2d 32 (2006) (decided under former O.C.G.A. § 24-9-83).

Trial court did not err in allowing a codefendant to play a 9-1-1 tape to impeach a witness's testimony with a prior inconsistent statement because the witness and the 9-1-1 operator could all be heard on the 9-1-1 tape, they testified at trial, and they were subject to cross-examination; on the 9-1-1 tape, the witness could be heard saying that the defendant told the witness that the defendant shot the victim, but at trial, the witness testified, "I don't believe that I said that she said she shot him," and the codefendant reminded the witness of the statement on the 9-1-1 call, but the witness did not change the witness' testimony. Krause v. State, 286 Ga. 745, 691 S.E.2d 211 (2010) (decided under former O.C.G.A. § 24-9-83).

Evidence sufficient to impeach in the following cases. — See Central of Ga. Ry. v. Pitts, 38 Ga. App. 780, 145 S.E. 518 (1928) (decided under former Civil Code 1910, § 5881); Sands v. State, 46 Ga. App. 730, 169 S.E. 58 (1933) (decided under former Code 1933, § 38-1803); Felts v. State, 244 Ga. 503, 260 S.E.2d 887 (1979) (decided under former Code 1933, § 38-1803); Walker v. Bruno's, Inc., 228 Ga. App. 589, 492 S.E.2d 336 (1997) (decided under former O.C.G.A. § 24-9-83).

Use of term "bad guys." — Defendant's motion for a mistrial was properly denied as a witness's use of the term "bad guys" in explaining undercover operations did not improperly inject defendant's character into evidence; even assuming the comment was improper, the error was harmless in light of the overwhelming evidence of defendant's guilt. Salgado v. State, 268 Ga. App. 18, 601 S.E.2d 417 (2004) (decided under former O.C.G.A. § 24-9-83).

Contradictions were shown in the following cases. — See Cox v. State, 64 Ga. 374, 37 Am. R. 76 (1879) (stenographic notes of testimony at coroner's inquest) (decided under former Code 1873, §§ 3871, 3872, and 3875); Owens v. State, 139 Ga. 92, 76 S.E. 860 (1912) (affidavit made previous to trial) (decided under former Penal Code 1910, § 1052); Frank v. State, 141 Ga. 243, 80 S.E. 1016 (1914) (affidavit of witness plus testimony of another witness) (decided under former Penal Code 1910, § 1052).

Exclusion of testimony harmless. — Trial court did not abuse the court's discretion in excluding testimony by the defendant's investigator that the defendant asserted was relevant to the issue of provocation because, even assuming that the

testimony at issue was relevant in showing provocation, the testimony was properly excluded and the testimony's exclusion was harmless given that the jury heard testimony that the victim had been spreading rumors that the defendant was gay. Slaughter v. State, 292 Ga. 573, No. S12A1527, 2013 Ga. LEXIS 251 (2013) (decided under former O.C.G.A. § 24-9-83).

Cited in Thompson v. State, 739 S.E.2d 434, No. A12A2000, 2013 Ga. App. LEXIS 141 (2013).

Admissibility of Statement

1. In General

General rule. — Prior inconsistent statements are in general admissible to impeach a witness. Andrews v. State, 118 Ga. 1, 43 S.E. 852 (1903) (decided under former Penal Code 1895, § 1026); Bates v. State, 4 Ga. App. 486, 61 S.E. 888 (1908) (decided under former Penal Code 1895, § 1026); Tommie v. State, 158 Ga. App. 216, 279 S.E.2d 510 (1981) (decided under former Code 1933, § 38-1803).

Rule that declarations to third persons against the declarant's penal interest to the effect that the declarant and not the accused was the actual perpetrator of the offense are not admissible in favor of the accused at the trial and does not apply when the declarant is present, testifies, and is subject to cross-examination; the accused should have been permitted to produce testimony of the declarant's prior inconsistent statements as substantive evidence of the facts contained therein. Guess v. State, 262 Ga. 487, 422 S.E.2d 178 (1992) (decided under former O.C.G.A. § 24-9-83).

One method of impeaching a witness is by showing that the witness made statements out of court at variance with the witness's testimony on the witness stand. Ricks v. State, 70 Ga. App. 395, 28 S.E.2d 303 (1943) (decided under former Code 1933, § 38-1803).

Prior statement of fact or opinion. — Prior inconsistent statement is admissible to impeach a witness whether the statement was one of fact or one of opinion when the statement is different from the facts testified to or from the conclusion which the testimony tends to establish. Bates v. State, 4 Ga. App. 486, 61 S.E. 888 (1908) (decided under former Penal Code 1895, § 1026).

Rape victim's statement to an investigator was not impeaching since the statement was neither contradictory nor inconsistent with her trial testimony, but merely stated facts that corroborated the trial testimony. Hightower v. State, 227 Ga. App. 74, 487 S.E.2d 646 (1997) (decided under former O.C.G.A. § 24-9-83).

Contradictory statements were immaterial. — In a trial for statutory rape and child molestation, the trial court did not err in not allowing the defendant to use contradictory statements about the victim's age to impeach the victim under former O.C.G.A. § 24-9-83 as the victim's age was not contested at trial and the defendant's knowledge of the victim's age was irrelevant; thus, the contradictory statements were immaterial. Haywood v. State, 283 Ga. App. 568, 642 S.E.2d 203 (2007) (decided under former O.C.G.A. § 24-9-83).

Relevant matters. — Contradictory statements must relate to matters relevant to the testimony of the witness and to the case. Green v. State, 43 Ga. 368 (1871) (decided under former Code 1868, §§ 3815, 3816, and 3819); Whitaker v. State, 79 Ga. 87, 3 S.E. 403 (1887) (decided under former Code 1882, §§ 3871, 3872, and 3875); Futch v. State, 90 Ga. 472, 16 S.E. 102 (1892) (decided under former Code 1882, §§ 3871, 3872, and 3875); Watts v. State, 120 Ga. 496, 48 S.E. 142 (1904) (decided under former Code 1882, §§ 3871, 3872, and 3875); Mann v. State, 124 Ga. 760, 53 S.E. 324, 4 L.R.A. (n.s.) 934 (1906) (decided under former Penal Code 1895, § 1026); Tanner v. State, 163 Ga. 121, 135 S.E. 917 (1926) (decided under former Penal Code 1910, § 1052); Cooper v. State, 66 Ga. App. 594, 18 S.E.2d 644 (1942) (decided under former Code 1933, § 38-1803); Green v. State, 138 Ga. App. 48, 225 S.E.2d 495 (1976) (decided under former Code 1933, § 38-1803); Wakily v. State, 225 Ga. App. 56, 483 S.E.2d 313 (1997) (decided under former O.C.G.A. § 24-9-83).

Since the declarant's testimony was relevant to the case and contradictory state-

Admissibility of Statement (Cont'd)
1. In General (Cont'd)

ments attributed to the declarant were relevant to the declarant's testimony, testimony proffered by the accused should have been admitted under "the prior inconsistent statement exception to the hearsay rule." Guess v. State, 262 Ga. 487, 422 S.E.2d 178 (1992) (decided under former O.C.G.A. § 24-9-83).

"Material matters" were matters competent to prove on one side or other of the issue, and admissible for that purpose. Kennedy v. State, 9 Ga. App. 219, 70 S.E. 986 (1911) (decided under former Penal Code 1910, § 1052); Stockton v. State, 20 Ga. App. 186, 92 S.E. 1019 (1917) (decided under former Penal Code 1910, § 1052).

Pre-trial statements. — For a party's credibility to be impeached by prior inconsistent statements, such statement must be relevant and material to the issues on trial; a factual stipulation presented by the parties to the trial court did not conflict with the pre-trial statement, and did not cause a prior inconsistent statement for purposes of impeachment. Redfearn v. Huntcliff Homes Assoc., 260 Ga. App. 150, 579 S.E.2d 37 (2003) (decided under former O.C.G.A. § 24-9-83).

Purpose of testimony limited. — Testimony offered avowedly to impeach the credit of a witness by showing contradictory statements cannot, in the argument before the jury, be used for a wholly different purpose. Williams v. Chapman, 7 Ga. 467 (1849) (decided under former law).

Witness could not be impeached by a memorandum that was not written by the witness and that did not record any statement made by the witness. Mobley v. State, 265 Ga. 292, 455 S.E.2d 61 (1995) (decided under former O.C.G.A. § 24-9-83).

Witness could not be cross-examined regarding a document the witness did not prepare and did not know about since the purpose of the cross-examination was to impeach the witness, not refresh the witness's recollection. Fleming v. State, 269 Ga. 245, 497 S.E.2d 211 (1998) (decided under former O.C.G.A. § 24-9-83).

Email could not be used for impeachment. — In a child molestation prosecution, an email that the defendant claimed the victim sent, in which the writer apologized for lying about the defendant, was not admissible to impeach the victim, as no testimony elicited from the victim would have been contradicted by the email. Had the victim been asked about telling anyone that the victim had lied about the defendant, and denied doing so, the email might have been admitted for impeachment. Hollie v. State, 298 Ga. App. 1, 679 S.E.2d 47 (2009), aff'd, 287 Ga. 389, 696 S.E.2d 642 (2010) (decided under former O.C.G.A. § 24-9-83).

Inadmissible testimony. — When the testimony of the former trial is inadmissible in evidence, that testimony may not be resorted to for purposes of impeachment. Mitchum v. State, 11 Ga. 615 (1852) (decided under former law).

Improper admission of inconsistent statement harmless error. — In a divorce proceeding, admission of the testimony of a witness called by a spouse that impeached the testimony of the other spouse's lover, also called by the spouse, would have been proper as prior inconsistent statements under former O.C.G.A. §§ 24-9-81 and 24-9-83 (see now O.C.G.A. §§ 24-6-608 and 24-6-613), but the timing of the impeaching testimony before the lover's testimony made the admission improper; there was no harm in the error, however, because the spouse's lover was called as a witness and was questioned about the contradictory statements. Moxley v. Moxley, 281 Ga. 326, 638 S.E.2d 284 (2006) (decided under former O.C.G.A. § 24-9-83).

Proving testimony by notes or memoranda. — For the purpose of impeaching witnesses, their testimony of the committing trial may be proved as well by one who heard it as by the notes or memoranda of the evidence taken by the court. Chambers v. State, 88 Ga. App. 57, 76 S.E.2d 84 (1953) (decided under former Code 1933, § 38-1803).

Document introduced in absence of witness. — If the foundation for impeaching documentary evidence was properly laid, it is immaterial that the witness had concluded the witness's testimony and was absent from the courthouse at the time the document was finally introduced

in evidence. Hartley v. Sanders, 45 Ga. App. 273, 164 S.E. 232 (1932) (decided under former Civil Code 1910, § 5881).

Admission by witness of previous statement. — Once a witness has unequivocally admitted having previously made inconsistent statements in a written report, the written report becomes inadmissible as proof of the inconsistency is no longer necessary or material. Choate v. Carter, 98 Ga. App. 375, 105 S.E.2d 909 (1958) (decided under former Code 1933, § 38-1803); Pethel v. Waters, 220 Ga. 543, 140 S.E.2d 252 (1965) (decided under former Code 1933, § 38-1803); Dickey v. State, 240 Ga. 634, 242 S.E.2d 55 (1978), overruled on other grounds, Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982) (decided under former Code 1933, § 38-1803).

When a witness admits making prior inconsistent statements, the witness has impeached oneself and it is not error to exclude the statements themselves from evidence. Daniels v. State, 203 Ga. App. 873, 418 S.E.2d 137 (1992) (decided under former O.C.G.A. § 24-9-83).

Whether the witness admits or denies making the prior inconsistent statement in writing, the written statement may be admissible and considered as substantive evidence. Language in cases that prior inconsistent statements are not admissible solely because the witness admits he or she made the statements is disapproved. Duckworth v. State, 268 Ga. 566, 492 S.E.2d 201 (1997) (decided under former O.C.G.A. § 24-9-83).

Trial court did not err in allowing the prosecutor to play the entire tape of an out-of-court police interview of a witness for the state because the fact that the witness admitted that the witness made the inconsistent pre-trial statement did not render the statement inadmissible. Johnson v. State, 289 Ga. 106, 709 S.E.2d 768 (2011) (decided under former O.C.G.A. § 24-9-83).

Denial of prior statement. — Witness's prior statement which is inconsistent on a material matter with the witness's trial testimony is properly admitted into evidence to impeach the witness's trial testimony when the witness denies having made such a statement. Dickey v. State, 240 Ga. 634, 242 S.E.2d 55 (1978), overruled on other grounds, Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982) (decided under former Code 1933, § 38-1803).

Inconsistent statement admissible only after witness's denial. — Prior inconsistent statement becomes admissible only if the witness denies having made the statement. Harden v. State, 166 Ga. App. 536, 304 S.E.2d 748 (1983) (decided under former O.C.G.A. § 24-9-83).

Fact that former O.C.G.A. § 24-9-83 did not mandate that a prior inconsistent statement be admitted into evidence before the statement was used for impeachment did not render erroneous a trial court's admission of such a statement after cross-examination. Williams v. State, 236 Ga. App. 351, 511 S.E.2d 910 (1999) (decided under former O.C.G.A. § 24-9-83).

Witness failing to deny former statement. — Trial court erred in refusing to allow the appellant to impeach a witness's testimony simply because the witness failed to deny making the witness's former statements. Sprouse v. State, 250 Ga. 174, 296 S.E.2d 584 (1982) (decided under former O.C.G.A. § 24-9-83).

Admissible as substantive evidence. — Prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence, and is not limited in value only to impeachment purposes. Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982) (decided under former O.C.G.A. § 24-9-83); Sprouse v. State, 250 Ga. 174, 296 S.E.2d 584 (1982) (decided under former O.C.G.A. § 24-9-83); Belcher v. State, 188 Ga. App. 244, 372 S.E.2d 650 (1988) (decided under former O.C.G.A. § 24-9-83).

Witness's prior statement which is inconsistent on a material matter with the witness's trial testimony is proper evidence to impeach the witness's trial testimony. Such an inconsistent statement of a witness is not limited in value only to impeachment purposes but is likewise admissible as substantive evidence. Truitt v. State, 168 Ga. App. 616, 309 S.E.2d 895 (1983) (decided under former O.C.G.A. § 24-9-83).

Admissibility of Statement (Cont'd)
1. In General (Cont'd)

Prior inconsistent statement of a witness who takes the stand and is subject to cross-examination is admissible as substantive evidence. Lumpkin v. State, 255 Ga. 363, 338 S.E.2d 431 (1986), overruled on other grounds, Woodard v. State, 269 Ga. 317, 496 S.E.2d 896, (1998) (decided under former O.C.G.A. § 24-9-83).

It was proper to allow the state to introduce prior inconsistent statements as substantive evidence with regard to three witnesses who claimed to have suffered memory loss as well as three other witnesses who equivocated regarding their statements. Spann v. State, 248 Ga. App. 419, 546 S.E.2d 368 (2001) (decided under former O.C.G.A. § 24-9-83).

Evidence which is admissible for impeachment purposes only cannot serve as evidence in support of an essential factual contention. Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982) (decided under former O.C.G.A. § 24-9-83).

Prior incriminatory statement is admissible for impeachment purposes even if Miranda warnings have not been given. Graham v. State, 175 Ga. App. 411, 333 S.E.2d 664 (1985) (decided under former O.C.G.A. § 24-9-83).

Valuation made two years prior to condemnation not admissible. — In a condemnation proceeding, statements concerning the value of the subject property on a date approximately two years prior to the taking may be excluded as impeaching evidence since the value of the property two years prior is not shown to be relevant to the issue of the value of the property at the time of the property's subsequent taking. DOT v. Wright, 169 Ga. App. 332, 312 S.E.2d 824 (1983) (decided under former O.C.G.A. § 24-9-83).

Falsity partially conceded. — Written document previously made and signed by a witness, which is contrary to the witness's testimony, may be introduced in evidence for the purpose of impeachment on the ground of contradictory statements; and this may be done even though the witness admits signing the document, and testifies that most of the statements contained therein are false since the document contains other statements whose falsity is not admitted. Manley v. Combs, 197 Ga. 768, 30 S.E.2d 485 (1944) (decided under former Code 1933, § 38-1803); Hodges v. Haverty, 115 Ga. App. 199, 154 S.E.2d 276 (1967) (decided under former Code 1933, § 38-1803).

Statement not admissible as prior inconsistent statement. — See Garrett v. State, 169 Ga. App. 327, 312 S.E.2d 621 (1983) (decided under former O.C.G.A. § 24-9-83).

Refusal to admit prior statement harmless error. — Even if the trial court erred in refusing to permit the defendant to read aloud part of the defendant's prior statement, since the defendant's entire custodial statement was admitted into evidence and the jury was free to determine what meaning, weight, and credibility to accord that statement, any error was harmless. O'Hara v. State, 241 Ga. App. 855, 528 S.E.2d 296 (2000) (decided under former O.C.G.A. § 24-9-83).

2. What Statements Admissible

Writing admissible. — Any writing previously made by a witness, which is in conflict with the witness's testimony, is admissible for the purpose of impeachment. State Hwy. Dep't v. Raines, 129 Ga. App. 123, 199 S.E.2d 96 (1973) (decided under former Code 1933, § 38-1803); Redd v. State, 242 Ga. 876, 252 S.E.2d 383, cert. denied, 442 U.S. 934, 99 S. Ct. 2870, 61 L. Ed. 2d 304 (1979) (decided under former Code 1933, § 38-1803).

Depositions. — Words "written statements made under oath in connection with some judicial proceedings" include previously taken depositions of a witness in a case. Williams v. Chapman, 7 Ga. 467 (1849) (decided under former law); Georgia R.R. & Banking Co. v. Smith, 85 Ga. 530, 11 S.E. 859 (1890) (decided under former Code 1882, §§ 3871, 3872, and 3875); Raleigh & G.R.R. v. Bradshaw, 113 Ga. 862, 39 S.E. 555 (1901) (decided under former Civil Code 1895, § 5292); Estill v. Citizens & S. Bank, 153 Ga. 618, 113 S.E. 522 (1922) (decided under former Civil Code 1895, § 5292); Phillips v. Howard, 109 Ga. App. 404, 136 S.E.2d 473 (1964) (decided under former Code 1933, § 38-1803).

Deposition concerning same issues. — Witness may be contradicted and thus discredited by the witness's depositions previously taken in the same case or in a different case involving the same issues. Lexington Developers, Inc. v. O'Neal Constr. Co., 145 Ga. App. 309, 243 S.E.2d 577 (1978) (decided under former Code 1933, § 38-1803).

Testimony concerning lost deposition. — When depositions were never properly transmitted to the court and were lost, the court properly allowed oral testimony as to what the interrogated persons said before the court commissioner, not for the purpose of establishing their previous testimony given in the case, but merely for the purpose of proving alleged previous contradictory statements, and properly permitted counsel for the defendants to refer to what purported to be a carbon copy of the previous questions and answers, in questioning the witnesses in order to lay a foundation for their impeachment and in testifying personally as to what answers were previously given, counsel at last testifying from counsel's own recollection after having counsel's memory thus refreshed. Lazar v. Black & White Cab Co., 50 Ga. App. 567, 179 S.E. 250 (1935) (decided under former Code 1933, § 38-1803).

Testimony at former trial. — When properly authenticated and proper preliminary proof for its introduction has been made, testimony given in a previous trial of the case is admissible for the purpose of impeaching a witness. Butler v. State, 142 Ga. 286, 82 S.E. 654 (1914) (decided under former Penal Code 1910, § 1052).

Statement made in different case. — Rule stated is not restricted to contradictory statements made in the same case and is applicable to contradictory statements made in different cases. Jones v. State, 70 Ga. App. 431, 28 S.E.2d 373 (1943) (decided under former Code 1933, § 38-1803).

Prior testimony from committing trial may be used. Brown v. State, 76 Ga. 623 (1886) (decided under former Code 1882,§§ 3871, 2872, and 3875).

Testimony from Jackson v. Denno hearing. — Defendant's testimony given during a Jackson v. Denno hearing was admissible at trial for the jury's consideration both as incriminatory testimony and as prior contradictory, inconsistent statements. Brown v. State, 226 Ga. App. 140, 486 S.E.2d 370 (1997) (decided under former O.C.G.A. § 24-9-83).

Prior statements implicating accused. — Trial court did not err in allowing the prosecution to cross-examine two state witnesses after their testimony differed from their prior statements implicating the appellant in a murder and after the witnesses had repudiated the prior statements as having been made under duress. Burney v. State, 252 Ga. 25, 310 S.E.2d 899 (1984) (decided under former O.C.G.A. § 24-9-83).

Hospital intake record was admissible to impeach a defense witness by proof of a prior inconsistent statement regarding the identity of the driver in a DUI prosecution. Gee v. State, 210 Ga. App. 60, 435 S.E.2d 275 (1993) (decided under former O.C.G.A. § 24-9-83).

Prior inconsistent statement. — In a prosecution for child molestation and related offenses, the prior inconsistent statement of a witness that the witness thought defendant "done it" was admissible to impeach the witness's direct testimony that the witness didn't believe the victim when the victim first reported the sexual assaults. Shropshire v. State, 226 Ga. App. 669, 487 S.E.2d 384 (1997) (decided under former O.C.G.A. § 24-9-83).

Trial court erred when the court prohibited the defendant from questioning a witness regarding a prior inconsistent statement contained in a document not admitted into evidence. Whitehead v. State, 232 Ga. App. 140, 499 S.E.2d 922 (1998) (decided under former O.C.G.A. § 24-9-83).

State was entitled to impeach the testimony of defendant's cousin denying that the defendant participated in a theft as it was entitled to do so using a contradictory statement previously made by the cousin as to matters relevant to the cousin's testimony and to the case. Wilson v. State, 258 Ga. App. 166, 573 S.E.2d 432 (2002) (decided under former O.C.G.A. § 24-9-83).

Hearsay testimony of detective admissible. — Hearsay testimony of a de-

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tective regarding statements made by a coconspirator after the coconspirator denied remembering the crime or giving the police any information was admissible as substance evidence under the prior inconsistent statement exception to the hearsay rule. Robinson v. State, 278 Ga. 31, 597 S.E.2d 386 (2004) (decided under former O.C.G.A. § 24-9-83).

Proper admission of prior inconsistent statement. — When a witness at the defendant's trial contradicted statements the witness had made to others about the defendant's involvement in a murder, the trial court properly admitted testimony about the earlier statements as prior inconsistent statements. Paige v. State, 281 Ga. 504, 639 S.E.2d 478 (2007) (decided under former O.C.G.A. § 24-9-83).

Witness's testimony that the brother of a juvenile defendant told the witness, "My brother just shot someone," was not inadmissible hearsay; the brother testified that the brother had not made such a statement, the testimony was admissible as an inconsistent statement, and it was also admissible as an excited utterance, as it was made by the brother after receiving a startling text message. In the Interest of B.S., 284 Ga. App. 680, 644 S.E.2d 527 (2007) (decided under former O.C.G.A. § 24-9-83).

Prior inconsistent statement to police admitted. — Trial court properly admitted a witness's pretrial statements to police in which the witness stated that the witness had observed another person have sex with the defendant in exchange for drugs, and that the defendant had been cutting and packaging the drugs into small bags. At trial, the witness denied the facts set forth in these statements and further denied making these statements to the police; thus, the prior inconsistent statements were properly admitted over the defendant's hearsay objection as impeachment evidence and as substantive evidence of the defendant's guilt. Gassett v. State, 289 Ga. App. 792, 658 S.E.2d 366 (2008) (decided under former O.C.G.A. § 24-9-83).

Prior inconsistent statement of victim admitted. — Whether or not the trial court erred by refusing to allow the admission of an assault victim's prior inconsistent statement, any error was harmless as defense counsel thoroughly cross-examined the victim about inconsistencies between the victim's written statement and trial testimony, and elicited testimony from a responding officer concerning a statement that the victim made to the officer shortly after the incident occurred, which likewise was inconsistent with the victim's trial testimony. Cash v. State, 293 Ga. App. 702, 667 S.E.2d 691 (2008) (decided under former O.C.G.A. § 24-9-83).

Use of employment application as prior inconsistent statement. — In a negligence action against a dump truck driver and the driver's employer, given the driver's trial testimony regarding the driver's driving experience, the trial court did not abuse the court's discretion in admitting testimony regarding statements in the driver's purported employment application regarding the driver's truck driving experience as prior inconsistent statements. A & G Trucking, Inc. v. Pitts, 306 Ga. App. 718, 703 S.E.2d 134 (2010) (decided under former O.C.G.A. § 24-9-83).

Inconsistent statement of defendant admitted. — Defendant was not entitled to a directed verdict of acquittal on a voluntary manslaughter count predicated on the defendant's claim of defense of habitation, O.C.G.A. § 16-3-23, because the evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of voluntary manslaughter in violation of O.C.G.A. § 16-5-2(a) and to find that the defendant's stabbing of the victim was not justified in defense of the defendant's habitation; the jury was authorized to rely upon the defendant's prior inconsistent statement to the defendant's relative to conclude that the victim's entry into the defendant's apartment was not "violent and tumultuous." Muckle v. State, 307 Ga. App. 634, 705 S.E.2d 721 (2011) (decided under former O.C.G.A. § 24-9-83).

Prior consistent statement of victim. — Victim's statement to a doctor was

properly admitted as a prior consistent statement as the victim testified at trial and was cross-examined by the defendant; the defendant asserted in opening statement that the defendant implied during cross-examination that because the victim's parent would have been upset if the parent believed the victim were having consensual sex with the parent's old significant other, the victim falsely testified that the defendant forced the victim to engage in sex, which testimony was designed to preserve the victim's relationship with the parent, and to continue the victim's receipt of food and shelter from the parent. Smith v. State, 282 Ga. App. 339, 638 S.E.2d 791 (2006) (decided under former O.C.G.A. § 24-9-83).

Testimony of police officers as to prior statements of a witness is admissible as substantive evidence of guilt of the accused in the nature of an admission. Gibbons v. State, 248 Ga. 858, 286 S.E.2d 717 (1982) (decided under former O.C.G.A. § 24-9-83).

Confession of codefendant. — In a prosecution for assault with intent to rape, when, on cross-examination, it was brought out that the codefendant had made a signed confession, and the state then placed the codefendant on the stand and, after the codefendant had denied the codefendant's and defendant's guilt, confronted the codefendant with a sworn confession for purposes of impeachment, such confession was admissible in view of conflicting evidence as to whether or not the statement was voluntarily made and was made without fear of injury or hope of reward. Elliott v. State, 87 Ga. App. 456, 74 S.E.2d 366 (1953) (decided under former Code 1933, § 38-1803).

Confession of coconspirator. — Admission into evidence of the alleged confession of a coconspirator was not error since the coconspirator had been called by the defense and the district attorney stated that the testimony would be for the sole purpose of impeachment. Hodge v. State, 149 Ga. App. 326, 254 S.E.2d 478 (1979) (decided under former Code 1933, § 38-1803).

Hearsay statements inadmissible. — Statements made by the defendant in the course of an earlier recorded meeting with the witness were hearsay and could not be used to impeach the witness. Willett v. State, 223 Ga. App. 866, 479 S.E.2d 132 (1996) (decided under former O.C.G.A. § 24-9-83).

Hearsay admissible for impeachment. — Testimony which consisted of declarations by one who was not a party to the case is ordinarily classed as hearsay but is admissible for the sole purpose of impeachment. Wiggins v. Lord, 87 Ga. App. 486, 74 S.E.2d 389 (1953) (decided under former Code 1933, § 38-1803); Simmons v. State, 139 Ga. App. 180, 228 S.E.2d 185 (1976) (decided under former Code 1933, § 38-1803).

Inconsistent statement of victim not admissible. — Victim advocate's testimony that a domestic abuse victim had told the advocate that the defendant was drunk when the defendant hit the victim was hearsay and not admissible as a prior inconsistent statement of the victim because the victim did not testify as to whether or not the defendant was drunk. However, counsel's failure to object was not ineffective assistance because there was no showing of a reasonable probability that the result would have been different if the jury thought the defendant was drunk or not at the time of the incident. Miller v. State, 300 Ga. App. 652, 686 S.E.2d 302 (2009) (decided under former O.C.G.A. § 24-9-83).

Silence as previous statement. — It is error to permit cross-examination of a defendant for impeachment purposes regarding the defendant's silence or failure to offer an exculpatory statement at the time of the defendant's arrest, including a defendant who was not apprised of the defendant's Miranda rights. Harrison v. State, 154 Ga. App. 343, 268 S.E.2d 396 (1980) (decided under former Code 1933, § 38-1803).

Effect of counteraffidavit, see Gardner v. Granniss, 57 Ga. 539 (1876) (decided under former Code 1873, §§ 3871, 3872, and 3875); Brantley v. State, 16 Ga. App. 6, 84 S.E. 131 (1915) (decided under former Penal Code 1910, § 1052).

Officer's statement on intoxications. — In a defendant's second trial for driving under the influence, it was not

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error to prevent the defendant from cross-examining a deputy under former O.C.G.A. § 24-9-83 about a statement the deputy made at the first trial about the defendant's level of intoxication; at the second trial, the state did not ask the deputy about the defendant's level of intoxication or about field sobriety tests and, thus, there was no contradiction between the deputy's testimony at the second trial and the deputy's testimony at the first trial. Davidson v. State, 284 Ga. App. 333, 643 S.E.2d 848 (2007) (decided under former O.C.G.A. § 24-9-83).

Admission of videotape statement. — There was no requirement under former O.C.G.A. § 24-9-83 that the witness deny making any statement at all, and a trial court properly allowed the state to introduce a videotape of a pretrial statement given by the state's own witness who admitted during the witness's testimony that the witness made the statement, but testified that the witness lied to the police when doing so; the prior inconsistent statement was admissible as substantive evidence, and no instruction that the statement was admitted solely for purposes of impeachment, but not as substantive evidence, would have been appropriate. Cummings v. State, 280 Ga. 831, 632 S.E.2d 152 (2006) (decided under former O.C.G.A. § 24-9-83).

Foundation

Purpose of foundation. — Foundation that statute requires be laid before contradictory statements may be proved to impeach a witness is for the purpose of giving the witness the opportunity to correct and explain the witness's evidence. Estill v. Citizens & S. Bank, 153 Ga. 618, 113 S.E. 552 (1922) (decided under former Civil Code 1910, § 5881); State Farm Mut. Auto. Ins. Co. v. Rogers, 105 Ga. App. 778, 125 S.E.2d 893 (1962) (decided under former Code 1933, § 38-1803).

Laying foundation required. — Witness cannot be impeached by proof of contradictory statements without laying a foundation with the particularity prescribed by statute. Williams v. Turner, 7 Ga. 348 (1849) (decided under former law); Floyd v. Wallace, 31 Ga. 688 (1861) (decided under former law); Taylor v. State, 110 Ga. 150, 35 S.E. 61 (1900) (decided under former Penal Code 1895, § 1026); Raleigh & G.R.R. v. Bradshaw, 113 Ga. 862, 39 S.E. 555 (1901) (decided under former Civil Code 1895, § 5292); Georgia, Fla. & Ala. Ry. v. Sasser, 4 Ga. App. 276, 61 S.E. 505 (1908) (decided under former Civil Code 1895, § 5292); Luke v. Cannon, 4 Ga. App. 538, 62 S.E. 110 (1908) (decided under former Civil Code 1895, § 5292); Glover v. State, 137 Ga. 82, 92 S.E. 926 (1911) (decided under former Penal Code 1910, § 1052); White v. Knapp, 31 Ga. App. 344, 120 S.E. 796 (1923) (decided under former Civil Code 1910, § 5881); Stewart v. Avery, 38 Ga. App. 431, 144 S.E. 218 (1928) (decided under former Civil Code 1910, § 5881); Johnson v. Roberson, 88 Ga. App. 548, 77 S.E.2d 232 (1953) (decided under former Code 1933, § 38-1803); Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971), cert. denied, 405 U.S. 1050, 92 S. Ct. 1511, 31 L. Ed. 2d 786 (1972) (decided under former Code 1933, § 38-1803).

Foundation for impeachment by prior inconsistent statements is as follows: the cross-examiner will ask the witness whether the witness made the alleged statement, giving the statement's substance, and naming the time, the place, and the person to whom made; if the witness denies the making of the statement, or fails to admit the statement, then the requirement of "laying the foundation" is satisfied and the cross-examiner, at the next stage of giving evidence, may prove the making of the alleged statement. Carter v. State, 244 Ga. 803, 262 S.E.2d 109 (1979) (decided under former Code 1933, § 38-1803); Sell v. State, 156 Ga. App. 333, 274 S.E.2d 723 (1980) (decided under former Code 1933, § 38-1803).

Statement of victim not admitted without foundation. — Trial court did not err in failing to allow the defendant to testify as to a prior inconsistent statement made by the victim during a preliminary inquiry hearing when the foundation requirement of former O.C.G.A. § 24-9-83

was not met since the victim was not questioned about the victim's prior inconsistent statement, and thus was afforded no opportunity to explain or deny the statement before the statement was offered at trial to impeach the victim. Horne v. State, 204 Ga. App. 81, 418 S.E.2d 441 (1992) (decided under former O.C.G.A. § 24-9-83); Searcy v. State, 214 Ga. App. 620, 448 S.E.2d 468 (1994) (decided under former O.C.G.A. § 24-9-83).

Impeachment with recorded statement not permitted. — Trial court did not err in refusing to allow impeachment of the plaintiff with a statement made in a tape recorded interview after the investigator who conducted the interview was not available to testify, the transcript contained many indications of omissions and indecipherable speech, and the tape itself was barely audible. Georgia Ports Auth. v. Harris, 243 Ga. App. 508, 533 S.E.2d 404 (2000) (decided under former O.C.G.A. § 24-9-83).

Counsel failed to lay proper foundation. — Police report of an investigating officer, which allegedly contained prior inconsistent statements of witnesses, was not allowed into evidence because defense counsel failed to lay the proper foundation for the admission of the report. Armour v. State, 265 Ga. App. 569, 594 S.E.2d 765 (2004) (decided under former O.C.G.A. § 24-9-83).

Inconsistent statement admitted on other grounds when no foundation laid. — Evidence of a victim's statement to the police, although not properly admitted as a prior inconsistent statement due to the failure to lay a proper foundation under former O.C.G.A. § 24-9-83, was properly admitted as part of the res gestae under former O.C.G.A. § 24-3-3 (see now O.C.G.A. § 24-8-803) because the victim's description of a distinctive jacket worn by one of the individuals who took a pickup truck was used by the police to search the defendant's residence. Stubbs v. State, 293 Ga. App. 692, 667 S.E.2d 905 (2008) (decided under former O.C.G.A. § 24-9-83).

Impeachment inappropriate when inadequate foundation laid. — Trial court's decision to foreclose the defendant from impeaching two of the state's witnesses during defendant's crossexamination of the responding police officer with the witnesses prior recorded statements was appropriate because the door to impeachment was never opened since the witnesses never denied making a contradictory statement; even assuming the witnesses denied making a contradictory statement, the defense never laid a proper foundation for the use of any such statement for impeachment purposes. Mubarak v. State, 305 Ga. App. 419, 699 S.E.2d 788 (2010) (decided under former O.C.G.A. § 24-9-83).

Witness given opportunity to admit, explain, or deny. — Trial court did not err in allowing hearsay testimony from the defendant's siblings regarding their father's prior inconsistent statements about the incidents leading up to the charges filed, and the state laid the proper foundation for this testimony as: (1) the statements at issue contradicted the victim's in-court testimony and were certainly relevant; (2) the victim denied making these statements; and (3) the victim's explanation of the incident as an accident was elicited on cross-examination, and hence, such was sufficient to provide the foundational requirement that the witness be given the opportunity to admit, explain, or deny the prior statements. Therefore, the three requirements for admissibility were met. Buchanan v. State, 282 Ga. App. 298, 638 S.E.2d 436 (2006) (decided under former O.C.G.A. § 24-9-83).

Admission of witness's prior contradictory statement. — With regard to a defendant's convictions for murder, felony murder, aggravated assault, and armed robbery, the trial court did not err by admitting certain prior inconsistent statements made by a witness with regard to seeing the defendant with a gun as both impeachment and substantive evidence because the witness was presented with the witness's prior contradictory statement and was allowed to fully review the statement after being reminded of the time, place, person, and circumstance of the statement. After that review, the witness testified that the witness was both familiar with the statement and that the statement was fair and accurate, although the witness continued to question the

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statement's contents; therefore, under those circumstances, an adequate foundation was laid for the statement to be used as impeachment evidence, and, since the witness was available at trial for cross-examination, the statement was also properly admitted as substantive evidence for the jury's consideration. McKnight v. State, 283 Ga. 56, 656 S.E.2d 830 (2008) (decided under former O.C.G.A. § 24-9-83).

Statement need not be introduced prior to questioning. — It is not necessary to admit the alleged inconsistent statement into evidence before questioning the witness about the statement. Harden v. State, 166 Ga. App. 536, 304 S.E.2d 748 (1983) (decided under former O.C.G.A. § 24-9-83).

Trial court erred by limiting defendant's cross-examination of a witness by not allowing the use of an alleged prior inconsistent statement contained in a document which the defendant refused to tender into evidence. Duckworth v. State, 268 Ga. 566, 492 S.E.2d 201 (1997) (decided under former O.C.G.A. § 24-9-83).

Trial court's error in requiring defendant to tender statements of victims into evidence before using prior inconsistencies allegedly contained therein for impeachment purposes was harmless since the subsequently tendered statements were used in cross-examination of the victims. Maxwell v. State, 233 Ga. App. 419, 503 S.E.2d 668 (1998) (decided under former O.C.G.A. § 24-9-83).

In order to lay the foundation for impeaching a witness with a prior inconsistent statement, the cross-examiner must show the written contradictory statement to the witness or read the statement in his or her hearing; the attorney need not introduce the prior written statement into evidence before using the statement to impeach the witness. Robinson v. State, 265 Ga. App. 481, 594 S.E.2d 696 (2004) (decided under former O.C.G.A. § 24-9-83).

Requirements as to laying of foundation fulfilled. — See Peterson v. State, 166 Ga. App. 719, 305 S.E.2d 447 (1983) (decided under former O.C.G.A. § 24-9-83); Meschino v. State, 259 Ga. 611, 385 S.E.2d 281 (1989) (decided under former O.C.G.A. § 24-9-83); Ward v. State, 271 Ga. 648, 520 S.E.2d 205 (1999) (decided under former O.C.G.A. § 24-9-83).

Witnesses' viewing of recordings of the witnesses' earlier statements satisfies the requirement that the time, place, person, and circumstances attending the former statements shall be called to the witness's mind with as much certainty as possible pursuant to former O.C.G.A. § 24-9-83 (see now O.C.G.A. §§ 24-6-608 and 24-6-613). Williams v. State, 304 Ga. App. 592, 696 S.E.2d 512 (2010) (decided under former O.C.G.A. § 24-4-8). (decided under former O.C.G.A. § 24-9-83).

Proper foundation for a child molestation victim's prior inconsistent statement to police and authorities was laid under former O.C.G.A. § 24-9-83 by the victim acknowledging making the prior statements, conceding that the statements were contradictory to the victim's trial testimony, and explaining that the allegations were fabricated to anger the defendant's spouse. Gunter v. State, 313 Ga. App. 756, 722 S.E.2d 450 (2012) (decided under former O.C.G.A. § 24-9-83).

Proper foundation was laid before evidence impeaching defendant admitted. Eller v. State, 183 Ga. App. 724, 360 S.E.2d 53 (1987) (decided under former O.C.G.A. § 24-9-83).

Trial court properly admitted a portion of a witness's written statement as a prior inconsistent statement under former O.C.G.A. § 24-9-83 because the state laid the appropriate foundation for the admission of the statement and the witness attempted to explain the inconsistency. Howell v. State, 278 Ga. App. 634, 629 S.E.2d 398 (2006) (decided under former O.C.G.A. § 24-9-83).

Proper foundation for videotaped statement laid. — Foundation for the use of a prior videotaped statement by a defendant's accomplice to impeach the accomplice's trial testimony was established by the accomplice when the accomplice testified that the accomplice had in fact given a videotaped statement in which the accomplice stated that the defendant was

the one who shot and killed a community service officer, and there was no requirement that the accomplice actually reviewed the videotape before the videotape was used to impeach the accomplice. Byrum v. State, 282 Ga. 608, 652 S.E.2d 557 (2007) (decided under former O.C.G.A. § 24-9-83).

Prior inconsistent statement of victim admitted. — Trial court's admission of the victim's prior inconsistent statement to a police investigator regarding the events surrounding the crime charged was proper as the prosecutor questioned the victim at considerable length regarding the statement, a tape recording of the victim's 9-1-1 call was played, and then the prosecutor questioned the victim in detail regarding the contents of the earlier statement which the victim denied making. Gooch v. State, 289 Ga. App. 74, 656 S.E.2d 214 (2007) (decided under former O.C.G.A. § 24-9-83).

No proper foundation was laid for proof of contradictory statement. Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth., 168 Ga. App. 202, 308 S.E.2d 547 (1983) (decided under former O.C.G.A. § 24-9-83).

Although witness one, who made a prior inconsistent statement was present and available for cross-examination, introduction of the prior inconsistent statement through witness two was improper because witness one testified before the issue of the alleged statement to witness two had been raised, and witness one was never questioned with the specificity necessary to establish the foundation for admission of the alleged prior inconsistent statement. Edmond v. State, 283 Ga. 507, 661 S.E.2d 520 (2008) (decided under former O.C.G.A. § 24-9-83).

Defendant failed to properly impeach defendant's witness by proof of previous contradictory statement, for while defendant put another witness on the stand who proffered that the witness overheard the allegedly inconsistent statement, the defendant never, on direct examination, asked the original witness questions concerning the time, place, or circumstances attending the former statement, nor did the defendant bring the witness back to the witness stand for further questioning along this line. Smith v. State, 171 Ga. App. 758, 321 S.E.2d 213 (1984) (decided under former O.C.G.A. § 24-9-83).

Trial counsel did not provide ineffective assistance by failing to object to the arresting detective's testimony about what a witness told the defendant just prior to a shooting because although the testimony was inadmissible hearsay since the state failed to lay a proper foundation for the admission of a prior inconsistent statement by not asking the witness about the witness's statement, the defendant failed to show a reasonable probability that the outcome of the trial would have been different if counsel had objected to the testimony; four eyewitnesses other than the witness testified that those witnesses saw the defendant shoot the victim, and the witnesses independently picked the defendant out of a photographic lineup. Cannon v. State, 288 Ga. 225, 702 S.E.2d 845 (2010) (decided under former O.C.G.A. § 24-9-83).

It was not error to exclude a preliminary hearing transcript offered to impeach a witness when a proper foundation was not laid. Sosebee v. State, 169 Ga. App. 370, 312 S.E.2d 853 (1983) (decided under former O.C.G.A. § 24-9-83).

Circumstances attending statement. — If the witness made a contradictory statement, it was proper for counsel for defendants to call to the witness's attention the name of the person or company to whom made, and the circumstances attending the statement. Sweet v. Awtrey, 70 Ga. App. 334, 28 S.E.2d 154 (1943) (decided under former Code 1933, § 38-1803).

Recall of witness to lay foundation. — Trial court erred in refusing to allow the defense to recall a prosecution witness to lay a foundation for admission of prior contradictory statements; the court's ruling forced the defendant to choose between testifying personally or foregoing the admission of relevant evidence. Childress v. State, 266 Ga. 425, 467 S.E.2d 865 (1996) (decided under former O.C.G.A. § 24-9-83).

Reading statement to witness. — Though a written statement not under oath must be read in the hearing of the

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witness, one under oath and made in connection with some judicial proceeding need not be read to the witness. Wilkerson v. State, 73 Ga. 799 (1884) (decided under former Code 1882, §§ 3871, 3872, and 3875); Washington v. State, 124 Ga. 423, 52 S.E. 910 (1905) (decided under former Penal Code 1895, § 1026).

To lay the proper foundation for the admission of a prior written inconsistent statement, the statement must be shown to the witness, or read in the witness's hearing. Davis v. State, 235 Ga. App. 256, 510 S.E.2d 537 (1998) (decided under former O.C.G.A. § 24-9-83).

Cross examination of officers from reports. — After counsel read five sentences from a police officer's report during crossexamination of that witness, it was held not to be evidence, but foundational language as contemplated by former O.C.G.A. § 24-9-83. Davis v. State, 235 Ga. App. 256, 510 S.E.2d 537 (1998) (decided under former O.C.G.A. § 24-9-83).

Court would reject the contention that the defendant had two deputies read paragraphs from their police reports into evidence simply to lay the required evidentiary foundation for impeaching the deputies with their prior inconsistent statements since defense counsel went beyond "mere cross-examination" and did more than recall a contradiction to the deputies by reading their prior inconsistent statements to the deputies when counsel had each deputy read into evidence paragraphs taken from police reports that had been marked and handled before the jury as defense exhibits and, further, those paragraphs contained information addressing matters other than the challenged contradictory statements. Aldridge v. State, 237 Ga. App. 209, 515 S.E.2d 397 (1999) (decided under former O.C.G.A. § 24-9-83).

Technical variance in the name stated by the witness as that of the person to whom a statement had been made and the witness's name when introduced for purposes of impeachment will not prevent the laying of a proper foundation when there is no real doubt that the two names belong to the same person. Taylor v. State, 135 Ga. 622, 70 S.E. 237 (1911) (decided under former Penal Code 1910, § 1052).

Witness failing to recall previous statements. — Proof that a witness made previous statements contradictory to the statements the witness made while testifying is admissible, though the witness testifies the witness does not remember whether or not the witness made such previous contradictory statements. Waycaster v. State, 136 Ga. 95, 70 S.E. 883 (1911) (decided under former Penal Code 1910, § 1052); Estill v. Citizens & S. Bank, 153 Ga. 618, 113 S.E. 552 (1922) (decided under former Civil Code 1910, § 5881); Lexington Developers, Inc. v. O'Neal Constr. Co., 145 Ga. App. 309, 243 S.E.2d 577 (1978) (decided under former Code 1933, § 38-1803).

Impeaching evidence not called to witness's mind. — When a written statement of a witness is introduced in evidence by agreement of counsel, admitting not that the statement is true, but that the writing shows what the witness would testify at the trial if present, the statement is subject to impeachment even though the impeaching evidence cannot be called to the witness's mind on cross-examination in the manner provided by statute. Travelers Ins. Co. v. Miller, 104 Ga. App. 554, 122 S.E.2d 268 (1961) (decided under former Code 1933, § 38-1803).

No contradictory statement. — When no statement was made by the witness which could be contradicted, no foundation could be laid for impeachment purposes. Casey v. State, 133 Ga. App. 161, 210 S.E.2d 375 (1974) (decided under former Code 1933, § 38-1803); Hardeman v. Metropolitan Atlanta Rapid Transit Auth., 157 Ga. App. 271, 277 S.E.2d 65 (1981) (decided under former Code 1933, § 38-1803).

No foundation for admission of audiotape. — Since the police officer made no statement on an audiotape that differed materially from the officer's in-court testimony, and the officer did not deny any statement made earlier, the foundation for the admission of the audiotape was not made, and it was properly excluded. Ow v. State, 255 Ga. App. 98, 564 S.E.2d 512 (2002) (decided under former O.C.G.A. § 24-9-83).

Inaccessibility of witness at the time it is sought to lay this foundation does not justify a departure from statute. Georgia, Fla. & Ala. Ry. v. Sasser, 4 Ga. App. 276, 61 S.E. 505 (1908) (decided under former Civil Code 1895, § 5292).

Testimony only by deposition. — When the plaintiff testified only by deposition, and plaintiff had not been examined in respect to the statements contained in the document, and plaintiff had not been confronted with the document by which it was sought to impeach plaintiff's testimony, or apprised of the contention that its effect was to contradict plaintiff's statements, the rule forbidding use of contradictory statements to impeach evidence taken by deposition was applicable. Metropolitan Life Ins. Co. v. Saul, 189 Ga. 1, 5 S.E.2d 214 (1939) (decided under former Code 1933, § 38-1803).

Time. — When the foundation has been laid for impeaching a witness, the witness called to prove the different statements will not be confined to any particular time. Thomasson v. Driskell, 13 Ga. 253 (1853) (decided under former law).

No obligation to listen to prior audiotape. — State was not obliged to let a witness listen to the witness's taped prior inconsistent statement before playing back the recording to impeach the witness. As the prosecutor questioned the witness in detail about the time, place, person, and circumstances attending the former statement, including the inconsistency at issue, this line of questioning established an ample foundation for introduction of the statement. Cade v. State, 289 Ga. 805, 716 S.E.2d 196 (2011) (decided under former O.C.G.A. § 24-9-83).

Jury should be sent out. — If it is necessary to read the statement in order to determine whether the witness signed the statement, the jury should be sent out while the reading takes place. Robinson v. State, 120 Ga. 311, 47 S.E. 968 (1904) (decided under former Penal Code 1895, § 1026).

Harmless error. — When the time, place, person, and circumstances attending a former contradictory statement made by a witness is not called to the witness's mind with as much certainty as possible, the subsequent statement cannot be impeached; however, when this evidence was admissible as a matter of substantive law, though the procedure through which the evidence was admitted was not correct, the improper admission was harmless error. Felts v. State, 244 Ga. 503, 260 S.E.2d 887 (1979) (decided under former Code 1933, § 38-1803).

Reversible error not found. — Even though the defendant failed to lay a foundation prior to using contradictory statements to impeach plaintiff's expert witness, it was not reversible error because the questioning complained of was elicited by the plaintiff during cross-examination of the witness. Spearman v. Georgia Bldg. Auth., 224 Ga. App. 801, 482 S.E.2d 463 (1997) (decided under former O.C.G.A. § 24-9-83).

Sustaining Witness

Introduction of entire former statement. — When it is sought to impeach a witness by proving contradictory statements made by the witness under oath, it is competent to bring out all the testimony given by the witness on the former hearing, upon the point in question, in order to show that on the whole it is not inconsistent with the testimony of the witness given at the trial in progress. Lowe v. State, 97 Ga. 792, 25 S.E. 676 (1896) (decided under former Penal Code 1895, § 1026); Wynes v. State, 182 Ga. 434, 185 S.E. 711 (1936) (decided under former Code 1933, § 38-1803).

No variance in testimony. — It is a defense to the witness to show there is no variance in the testimony. Brantley v. State, 133 Ga. 264, 65 S.E. 426 (1909) (decided under former Penal Code 1895, § 1026).

Prior consistent statements. — Witness sought to be impeached by proof of contradictory statements cannot be supported by proof that the witness made elsewhere other statements consistent with the witness's testimony on the stand. Fussell v. State, 93 Ga. 450, 21 S.E. 97 (1893) (decided under former Code 1882, §§ 3871, 3872, and 3875); Cook v. State, 124 Ga. 653, 53 S.E. 104 (1906) (decided under former Penal Code 1895, § 1026); Smith v. State, 7 Ga. App. 252, 66 S.E. 556 (1909), later appeal, 7 Ga. App. 802, 68

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S.E. 334 (1910) (decided under former Penal Code 1895, § 1026); Cobb v. State, 11 Ga. App. 52, 74 S.E. 702 (1912) (decided under former Penal Code 1910, § 1052); Douglas v. Herringdine, 117 Ga. 72, 159 S.E.2d 711 (1967) (decided under former Code 1933, § 38-1803).

Officers testimony consistent with dates of victim not bolstering. — Admission of testimony by an officer who spoke with a child molestation victim was proper to show that the victim's prior statement of what occurred that was made to the officer was consistent with the dates the victim testified to on direct examination and which were directly challenged during cross-examination; the officer's testimony was limited to the credibility issue raised in the victim's cross-examination and was not a bolstering of the victim's general credibility. Joines v. State, 264 Ga. App. 558, 591 S.E.2d 454 (2003) (decided under former O.C.G.A. § 24-9-83).

Admission of conversation between officers. — Testimony by one officer regarding what a witness told another officer was admissible under the prior consistent statement exception to the hearsay rule since the witness's veracity was placed in issue and the witness was subject to cross-examination. Johnson v. State, 265 Ga. App. 777, 595 S.E.2d 625 (2004) (decided under former O.C.G.A. § 24-9-83).

Instructions

Charging statute not required. — There is no error in failing to charge this statute in the absence of an appropriate written request. Western & Atl. R.R. v. Holt, 22 Ga. App. 187, 95 S.E. 758 (1918) (decided under former Civil Code 1910, § 5881); Carson v. State, 22 Ga. App. 743, 97 S.E. 202 (1918) (decided under former Penal Code 1910, § 1052); Lee v. State, 37 Ga. App. 632, 141 S.E. 317 (1928) (decided under former Penal Code 1910, § 1052); Smith v. State, 79 Ga. App. 595, 54 S.E.2d 378 (1949) (decided under former Code 1933, § 38-1803); Hinton v. State, 85 Ga. App. 249, 69 S.E.2d 116 (1952) (decided under former Code 1933, § 38-1803); Hand v. State, 90 Ga. App. 452, 83 S.E.2d 276 (1954) (decided under former Code 1933, § 38-1803).

Failure to charge all modes of impeachment. — When the judge having charged correctly upon one of the modes or methods of impeachment, to wit, impeachment by contradictory statements, the judge's failure to charge also upon the other modes of impeachment of disproving facts testified to by the witness, and also on the method of impeachment when a witness's testimony shall be disregarded entirely, was not reversible error in the absence of a request. Hall v. Burpee, 176 Ga. 270, 168 S.E. 39 (1933) (decided under former Code 1933, § 38-1803); Milwaukee Mechanics Ins. Co. v. Davis, 79 Ga. App. 70, 52 S.E.2d 643 (1949) (decided under former Code 1933, § 38-1803).

Failure to give pattern instruction on impeachment proper. — In a married couple's personal injury case, the trial court did not err in not giving parts of the pattern charge on impeachment requested by an insurance carrier on the ground that the couple's trial testimony contradicted their previous statements or actions. Because the carrier did not offer evidence that disproved the facts to which the couple testified, the portion of the charge that pertained to impeachment by disproving facts was not applicable, and the trial court was thus authorized to refuse the entire charge; furthermore, the trial court's charge to the jury that the jury could consider the witnesses' manner of testifying and demeanor as well as the probability or improbability of their testimony and their personal credibility adequately covered the necessary principles. Ga. Farm Bureau Mut. Ins. Co. v. Turpin, 294 Ga. App. 63, 668 S.E.2d 518 (2008) (decided under former O.C.G.A. § 24-9-83).

Charge on relevant testimony not required. — Charge need not be qualified by a statement that only relevant testimony could be contradicted when impeachment of irrelevant evidence was not attempted. Tucker v. Central of Ga. Ry., 122 Ga. 387, 50 S.E. 128 (1905) (decided under former Civil Code 1895, § 5292); Goldberg v. State, 22 Ga. App. 122, 95 S.E. 541 (1918) (decided under former Penal Code 1910, § 1052).

Corroboration unnecessary. — When instructing the jury on the method of impeachment provided for by statute it was error for the court to instruct the jury that, if the jury believed a witness had made previous statements contradictory to the witness's testimony delivered on the trial, such testimony should be disregarded, unless the testimony was corroborated by other credible evidence, or was corroborated by the proven circumstances in the case. Ricks v. State, 70 Ga. App. 395, 28 S.E.2d 303 (1943) (decided under former Code 1933, § 38-1803).

Former trial. — In criminal prosecution, court's charge to the effect that the jury should not consider anything said or done in the former trial of the case was not an infringement and invasion of the province of the jury trying the case, notwithstanding the contention that had the jury been allowed to consider testimony from the former trial, the jury could have concluded that the evidence in the present trial was inconsistent and contradictory to evidence and statements made by prosecution witness previously and thus could have believed the statement of the defendant. Crosby v. State, 92 Ga. App. 335, 88 S.E.2d 523 (1955) (decided under former Code 1933, § 38-1803).

Charge alluding to particular witness. — When there exists a difference between opposing counsel as to whether there is a discrepancy between the testimony of a witness and a previous statement alleged to be contradictory of the testimony, the court in the charge may allude to the particular witness. Walker v. State, 137 Ga. 398, 73 S.E. 368 (1912) (decided under former Penal Code 1910, § 1052).

Limiting instruction required for Miranda-violating prior statements. — When prior inconsistent statements are used to impeach trial statements, a limiting instruction is required even absent a request. The significance of not so limiting the jury's consideration would be to allow a Miranda-violating statement to be used as substantive evidence. However, if the statement is found by the trial court not to have been obtained in violation of the defendant's rights against self-incrimination, the court need not give a limiting instruction absent defendant's request. Fussell v. State, 187 Ga. App. 134, 369 S.E.2d 511 (1988) (decided under former O.C.G.A. § 24-9-83).

Function of Jury

Impeachment and credibility are questions for jury when a witness is sought to be impeached by reason of having previously made contradictory statements out of court as to matters relevant to the witness's testimony and to the case. King v. State, 163 Ga. 313, 136 S.E. 154 (1926) (decided under former Penal Code 1910, § 1052); United Motor Freight Term Co. v. Hixon, 78 Ga. App. 638, 51 S.E.2d 679 (1949) (decided under former Code 1933, § 38-1803); Champion v. State, 84 Ga. App. 163, 65 S.E.2d 280 (1951) (decided under former Code 1933, § 38-1803); Wynn v. Johns, 97 Ga. App. 605, 104 S.E.2d 150 (1958) (decided under former Code 1933, § 38-1803); Travelers Ins. Co. v. Miller, 104 Ga. App. 554, 122 S.E.2d 268 (1961) (decided under former Code 1933, § 38-1803).

Question for jury or court. — When contradictory statements are established as having been made by a witness, it then becomes a question for the jury as to whether or not such witness has been successfully impeached; if such contradiction is not on matters relevant to the witness's testimony and to the case, or if the prior statement fails to amount to a contradiction at all, the question of whether or not the witness has been successfully impeached is then one of law for the court. Travelers Ins. Co. v. Bailey, 76 Ga. App. 698, 47 S.E.2d 103 (1948) (decided under former Code 1933, § 38-1803).

Testimony need not be excluded. — When a state's witness is impeached, the effect of the impeaching evidence is to be determined by the jury, and the testimony of the witness need not be excluded. Henrich v. McCouley, 151 Ga. 138, 106 S.E. 94 (1921) (decided under former Civil Code 1910, § 5881); Griffin v. State, 123 Ga. App. 820, 182 S.E.2d 498 (1971) (decided under former Code 1933, § 38-1803).

Jury may believe witness. — Question of credibility is always for the jury,

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and though a witness swore falsely on the other trial, the witness's contention that the witness was under duress may cause the jury to believe the witness. Williams v. State, 69 Ga. 11 (1882) (decided under former Code 1882, §§ 3871, 3872, and 3875).

Accepting part of testimony. — Jury may believe part of the testimony and disbelieve other parts. Atlantic Coast Line R.R. v. Heyward, 82 Ga. App. 337, 60 S.E.2d 641 (1950) (decided under former Code 1933, § 38-1803).

When testimony is disregarded, the jury must place that testimony in the same category as if the witness had not testified at all. Harper v. State, 85 Ga. App. 252, 69 S.E.2d 102 (1952) (decided under former Code 1933, § 38-1803).

When prior statement fails to amount to contradiction, the fact-finding tribunal cannot disregard the testimony of the witness, and when facts sufficient to support an issue have thus been testified to, such issue has, prima facie, been established. Travelers Ins. Co. v. Bailey, 76 Ga. App. 698, 47 S.E.2d 103 (1948) (decided under former Code 1933, § 38-1803).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 362, 365 et seq., 663. 81 Am. Jur. 2d, Witnesses, §§ 218, 423 et seq., 458 et seq., 501, 505.

ALR. — May a witness who testifies to facts be impeached by showing of prior inconsistent expressions of opinion by him, 66 ALR 289; 158 ALR 820.

Extrajudicial statements by witness who is subject to cross-examination as evidence of facts to which they relate, 133 ALR 1454.

Right to show in civil case that party or witness refused to testify on same matter under claim of privilege in previous criminal proceeding, 2 ALR2d 1297.

Binding effect, upon party litigant, of testimony of his witnesses at a former trial, 74 ALR2d 521.

Impeachment of accused as witness by use of involuntary or not properly qualified confession, 89 ALR2d 478.

Denial of recollection as inconsistent with prior statement so as to render statement admissible, 99 ALR3d 934.

Admissibility of affidavit to impeach witness, 14 ALR4th 828.

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case — modern state cases, 30 ALR4th 414.

Admissibility of impeached witness's prior consistent statement — modern state criminal cases, 58 ALR4th 985; 59 ALR4th 1000.

Effect of Rule 801(d)(1)(B) of the Federal Rules of Evidence upon the admissibility of a witness's prior consistent statement, 47 ALR Fed 639.

24-6-614. Calling and interrogation of witnesses by court.

(a) The court may, on its own motion, call a court appointed expert, call a witness regarding the competency of any party, or call a child witness or, at the suggestion of a party, call such witnesses, and all parties shall be entitled to cross-examine such witnesses. In all other situations, the court may only call witnesses when there is an agreement of all of the parties for the court to call such witnesses and all parties shall be entitled to cross-examine such witnesses.

(b) The court may interrogate witnesses whether called by itself pursuant to subsection (a) of this Code section or by a party.

(c) Objections to the calling of witnesses by the court or to interrogation by the court may be made at the time or at the next available opportunity when the jury is not present. (Code 1981, § 24-6-614, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Court's calling or examining a witness, Fed. R. Evid. 614.

24-6-615. Exclusion of witnesses.

Except as otherwise provided in Code Section 24-6-616, at the request of a party the court shall order witnesses excluded so that each witness cannot hear the testimony of other witnesses, and it may make the order on its own motion. This Code section shall not authorize exclusion of:

(1) A party who is a natural person;

(2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or

(3) A person whose presence is shown by a party to be essential to the presentation of the party's cause. (Code 1981, § 24-6-615, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Excluding witnesses, Fed. R. Evid. 615.

Law reviews. — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration
Right of Sequestration
Exceptions to Sequestration Rule
Testimony of Witnesses Not Sequestered

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3863, former Code 1882, § 3863, former Civil Code 1895, § 5280, former Penal Code 1895, § 1017, former Civil Code 1910, § 5869, former Penal Code 1910, § 1043, former Code 1933, § 38-1703, and former O.C.G.A. § 24-9-61 are included in the annotations for this Code section.

Purpose. — Purpose of the rule of sequestration is to prevent a witness who has not testified, or who has not completed his or her testimony, from overhearing and having his or her testimony affected by the testimony of another witness. Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785 (1946) (decided under former Code 1933, § 38-1703); Hall v. Hall, 220 Ga. 677, 141 S.E.2d 400 (1965) (decided under former Code 1933, § 38-1703); General Oglethorpe Hotel Co. v. Lanier, 99 Ga. App. 401, 109 S.E.2d 769 (1959) (decided under former Code 1933, § 38-1703); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975) (decided under former Code 1933, § 38-1703); Byrd v. Brand, 140 Ga. App. 135, 230 S.E.2d 113 (1976) (decided under former Code 1933, § 38-1703); Ruffin v. State, 243 Ga. 95,

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252 S.E.2d 472 (1979) (decided under former Code 1933, § 38-1703); Lackey v. State, 246 Ga. 331, 271 S.E.2d 478 (1980) (decided under former Code 1933, § 38-1703).

Import of former O.C.G.A. § 24-9-61 was to preserve the integrity of testimony with the ultimate goal of arriving at the truth; thus, the rule extended to communications, direct and indirect, between witnesses outside the courtroom. O'Kelley v. State, 175 Ga. App. 503, 333 S.E.2d 838 (1985) (decided under former O.C.G.A. § 24-9-61).

Purpose of the rule of sequestration was to prevent a witness who had testified from influencing the witness who had not. Whether the witness had been excused after testifying was of no relevance to the witness's duty to refrain from discussing the witness's testimony with another witness. Rogers v. State, 257 Ga. 590, 361 S.E.2d 814 (1987) (decided under former O.C.G.A. § 24-9-61).

Sequestration rule literally prohibits only witnesses from being examined in the hearing of each other. Johnson v. State, 258 Ga. 856, 376 S.E.2d 356 (1989) (decided under former O.C.G.A. § 24-9-61).

Right to testimony of witnesses unaffected. — Party's right to have the testimony of any witness, when material to the assertion of the party's rights, was unaffected by the provisions which related to the sequestration of witnesses. Higdon v. State, 46 Ga. App. 346, 167 S.E. 782 (1933) (decided under former Code 1933, § 38-1703); McCartney v. McCartney, 217 Ga. 200, 121 S.E.2d 785 (1961) (decided under former Code 1933, § 38-1703); Baker v. State, 131 Ga. App. 48, 205 S.E.2d 79 (1974) (decided under former Code 1933, § 38-1703).

Contact between attorney and witness. — Rule of sequestration did not prohibit discussions between an attorney for a party in the case and a prospective witness, at least so long as the attorney talked to the witness separately from the other witnesses and did not inform the witness of previous testimony. Norman v. State, 212 Ga. App. 105, 441 S.E.2d 94 (1994) (decided under former O.C.G.A. § 24-9-61).

Spectators not excluded. — Rule of sequestration was not applicable to spectators and it is not designed to exclude nonwitnesses from the courtroom. Lackey v. State, 246 Ga. 331, 271 S.E.2d 478 (1980) (decided under former Code 1933, § 38-1703).

Trial court did not commit prejudicial error in allowing witnesses testifying on behalf of a child molestation victim to remain in the courtroom during the victim's testimony since the witnesses' testimony did not bolster the victim's testimony. Mullis v. State, 184 Ga. App. 525, 362 S.E.2d 90 (1987) (decided under former O.C.G.A. § 24-9-61).

Victim/witness conversing with spectator. — Rule of sequestration was not violated after victim/witness conversed with spectator during recess. Kirkland v. State, 173 Ga. App. 687, 327 S.E.2d 808 (1985) (decided under former O.C.G.A. § 24-9-61).

Violation of rule of sequestration. — In a juvenile court deprivation proceeding, evidence that father discussed his testimony with his mother before her testimony in violation of the rule of sequestration justified finding of contempt. In re A.L.L., 211 Ga. App. 767, 440 S.E.2d 517 (1994) (decided under former O.C.G.A. § 24-9-61).

Rule of sequestration was not violated by allowing a witness to testify who was in the courtroom at the time defendant attempted to plead guilty. Cook v. State, 221 Ga. App. 831, 472 S.E.2d 686 (1996) (decided under former O.C.G.A. § 24-9-61).

Sequestration of the victim's spouse was not required since, although the spouse's name appeared on the state's witness list originally, the spouse was removed from the list and did not testify. Edwards v. State, 224 Ga. App. 14, 479 S.E.2d 754 (1996) (decided under former O.C.G.A. § 24-9-61).

Even though a police officer, who was a witness for the state, spoke to defense witnesses during the trial, there was no violation of this rule, since there was no allegation that the officer spoke with the witnesses about their testimony or that

any witness heard the officer's testimony. Bayer v. State, 230 Ga. App. 708, 497 S.E.2d 266 (1998) (decided under former O.C.G.A. § 24-9-61).

Procedure of the trial judge in allowing the victim to remain in the courtroom while a detective and polygraph examiner testified, and then letting the victim give the victim's own testimony was fully within the court's discretion and did not constitute reversible error. Shepherd v. State, 245 Ga. App. 386, 537 S.E.2d 777 (2000) (decided under former O.C.G.A. § 24-9-61).

Trial court did not violate former O.C.G.A. § 24-9-61 by permitting three prior difficult witnesses to remain in the courtroom together while the court instructed each of them on the limitation to be placed on their testimony since each was then examined out of the hearing of each other. Williams v. State, 277 Ga. 853, 596 S.E.2d 597 (2004) (decided under former O.C.G.A. § 24-9-61).

Because the target of the invocation of the rule of sequestration did not testify, the trial court's failure to enforce the rule against that person was not an abuse of discretion. Avren v. Garten, 289 Ga. 186, 710 S.E.2d 130 (2011) (decided under former O.C.G.A. § 24-9-61).

Curing violation of rule of sequestration. — In a medical malpractice action, violation of an order on sequestration, indicated by defendant's expert when the expert revealed that defendant's attorney had discussed with the expert testimony of one of plaintiff's attorneys, did not warrant a new trial since the court gave curative instructions to the jury, admonishing defendant's attorney and advising that the violation could be considered in assessing the witness's credibility. Bean v. Landers, 215 Ga. App. 366, 450 S.E.2d 699 (1994) (decided under former O.C.G.A. § 24-9-61).

Appropriate remedy in a case where a witness violated the rule of sequestration when the witness spoke to another witness outside the courtroom was to admit testimony regarding the violation and failure to do so was reversible error. Childress v. State, 266 Ga. 425, 467 S.E.2d 865 (1996) (decided under former O.C.G.A. § 24-9-61).

Witness who has finished testifying. — Once a witness who has been sequestered has testified and is excused and neither side intends to recall the witness, the witness can do as the witness pleases and leave or remain in the courtroom. Bigby v. State, 184 Ga. App. 94, 360 S.E.2d 751 (1987).

Mutual observations of witnesses outside courtroom following testimony not prejudicial. — Mutual observation of two witnesses outside the courtroom that they could not identify a suspicious party by one's shoes constituted only innocuous remarks which could not have been prejudicial even to appellant's codefendant, about whom the observation ostensibly related, especially given the fact that the two witnesses had already testified when their conversation took place. Almond v. State, 173 Ga. App. 423, 326 S.E.2d 798 (1985) (decided under former O.C.G.A. § 24-9-61).

Rule of sequestration was not violated when witnesses discuss their testimony outside of courtroom, as the rule only prevented a potential witness from being present in the courtroom while any other witness was testifying. Boyd v. State, 168 Ga. App. 246, 308 S.E.2d 626 (1983) (decided under former O.C.G.A. § 24-9-61).

Out-of-court violation. — Witness's violation of the rule of sequestration when the witness spoke to another witness outside the courtroom was relevant to the issue of the witness's credibility and could be considered by the jury in assessing the credit to be given the testimony of the violator, irrespective of the violating witness's success in affecting the testimony of the other witness. Childress v. State, 266 Ga. 425, 467 S.E.2d 865 (1996) (decided under former O.C.G.A. § 24-9-61).

Sequestration of defendant's wife. — Trial court did not abuse the court's discretion in sequestering defendant's wife when it appeared she would be called as a witness. Norman v. State, 255 Ga. 313, 338 S.E.2d 249 (1986) (decided under former O.C.G.A. § 24-9-61).

Sequestration of juvenile's parent. — Parent was not a party to criminal proceedings in which a juvenile was being tried as an adult and the court had discre-

General Consideration (Cont'd)

tion to grant a motion to sequester a parent who was a witness. Appling v. State, 221 Ga. App. 162, 470 S.E.2d 761 (1996) (decided under former O.C.G.A. § 24-9-61).

Sequestering of defendant's experts. — In a prosecution for driving under the influence, the trial court did not abuse the court's discretion by sequestering defendant's expert on field sobriety evaluations during the presentation of the state's case. McNeil v. State, 229 Ga. App. 149, 493 S.E.2d 570 (1997) (decided under former O.C.G.A. § 24-9-61).

Sequestration of plaintiff. — In a negligence suit wherein a train patron was attacked and raped while exiting a train station, the trial court did not abuse the court's discretion by not forcing the plaintiff to either testify first or to leave the courtroom until the plaintiff testified after the rule of sequestration had been invoked as it was within the trial court's broad discretion to allow the plaintiff to remain in the courtroom during the presentation of the case and to testify at a later point in that presentation. MARTA v. Doe, 292 Ga. App. 532, 664 S.E.2d 893 (2008) (decided under former O.C.G.A. § 24-9-61).

Appellate review. — In the absence of an offer of proof as to expert's testimony, the appellate court could not review the defendant's claim of error based on the trial court's actions in invoking the sequestration rule and threatening the defendant's attorney and expert with contempt, whereupon the defendant's counsel withdrew the expert from the witness list so that the expert could remain in the courtroom and assist counsel during the state's case. Pittman v. State, 274 Ga. 260, 553 S.E.2d 616 (2001) (decided under former O.C.G.A. § 24-9-61).

Ineffective assistance of counsel not established by failure to object to lack of sequestering admonition. — Defendant's counsel did not provide ineffective assistance because counsel did not object to the trial court's failure to admonish sequestered witnesses not to talk to each other as former O.C.G.A. § 24-9-61 did not prohibit the witnesses from having any contact, but merely prohibited them from discussing their testimony and/or the charges. Ogle v. State, 256 Ga. App. 26, 567 S.E.2d 700 (2002) (decided under former O.C.G.A. § 24-9-61).

Right of Sequestration

Right of sequestration was absolute, subject only to the discretion of the trial judge in making exceptions thereto. Johnson v. State, 14 Ga. 55 (1853) (decided under former law); Bird v. State, 50 Ga. 585 (1874) (decided under former Code 1873, § 3863); Hughes v. State, 128 Ga. 19, 57 S.E. 236 (1907) (decided under former Civil Code 1895, § 5280); Hill-Atkinson Co. v. Hasty, 17 Ga. App. 569, 87 S.E. 839 (1916) (decided under former Civil Code 1910, § 5869); Blitch-Everett Co. v. Jackson, 29 Ga. App. 440, 116 S.E. 47 (1923) (decided under former Civil Code 1910, § 5869); Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785 (1946) (decided under former Code 1933, § 38-1703); Montos v. State, 212 Ga. 764, 95 S.E.2d 792 (1956), overruled on other grounds, White v. State, 273 Ga. 787, 546 S.E.2d 514 (2001) (decided under former Code 1933, § 38-1703); Smith v. State, 215 Ga. 51, 108 S.E.2d 688 (1959) (decided under former Code 1933, § 38-1703); Spurlin v. State, 222 Ga. 179, 149 S.E.2d 315 (1966) (decided under former Code 1933, § 38-1703); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581 (1971) (decided under former Code 1933, § 38-1703); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971) (decided under former Code 1933, § 38-1703); Rozier v. State, 124 Ga. App. 481, 184 S.E.2d 203 (1971) (decided under former Code 1933, § 38-1703); Bush v. State, 129 Ga. App. 160, 199 S.E.2d 121 (1973) (decided under former Code 1933, § 38-1703); Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974) (decided under former Code 1933, § 38-1703); Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493 (1975) (decided under former Code 1933, § 38-1703); Pearley v. State, 235 Ga. 276, 219 S.E.2d 404 (1975) (decided under former Code 1933, § 38-1703); James v. State, 143 Ga. App. 696, 240 S.E.2d 149 (1977) (decided under former Code 1933, § 38-1703); Whitfield

v. State, 143 Ga. App. 779, 240 S.E.2d 189 (1977) (decided under former Code 1933, § 38-1703).

Former O.C.G.A. § 24-9-61 gave either party the right to have witnesses sequestered, but it was subject to the discretion of the trial judge, who may make exceptions. Welch v. State, 251 Ga. 197, 304 S.E.2d 391 (1983) (decided under former O.C.G.A. § 24-9-61).

Trial court was vested with broad discretion in enforcement of the sequestration rule. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982) (decided under former Code 1933, § 38-1703); Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653 (1981) (decided under former Code 1933, § 38-1703).

Application of the rule of sequestration was within the sound discretion of the trial court. Wilson v. State, 158 Ga. App. 174, 279 S.E.2d 345 (1981) (decided under former Code 1933, § 38-1703).

Enforcement of former O.C.G.A. § 24-9-61 long had been vested in the discretion of the trial court. Croom v. State, 165 Ga. App. 676, 302 S.E.2d 598 (1983) (decided under former O.C.G.A. § 24-9-61).

Both parties have the right of sequestration of witnesses, but the enforcement of the rule is vested in the discretion of the trial court; the orderly presentation of evidence being a proper reason for an exception to the rule. Kelly v. State, 182 Ga. App. 7, 354 S.E.2d 647 (1987) (decided under former O.C.G.A. § 24-9-61).

State's explanation of the state's need for the deputy sheriff's assistance during trial can provide an acceptable reason for the trial court's exercise of the court's discretion in permitting the state's witness to remain in the courtroom and testify after another state witness has testified. Kelly v. State, 182 Ga. App. 7, 354 S.E.2d 647 (1987) (decided under former O.C.G.A. § 24-9-61).

Rule not enforced until presentation of evidence began. — Trial court was not required to enforce the rule of sequestration until the presentation of evidence began. Blankenship v. State, 258 Ga. 43, 365 S.E.2d 265, cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988) (decided under former O.C.G.A. § 24-9-61). Chastain v. State, 244 Ga. App. 84, 535 S.E.2d 25 (2000) (decided under former O.C.G.A. § 24-9-61).

Rule of sequestration did prohibit persons from remaining in courtroom during proceedings, but merely gave a right to either party to have the witnesses for the other party examined out of the hearing of each other. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982) (decided under former O.C.G.A. § 24-9-61).

Witnesses may not be told what prior witnesses have said. O'Kelley v. State, 175 Ga. App. 503, 333 S.E.2d 838 (1985).

Request denied when no previous notice that witness considered hostile or adverse. — In a garnishment proceeding, court did not err in denying plaintiff's request to sequester a witness (president of the judgment debtor) since the witness had been subpoenaed by plaintiff and when plaintiff did not announce or request that the witness be considered a hostile or an adverse witness. Travelers Ins. Co. v. Trans State, Inc., 172 Ga. App. 763, 324 S.E.2d 585 (1984) (decided under former O.C.G.A. § 24-9-61).

Failure of the district attorney to invoke sequestration of witnesses at the outset of the presentation of evidence constituted a ground for new trial. Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493 (1975) (decided under former Code 1933, § 38-1703).

When the rule of sequestration was never invoked by either the state or defendant, the trial court did not err by permitting a witness to testify as a rebuttal witness for the state after the witness had sat through the trial and heard the testimony of the state's previous witnesses. Watson v. State, 222 Ga. App. 158, 473 S.E.2d 262 (1996) (decided under former O.C.G.A. § 24-9-61).

Time of request. — Since statute devolves upon each party who wishes to obtain the benefit of the rule to invoke the statute with respect to the separation of the witnesses of the party's adversary, the

Right of Sequestration (Cont'd)

fact that the demand of the plaintiff was not entered until after one's own witnesses had testified would not militate against one's "right to have the witnesses of the other party examined out of the hearing of each other." Blitch-Everett Co. v. Jackson, 29 Ga. App. 440, 116 S.E. 47 (1923) (decided under former Civil Code 1910, § 5869).

When at the close of evidence for propounders of a will, the propounders moved that witnesses for the caveator be sequestered and this was opposed by the caveator, on the ground that the motion came too late, the court was correct in ordering that the witnesses be sequestered. Chedel v. Mooney, 158 Ga. 297, 123 S.E. 300 (1924) (decided under former Civil Code 1910, § 5869).

Judge may sequester witnesses on own motion. Meeks v. State, 51 Ga. 429 (1874) (decided under former Code 1873, § 3863).

Waiver of right. — When a defendant could not have known whether the district attorney was going to call the FBI agent even though the defendant was listed on the indictment it cannot be held as a matter of law that the defendant waived defendant's objection to the witness being in the courtroom by not objecting until the witness was called. Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493 (1975) (decided under former Code 1933, § 38-1703).

Application of the rule to a particular witness is within the sound discretion of the trial court and since the defendant did not object to allowing the victim's father to remain in the courtroom, the defendant thereby waived the issue on appeal; without a showing of manifest abuse of discretion, the trial judge's decision will not be disturbed. Earnest v. State, 262 Ga. 494, 422 S.E.2d 188 (1992) (decided under former O.C.G.A. § 24-9-61).

Defendant waived the defendant's argument regarding an alleged violation of the rule of sequestration, former O.C.G.A. § 24-9-61, caused by the courtroom sound system being loud enough to be heard in the hallway outside, by failing to object and continuing the defendant's examination of the witness. Watson v. State, 304 Ga. App. 128, 695 S.E.2d 416 (2010) (decided under former O.C.G.A. § 24-9-61).

Sequestration at interlocutory hearing for injunction. — Since in all cases, either party shall have the right to have the witnesses of the other party examined out of the hearing of each other, the rule was applicable and mandatory in an interlocutory hearing for injunction. Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785 (1946) (decided under former Code 1933, § 38-1703). Hall v. Hobbs, 107 Ga. App. 46, 129 S.E.2d 209 (1962) (decided under former Code 1933, § 38-1703).

Sequestration during videotaped testimony of expert witness. — Requiring sequestration of plaintiff's expert witness during the videotaped testimony of defendant's expert witness was not error since plaintiff's expert had already been allowed to review a transcript of the testimony. Simonds v. Conair Corp., 185 Ga. App. 664, 365 S.E.2d 507 (1988) (decided under former O.C.G.A. § 24-9-61).

Enforcement of rule by court. — When the rule of sequestration of witnesses is invoked by a defendant, it is the duty of the court to enforce the rule. Norman v. State, 121 Ga. App. 753, 175 S.E.2d 119 (1970), cert. denied, 401 U.S. 956, 91 S. Ct. 981, 28 L. Ed. 2d 240 (1971) (decided under former Code 1933, § 38-1703); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581 (1971) (decided under former Code 1933, § 38-1703); Nance v. State, 123 Ga. App. 410, 181 S.E.2d 295 (1971) (decided under former Code 1933, § 38-1703); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975) (decided under former Code 1933, § 38-1703); Pearley v. State, 235 Ga. 276, 219 S.E.2d 404 (1975) (decided under former Code 1933, § 38-1703); Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979) (decided under former Code 1933, § 38-1703); Simonton v. State, 151 Ga. App. 431, 260 S.E.2d 487 (1979) (decided under former Code 1933, § 38-1703); Mize v. State, 152 Ga. App. 190, 262 S.E.2d 492 (1979) (decided under former Code 1933, § 38-1703); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565 (1980), cert. denied, 449 U.S. 938, 101 S. Ct. 337, 66 L. Ed. 2d 161, supplemented, 245 Ga.

882, 268 S.E.2d 349 (1980) (in light of Supreme Court opinion in Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) (decided under former Code 1933, § 38-1703)).

Effect of denial of sequestration. — Refusal of the trial judge to grant sequestration when requested deprived the party of substantial and positive rights and was in absolute ground for new trial. Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785 (1946) (decided under former Code 1933, § 38-1703); Smith v. State, 215 Ga. 51, 108 S.E.2d 688 (1959) (decided under former Code 1933, § 38-1703); Hall v. Hall, 220 Ga. 677, 141 S.E.2d 400 (1965) (decided under former Code 1933, § 38-1703); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581 (1971) (decided under former Code 1933, § 38-1703); Rozier v. State, 124 Ga. App. 481, 184 S.E.2d 203 (1971) (decided under former Code 1933, § 38-1703); Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974) (decided under former Code 1933, § 38-1703); James v. State, 143 Ga. App. 696, 240 S.E.2d 149 (1977) (decided under former Code 1933, § 38-1703); Whitfield v. State, 143 Ga. App. 779, 240 S.E.2d 189 (1977) (decided under former Code 1933, § 38-1703).

Sequestration at later stage of trial. — Fact that the witnesses were sequestered at a later stage of the trial did not cure the error of the court in refusing to invoke the rule of sequestration upon timely request prior to allowing the defendant's witnesses to testify. Hall v. Hobbs, 107 Ga. App. 46, 129 S.E.2d 209 (1962) (decided under former Code 1933, § 38-1703).

Solitary defense expert witness. — Former O.C.G.A. § 24-9-61 authorized sequestration of a solitary defense expert witness to prevent the expert's hearing the testimony of the other witnesses. Accordingly, the trial court did not err in presenting defense counsel with a choice of whether to use the defense expert to assist in cross-examination or as a witness, but forbidding the expert's use for both roles. Greenway v. State, 207 Ga. App. 511, 428 S.E.2d 415 (1993) (decided under former O.C.G.A. § 24-9-61).

Counsel not ineffective for failing to invoke rule of sequestration. — Defendant did not show prejudice due to trial counsel's failure to invoke the rule of sequestration because the jury was informed of the earlier presence of the victim's father in the courtroom, defense counsel thoroughly cross-examined the father, and the trial court properly instructed the jurors on their role in resolving conflicts in the evidence and in determining the credibility of witnesses, the weight of the evidence, and whether a witness was impeached; thus, the jury was able to gauge the father's credibility and make a determination as to the weight, if any, it would give to the father's testimony. Pennington v. State, 313 Ga. App. 764, 723 S.E.2d 13 (2012) (decided under former O.C.G.A. § 24-9-61).

Trial counsel was not ineffective for failing to invoke the rule of sequestration at the beginning of the trial because the defendant failed to show any harm that resulted from the admission of the testimony of the victim's father; the evidence presented by both the state and the defense showed that the father's testimony about what happened did not conflict with the defendant's claim. Pennington v. State, 313 Ga. App. 764, 723 S.E.2d 13 (2012) (decided under former O.C.G.A. § 24-9-61).

Exceptions to Sequestration Rule

In general. — Whether such witnesses should be instructed not to converse with other persons or with each other, and whether the witnesses who have been examined should be allowed to return to the room in which the others were waiting, were questions within the sound discretion of the trial judge, to be determined in the light of one's knowledge of the witnesses and of the case. Kelly v. State, 118 Ga. 329, 45 S.E. 413 (1903) (decided under former Civil Code 1895, § 5280); Turbaville v. State, 58 Ga. 545 (1877) (decided under former Code 1873, § 3863); Carson v. State, 80 Ga. 170, 5 S.E. 295 (1887) (decided under former Code 1882, § 3863); Talley v. State, 2 Ga. App. 395, 58 S.E. 667 (1907) (decided under former Civil Code 1895, § 5280); Hudgins v. State, 13 Ga. App. 489, 79 S.E. 367 (1913) (decided under former Penal Code 1910, § 1043).

Exceptions to Sequestration Rule (Cont'd)

Nothing prohibited anything other than the examination of witnesses out of the hearing of each other; former statute said nothing about other types of contact. Byrd v. Brand, 140 Ga. App. 135, 230 S.E.2d 113 (1976) (decided under former Code 1933, § 38-1703).

In the absence of some allegation of impropriety as the result of granting an exception to the sequestration order the court will not find prejudicial harm. Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971) (decided under former Code 1933, § 38-1703); Smith v. State, 244 Ga. 814, 262 S.E.2d 116 (1979) (decided under former Code 1933, § 38-1703).

No harmful error was shown in a case when, after the witnesses have been sequestered, the solicitor general (now district attorney) interviewed a witness before placing the witness on the stand in the absence of an allegation that such witness was informed of what other witnesses had testified or what the witness was expected to testify. Smith v. State, 244 Ga. 814, 262 S.E.2d 116 (1979) (decided under former Code 1933, § 38-1703).

Trial court had discretion in permitting, upon request, counsel for one of the parties an opportunity to converse with a witness in the case for limited purposes, and that discretion will not be controlled unless abused. Smith v. State, 244 Ga. 814, 262 S.E.2d 116 (1979) (decided under former Code 1933, § 38-1703).

Orderly presentation of evidence was a proper reason for an exception to the rule of sequestration. Hardy v. State, 245 Ga. 673, 266 S.E.2d 489 (1980) (decided under former Code 1933, § 38-1703).

When the prosecutor stated that the prosecutor needed a witness for presentation of a case and that to require the witness to testify first would interfere with the orderly presentation of a case, the trial judge had discretion to except such witness from the rule of sequestration. Blalock v. State, 250 Ga. 441, 298 S.E.2d 477 (1983) (decided under former O.C.G.A. § 24-9-61); Fowler v. State, 179 Ga. App. 492, 347 S.E.2d 322 (1986) (decided under former O.C.G.A. § 24-9-61); Denny v. State, 210 Ga. App. 406, 436 S.E.2d 526 (1993) (decided under former O.C.G.A. § 24-9-61).

Former O.C.G.A. § 24-9-61 did not prohibit the state from stating the case and allegations in front of the witnesses prior to sequestration. Brewer v. State, 162 Ga. App. 228, 291 S.E.2d 87 (1982) (decided under former O.C.G.A. § 24-9-61).

Orderly presentation of evidence is a proper reason for permitting an unsequestered witness, who is assisting the prosecutor, to testify after other witnesses. Croom v. State, 165 Ga. App. 676, 302 S.E.2d 598 (1983) (decided under former O.C.G.A. § 24-9-61).

Based upon a showing by the state of some need not to call the unsequestered witness first, the trial court was authorized, in the court's discretion, to allow the unsequestered witness to be called to the stand after other witnesses have testified. Law v. State, 165 Ga. App. 687, 302 S.E.2d 570, aff'd, 251 Ga. 525, 307 S.E.2d 904 (1983) (decided under former O.C.G.A. § 24-9-61).

It was within the discretion of the trial court to make exceptions in regard to the sequestration of nonparty witnesses, and unless that discretion was abused it will not be reversed. Batten v. Batten, 182 Ga. App. 442, 356 S.E.2d 228 (1987) (decided under former O.C.G.A. § 24-9-61).

Request for exception. — Proper procedure in situations when the former statute had been invoked and a party needed the assistance of a witness during the prosecution of a case was to specifically request that the trial judge made an exception to the rule at the commencement of the evidence. Brown v. State, 150 Ga. App. 116, 257 S.E.2d 25 (1979) (decided under former Code 1933, § 38-1703); McCranie v. State, 151 Ga. App. 871, 261 S.E.2d 779 (1979) (decided under former Code 1933, § 38-1703).

Exceptions are granted at court's discretion. — It was within the trial court's discretion to make exceptions to the sequestration rule, and unless that discretion had been abused the court's decision will not be reversed on appeal. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174 (1947) (decided under former Code

1933, § 38-1703); Dye v. State, 220 Ga. 113, 137 S.E.2d 465 (1964) (decided under former Code 1933, § 38-1703); Cooper v. Butler, 223 Ga. 797, 158 S.E.2d 244 (1967) (decided under former Code 1933, § 38-1703); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975) (decided under former Code 1933, § 38-1703); Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493 (1975) (decided under former Code 1933, § 38-1703); Disby v. State, 238 Ga. 178, 231 S.E.2d 763 (1977) (decided under former Code 1933, § 38-1703); Lloyd v. State, 146 Ga. App. 584, 246 S.E.2d 697 (1978) (decided under former Code 1933, § 38-1703); Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979) (decided under former Code 1933, § 38-1703); Horton v. Wayne County, 243 Ga. 789, 256 S.E.2d 775 (1979) (decided under former Code 1933, § 38-1703); Ratliff v. State, 150 Ga. App. 695, 258 S.E.2d 324 (1979) (decided under former Code 1933, § 38-1703); McCranie v. State, 151 Ga. App. 871, 261 S.E.2d 779 (1979) (decided under former Code 1933, § 38-1703).

Excepted witnesses testify first. — When a witness had been excepted from the sequestration rule, that witness should be presented first or explanation made to the trial court why the witness cannot be called first. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174 (1947) (decided under former Code 1933, § 38-1703); McCranie v. State, 151 Ga. App. 871, 261 S.E.2d 779 (1970) (decided under former Code 1933, § 38-1703); Walker v. State, 132 Ga. App. 274, 208 S.E.2d 5 (1974) (decided under former Code 1933, § 38-1703); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975) (decided under former Code 1933, § 38-1703); Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493 (1975) (decided under former Code 1933, § 38-1703); Pless v. State, 142 Ga. App. 594, 236 S.E.2d 842 (1977) (decided under former Code 1933, § 38-1703); James v. State, 143 Ga. App. 696, 240 S.E.2d 149 (1977) (decided under former Code 1933, § 38-1703); Whitfield v. State, 143 Ga. App. 779, 240 S.E.2d 189 (1977) (decided under former Code 1933, § 38-1703); Lloyd v. State, 146 Ga. App. 584, 246 S.E.2d 697 (1978) (decided under former Code 1933, § 38-1703); Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979) (decided under former Code 1933, § 38-1703); Brown v. State, 150 Ga. App. 116, 257 S.E.2d 25 (1979) (decided under former Code 1933, § 38-1703); Ratliff v. State, 150 Ga. App. 695, 258 S.E.2d 324 (1979) (decided under former Code 1933, § 38-1703); Simonton v. State, 151 Ga. App. 431, 260 S.E.2d 487 (1979) (decided under former Code 1933, § 38-1703).

Court may allow witness for prosecution to remain in courtroom in violation of the sequestration rule, if the prosecuting attorney stated that the witness was needed to aid in the presentation of the case and that in the orderly presentation of the case cannot testify first. Sweat v. State, 203 Ga. App. 290, 416 S.E.2d 845 (1992) (decided under former O.C.G.A. § 24-9-61).

Trial court did not abuse the court's discretion in defendant's criminal trial when the court denied defendant's sequestration request regarding one of the police officers involved in the arrest as the state's request that the officer stay in the court to assist was deemed reasonable given that defendant's trial counsel had the assistance of two other attorneys as well as a recent law graduate. Warren v. State, 281 Ga. App. 490, 636 S.E.2d 671 (2006) (decided under former O.C.G.A. § 24-9-61).

State's lead detective was properly excepted from the rule of sequestration as the state adequately demonstrated that the state needed the presence of the primary investigator in the courtroom for an orderly presentation of the case. Morgan v. State, 287 Ga. App. 569, 651 S.E.2d 833 (2007) (decided under former O.C.G.A. § 24-9-61).

Prosecutor requested that the chief investigating detective be excepted from the rule of sequestration to permit the detective to assist the prosecutor in presenting the case because of the detective's familiarity with the facts and the crime scene. In light of the prosecutor's request, allowing the detective to remain in the courtroom during the presentation of the state's case was not an abuse of discretion. Hollis v. State, 295 Ga. App. 529, 672 S.E.2d 487 (2009) (decided under former O.C.G.A. § 24-9-61).

Exceptions to Sequestration Rule (Cont'd)

Trial court did not abuse the court's discretion in allowing the lead investigative officer to stay in the courtroom throughout a defendant's marijuana possession trial, although the defendant invoked sequestration, because the prosecutor designated the officer as the state's prosecuting witness. Moreover, defense counsel made no objection at the time of the designation. Sirmans v. State, 301 Ga. App. 756, 688 S.E.2d 669 (2009) (decided under former O.C.G.A. § 24-9-61).

Witness allowed to remain in courtroom. — When lead investigator testified first and was then permitted to remain in the courtroom during the remainder of the trial, and was twice recalled to the stand after having heard the testimony of the other witnesses, it was not an abuse of the trial court's discretion to permit the detective's testimony. Dunbar v. State, 209 Ga. App. 97, 432 S.E.2d 829 (1993) (decided under former O.C.G.A. § 24-9-61); Mitchell v. State, 222 Ga. App. 878, 476 S.E.2d 604 (1996) (decided under former O.C.G.A. § 24-9-61).

In a prosecution for child molestation, it was not an abuse of discretion to allow the mother of the victim to remain in the courtroom after the victim became upset while testifying. Peters v. State, 224 Ga. App. 837, 481 S.E.2d 898 (1997) (decided under former O.C.G.A. § 24-9-61).

Parties as witnesses. — When a party to an action intended to be a witness personally and the court directs that the party's witnesses be separately examined, it was the proper rule, unless there be special reasons to the contrary, that such party should first be examined in the absence of the party's other witnesses, in order that the party may thereby be present, as was the party's right, during the whole trial of the party's case. Tift v. Jones, 52 Ga. 538 (1874) (decided under former Code 1873, § 3863); Georgia R.R. & Banking Co. v. Tice, 124 Ga. 459, 52 S.E. 916, 4 Ann. Cas. 200 (1905) (decided under former Civil Code 1895, § 5280); Massey v. State, 220 Ga. 883, 142 S.E.2d 832 (1965) (decided under former Code 1933, § 38-1703); Cochran v. State, 151 Ga. App. 436, 260 S.E.2d 391 (1979) (decided under former Code 1933, § 38-1703).

In juvenile court trials the parents are parties and therefore not subject to sequestration. D.C.A. v. State, 135 Ga. App. 234, 217 S.E.2d 470 (1975) (decided under former Code 1933, § 38-1703).

When the plaintiff elects to call the plaintiff's own witnesses before testifying personally, the trial court has broad discretion to require either that the plaintiff testify prior to presenting the testimony of plaintiff's witnesses, or that the plaintiff be excluded from the courtroom prior to the time plaintiff chooses to testify. Barber v. Barber, 257 Ga. 488, 360 S.E.2d 574 (1987) (decided under former O.C.G.A. § 24-9-61).

Assistance to either party. — It is within the discretion of the trial judge to permit a witness to remain in the courtroom to assist either party and the action of the court in this respect will not be reviewed. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174 (1947) (decided under former Code 1933, § 38-1703); Justice v. State, 213 Ga. 166, 97 S.E.2d 569 (1957) (decided under former Code 1933, § 38-1703); Dye v. State, 220 Ga. 113, 137 S.E.2d 465 (1964) (decided under former Code 1933, § 38-1703); Ratliff v. State, 150 Ga. App. 695, 258 S.E.2d 324 (1970) (decided under former Code 1933, § 38-1703); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581 (1971) (decided under former Code 1933, § 38-1703); Walker v. State, 132 Ga. App. 274, 208 S.E.2d 5 (1974) (decided under former Code 1933, § 38-1703); Parham v. State, 135 Ga. App. 315, 217 S.E.2d 493 (1975) (decided under former Code 1933, § 38-1703); James v. State, 143 Ga. App. 696, 240 S.E.2d 149 (1977) (decided under former Code 1933, § 38-1703).

Assistance to opposite party. — Court may permit witnesses to remain in the courtroom to advise the opposite party, but the record must show that such was done for that purpose. Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785 (1946) (decided under former Code 1933, § 38-1703); Montos v. State, 212 Ga. 764, 95 S.E.2d 792 (1956), overruled on other grounds, White v. State, 273 Ga.

787, 546 S.E.2d 514 (2001) (decided under former Code 1933, § 38-1703); Smith v. State, 215 Ga. 51, 108 S.E.2d 688 (1959) (decided under former Code 1933, § 38-1703); Spurlin v. State, 222 Ga. 179, 149 S.E.2d 315 (1966) (decided under former Code 1933, § 38-1703); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971) (decided under former Code 1933, § 38-1703); Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974) (decided under former Code 1933, § 38-1703).

Officer of the court. — When the rule requiring sequestration is invoked and one of the witnesses is an officer of the court the judge may allow that witness to remain in the courtroom so as not to impair the efficiency of the court. Hoxie v. State, 114 Ga. 19, 39 S.E. 944 (1901) (decided under former Penal Code 1895, § 1017); Askew v. State, 3 Ga. App. 79, 59 S.E. 311 (1907) (decided under former Penal Code 1895, § 1017); Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785 (1946) (decided under former Code 1933, § 38-1703); Montos v. State, 212 Ga. 764, 95 S.E.2d 792 (1956), overruled on other grounds, White v. State, 273 Ga. 787, 546 S.E.2d 514 (2001) (decided under former Code 1933, § 38-1703); Cornett v. State, 218 Ga. 405, 128 S.E.2d 317 (1962) (decided under former Code 1933, § 38-1703); Head v. State, 111 Ga. App. 14, 140 S.E.2d 291 (1965) (decided under former Code 1933, § 38-1703); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581 (1971) (decided under former Code 1933, § 38-1703); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971) (decided under former Code 1933, § 38-1703); Bush v. State, 129 Ga. App. 160, 199 S.E.2d 121 (1973) (decided under former Code 1933, § 38-1703); Childers v. State, 130 Ga. App. 555, 203 S.E.2d 874 (1974) (decided under former Code 1933, § 38-1703); James v. State, 143 Ga. App. 696, 240 S.E.2d 149 (1977) (decided under former Code 1933, § 38-1703).

Prosecutor. — Court may permit the prosecutor in the indictment to remain at the state's counsel table to assist in the trial of the case, even though the prosecutor may be used as a witness. Norman v. State, 121 Ga. App. 753, 175 S.E.2d 119 (1970), cert. denied, 401 U.S. 959, 91 S. Ct. 981, 28 L. Ed. 2d 240 (1971) (decided under former Code 1933, § 38-1703); Howard v. State, 144 Ga. App. 31, 240 S.E.2d 589 (1977) (decided under former Code 1933, § 38-1703); McCranie v. State, 151 Ga. App. 871, 261 S.E.2d 779 (1979) (decided under former Code 1933, § 38-1703).

One long-standing exception to the sequestration rule exists in criminal cases for the prosecutor, that is, the one who signs the indictment bringing the charges. The prosecutor may testify as a witness after other witnesses for the state have testified. Chastain v. State, 255 Ga. 723, 342 S.E.2d 678 (1986) (decided under former O.C.G.A. § 24-9-61); Anderson v. State, 200 Ga. App. 29, 406 S.E.2d 791 (1991) (decided under former O.C.G.A. § 24-9-61); Jackson v. State, 222 Ga. App. 843, 476 S.E.2d 615 (1996) (decided under former O.C.G.A. § 24-9-61).

Prosecuting witness. — It is within the trial court's discretion to allow the prosecuting witness to remain in the courtroom as an exception to the sequestration rule. Jefferson v. State, 159 Ga. App. 740, 285 S.E.2d 213 (1981) (decided under former Code 1933, § 38-1703).

It is within the trial court's discretion to allow a prosecuting witness to remain in the courtroom as an exception to the sequestration rule. Law v. State, 165 Ga. App. 687, 302 S.E.2d 570, aff'd, 251 Ga. 525, 307 S.E.2d 904 (1983) (decided under former O.C.G.A. § 24-9-61).

Trial court may, in the court's discretion permit the prosecutor in the indictment to remain in the courtroom to assist in the trial of the case, even though the prosecutor may be used as a witness. Edwards v. State, 171 Ga. App. 264, 319 S.E.2d 101 (1984) (decided under former O.C.G.A. § 24-9-61).

It was within the trial court's discretion to allow a police officer who was the nominal prosecutor to remain in the courtroom based on the district attorney's statement that the officer's presence was necessary for the orderly administration of the state's case. Davis v. State, 239 Ga. App. 318, 521 S.E.2d 368 (1999), rev'd on other grounds, 273 Ga. 14, 537 S.E.2d 663 (2000) (decided under former O.C.G.A. § 24-9-61).

Exceptions to Sequestration Rule (Cont'd)

Victim's assistance coordinator. — Because the state's victim assistance coordinator was not a witness subject to sequestration, the trial court did not err in allowing the coordinator to remain in the courtroom during the trial. Clements v. State, 279 Ga. App. 773, 632 S.E.2d 702 (2006) (decided under former O.C.G.A. § 24-9-61).

Reopening state's case so victim could make in-court identification. — Allowing the state to reopen the state's case so a robbery victim could make an in-court identification based on the sound of defendant's voice did not violate the rule of sequestration since the victim was not recalled in order to further or alter the substance of defendant's own recounting of the incident in light of the substance of defendant's testimony but was recalled merely to testify about the similarity of the sound of defendant's voice to the sound of the gunman's voice during commission of the crime. Stith v. State, 201 Ga. App. 621, 411 S.E.2d 532 (1991) (decided under former O.C.G.A. § 24-9-61).

Excepting witness testifying as to post-arrest event not error. — Trial court's excepting a state's witness from the rule of sequestration and, having done so, not requiring the witness to testify first was not an abuse of discretion, since the witness testified only about post-arrest events and not about the crime itself. Mathews v. State, 183 Ga. App. 224, 358 S.E.2d 639 (1987) (decided under former O.C.G.A. § 24-9-61).

Investigating officer. — Appellate courts have found no abuse of discretion when the trial court permits the investigating officer to remain in the courtroom to assist in the trial of the case and testify after other state witnesses have testified. Pless v. State, 142 Ga. App. 594, 236 S.E.2d 842 (1977) (decided under former Code 1933, § 38-1703); Lloyd v. State, 146 Ga. App. 584, 246 S.E.2d 697 (1978) (decided under former Code 1933, § 38-1703); Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979) (decided under former Code 1933, § 38-1703); Brown v. State, 150 Ga. App. 116, 257 S.E.2d 25 (1979) (decided under former Code 1933, § 38-1703); Simonton v. State, 151 Ga. App. 431, 260 S.E.2d 487 (1979) (decided under former Code 1933, § 38-1703).

When a witness police detective was permitted to remain in the courtroom to assist the prosecutor in spite of a sequestration order, and when during the course of the trial the prosecutor sent the detective to telephone another police officer witness whose presence was needed, the rule of sequestration was not violated. McGarl v. State, 165 Ga. App. 323, 301 S.E.2d 58 (1983) (decided under former O.C.G.A. § 24-9-61).

When defendants contended that it was improper to exempt from the sequestration order two prospective prosecution witnesses, the county sheriff and the police officer who investigated the case, it was held that these exceptions were not an abuse of the court's discretion as the sheriff never testified and the investigator was shown to be needed to assist the district attorney in the trial of the case, an approved exception. Welch v. State, 251 Ga. 197, 304 S.E.2d 391 (1983) (decided under former O.C.G.A. § 24-9-61).

Trial court may permit the investigating officer to remain at the counsel table and to testify at trial. Edwards v. State, 171 Ga. App. 264, 319 S.E.2d 101 (1984) (decided under former O.C.G.A. § 24-9-61).

Trial court is vested with the discretion to make an exception to the sequestration rule for the chief investigating officer and the discretion will not be reversed on appeal unless abused. Norman v. State, 255 Ga. 313, 338 S.E.2d 249 (1986); Watson v. State, 222 Ga. App. 814, 476 S.E.2d 96 (1996) (decided under former O.C.G.A. § 24-9-61).

Trial court did not abuse the court's discretion in allowing an investigator to sit at counsel table with the prosecutor after the rule of sequestration had been invoked, even though the investigator was the last witness to testify for the state, since the prosecutor stated the prosecutor needed the investigator's assistance during the trial and that to compel the investigator to testify first would require the state to present the state's case out of sequence. Mullen v. State, 197 Ga. App.

26, 397 S.E.2d 487 (1990) (decided under former O.C.G.A. § 24-9-61).

Trial court did not err in allowing an investigating officer to sit with the state's attorney during a trial as an exception to the rule of sequestration or in failing to require the officer to testify first as the trial court expressly recognized that the court was vested with discretion to do so; moreover, the investigating officer's testimony was primarily directed at the playing of the videotape interview with the child victim. Howse v. State, 273 Ga. App. 252, 614 S.E.2d 869 (2005) (decided under former O.C.G.A. § 24-9-61).

Despite the defendant's contrary claims on appeal, the trial court properly allowed the lead investigating officer to remain in the courtroom during the presentation of evidence, based on the prosecutor's statement that the officer was necessary to assist in the orderly presentation of the case. Stafford v. State, 288 Ga. App. 733, 655 S.E.2d 221 (2007), cert. denied, No. S08C0654, 2008 Ga. LEXIS 489 (Ga. 2008) (decided under former O.C.G.A. § 24-9-61).

Trial court did not err in permitting the state to have the investigating agent from the Georgia Bureau of Investigation remain in the courtroom at counsel table during the entire trial, thereby violating the rule of sequestration under former O.C.G.A. § 24-9-61. Since the state maintained that the state needed the presence of the primary investigator for the orderly presentation of the case, excepting the investigator from the rule of sequestration was within the trial court's discretion. Holloman v. State, 291 Ga. 338, 729 S.E.2d 344 (2012) (decided under former O.C.G.A. § 24-9-61).

Sheriff may be excepted on court's motion. — Since the sheriff is an officer of the court and may be excepted from the rule of sequestration on the court's own initiative, it is not necessary to evaluate the state's asserted need for the assistance of the sheriff, as a demonstration of such was unnecessary to the court's exercise of discretion. Childs v. State, 257 Ga. 243, 357 S.E.2d 48, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987) (decided under former O.C.G.A. § 24-9-61).

Expert witnesses. — When it was necessary to offer a considerable body of technical information relating to the alleged eavesdropping device for jury consideration, and the solicitor (now district attorney) stated in the solicitor's place that the solicitor needed to confer with an expert in this field during the trial, it was not an abuse of discretion to allow such witness to remain in the courtroom after a motion for the sequestration of witnesses had in other respects been granted. Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971) (decided under former Code 1933, § 38-1703).

Trial court did not err by refusing to allow defendant's accident reconstruction expert to hear the testimony of other witnesses, since the rule of sequestration was invoked, in view of the court's conclusion that granting the request would give the defense an unfair advantage. Bartell v. State, 181 Ga. App. 148, 351 S.E.2d 495 (1986) (decided under former O.C.G.A. § 24-9-61).

An expert is not automatically excepted from the rule on sequestration because ordinarily it is not necessary for the expert to hear the testimony of other witnesses in order to form an opinion. Bean v. Landers, 215 Ga. App. 366, 450 S.E.2d 699 (1994) (decided under former O.C.G.A. § 24-9-61).

Member of local police. — City or county police officer is not an officer of the court so as to merit an exception to the rule of sequestration as such. Head v. State, 111 Ga. App. 14, 140 S.E.2d 291 (1965) (decided under former Code 1933, § 38-1703); Bush v. State, 129 Ga. App. 160, 199 S.E.2d 121 (1973) (decided under former Code 1933, § 38-1703).

Rape victim. — In the absence of any such showing or statement of the solicitor general (now district attorney) and where the record is silent as to any reason a rape victim should be excepted from the rule of sequestration and allowed to remain in the courtroom, none will be assumed to exist. Massey v. State, 220 Ga. 883, 142 S.E.2d 832 (1965), cert. denied, 385 U.S. 36, 87 S. Ct. 241, 17 L. Ed. 2d 36 (1966) (decided under former Code 1933, § 38-1703).

Former O.C.G.A. § 24-9-61 did not prohibit discussions between attor-

Exceptions to Sequestration Rule (Cont'd)

ney to the case and a prospective witness, at least so long as the attorney talked to the witness separately from the other witnesses and did not inform the witness of previous testimony. Ross v. State, 254 Ga. 22, 326 S.E.2d 194, cert. denied, 472 U.S. 1022, 105 S. Ct. 3490, 87 L. Ed. 2d 623 (1985) (decided under former O.C.G.A. § 24-9-61).

Testimony of Witnesses Not Sequestered

Liberal interpretation. — Legislative statement that "no mere irregularity shall exclude the witness" imports that a liberal interpretation should be given when applying the former provisions. Pless v. State, 142 Ga. App. 594, 236 S.E.2d 842 (1977) (decided under former Code 1933, § 38-1703).

Presumption of injury to party. — When a sequestration order is violated, there is a presumption of injury to the rights of a party unless the contrary plainly appears. Hall v. Hobbs, 107 Ga. App. 46, 129 S.E.2d 209 (1962) (decided under former Code 1933, § 38-1703).

Witness disregarding sequestration order. — When a witness was competent to testify, and the testimony was relevant, material, and necessary to an adequate defense of the charges against the defendant; only the witness's credibility as a witness, not the witness's competence, is affected by the witness's disregard of a sequestration order. Rooks v. State, 65 Ga. 330 (1880) (decided under former Code 1873, § 3863); Lassiter v. State, 67 Ga. 739 (1881) (decided under former Code 1873, § 3863); Bone v. State, 86 Ga. 108, 12 S.E. 205 (1890) (decided under former Code 1873, § 3863); May v. State, 90 Ga. 793, 17 S.E. 108 (1893) (decided under former Code 1873, § 3863); Hoxie v. State, 114 Ga. 19, 39 S.E. 944 (1901) (decided under former Penal Code 1895, § 1017); McWhorter v. State, 118 Ga. 55, 44 S.E. 873 (1903) (decided under former Penal Code 1895, § 1017); Phillips v. State, 121 Ga. 358, 49 S.E. 290 (1904) (decided under former Penal Code 1895, § 1017); Davis v. State, 120 Ga. 843, 48 S.E. 305 (1904) (decided under former Penal Code 1895, § 1017); Green v. State, 125 Ga. 742, 54 S.E. 724 (1906) (decided under former Penal Code 1895, § 1017); Carter v. State, 2 Ga. App. 254, 58 S.E. 532 (1907) (decided under former Penal Code 1895, § 1017); Thomas v. State, 7 Ga. App. 615, 67 S.E. 707 (1910) (decided under former Penal Code 1895, § 1017); Whigby v. Burnham, 135 Ga. 584, 69 S.E. 1114 (1911) (decided under former Penal Code 1910, § 1043); Benton v. State, 9 Ga. App. 291, 71 S.E. 8 (1911) (decided under former Penal Code 1910, § 1043); Higdon v. State, 46 Ga. App. 346, 167 S.E. 782 (1933) (decided under former Penal Code 1910, § 1043); Edwards v. State, 55 Ga. App. 187, 189 S.E. 678 (1937) (decided under former Code 1933, § 38-1703); McCartney v. McCartney, 217 Ga. 200, 121 S.E.2d 785 (1961) (decided under former Code 1933, § 38-1703); Hall v. Hobbs, 107 Ga. App. 46, 129 S.E.2d 209 (1962) (decided under former Code 1933, § 38-1703); Hall v. Hall, 220 Ga. 677, 141 S.E.2d 400 (1965) (decided under former Code 1933, § 38-1703); Shelton v. State, 111 Ga. App. 351, 141 S.E.2d 776, cert. denied, 382 U.S. 917, 86 S. Ct. 291, 15 L. Ed. 2d 232 (1965) (decided under former Code 1933, § 38-1703); Pippins v. State, 224 Ga. 462, 162 S.E.2d 338 (1968) (decided under former Code 1933, § 38-1703); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971) (decided under former Code 1933, § 38-1703); Rozier v. State, 124 Ga. App. 481, 184 S.E.2d 203 (1971) (decided under former Code 1933, § 38-1703); Baker v. State, 131 Ga. App. 48, 205 S.E.2d 79 (1974) (decided under former Code 1933, § 38-1703); Pearley v. State, 235 Ga. 276, 219 S.E.2d 404 (1975) (decided under former Code 1933, § 38-1703); Still v. State, 142 Ga. App. 312, 235 S.E.2d 737 (1977) (decided under former Code 1933, § 38-1703); Watts v. State, 239 Ga. 725, 238 S.E.2d 894 (1977) (decided under former Code 1933, § 38-1703); Banks v. State, 144 Ga. App. 471, 241 S.E.2d 587 (1978) (decided under former Code 1933, § 38-1703); Bryan v. State, 148 Ga. App. 428, 251 S.E.2d 338 (1978) (decided under former Code 1933, § 38-1703); Dudley v. State, 148 Ga. App. 560, 251 S.E.2d 815

(1978) (decided under former Code 1933, § 38-1703); International Ass'n of Bridge Ironworkers, Local 387 v. Moore, 149 Ga. App. 431, 254 S.E.2d 438 (1979) (decided under former Code 1933, § 38-1703); Smith v. State, 244 Ga. 814, 262 S.E.2d 116 (1979) (decided under former Code 1933, § 38-1703); Stroming v. State, 152 Ga. App. 129, 262 S.E.2d 193 (1979) (decided under former Code 1933, § 38-1703); Wright v. State, 246 Ga. 53, 268 S.E.2d 645 (1980) (decided under former Code 1933, § 38-1703); Jordan v. State, 247 Ga. 328, 276 S.E.2d 224 (1981) (decided under former Code 1933, § 38-1703); Blanchard v. State, 247 Ga. 415, 276 S.E.2d 593 (1981) (decided under former Code 1933, § 38-1703); Harper v. State, 249 Ga. 519, 292 S.E.2d 389 (1982) (decided under former Code 1933, § 38-1703).

When the rule of sequestration is violated, the violation goes to the credibility rather than the admissibility of the witness's testimony. Johnson v. State, 258 Ga. 856, 376 S.E.2d 356 (1989) (decided under former O.C.G.A. § 24-9-61); Lee v. State, 214 Ga. App. 164, 447 S.E.2d 323 (1994) (decided under former O.C.G.A. § 24-9-61).

In criminal cases, the violation of the rule of sequestration of any witness either for the defense or for the prosecution goes to the credibility rather than to the admissibility of the witness's testimony. O'Kelley v. State, 175 Ga. App. 503, 333 S.E.2d 838 (1985) (decided under former O.C.G.A. § 24-9-61); State v. Marshall, 195 Ga. App. 535, 394 S.E.2d 379 (1990), overruled on other grounds, Armstrong v. State, 209 Ga. App. 796, 434 S.E.2d 560 (1993) (decided under former O.C.G.A. § 24-9-61); Weathers v. State, 202 Ga. App. 849, 415 S.E.2d 690, cert. denied, 202 Ga. App. 907, 415 S.E.2d 690 (1992) (decided under former O.C.G.A. § 24-9-61).

Violation of sequestration does not render the offending witness incompetent to testify; defendant's recourse is to seek instructions from the court informing the jury that the violation of the rule should be considered in determining the weight and credit to be given to the testimony of the witness. Bradford v. State, 182 Ga. App. 337, 355 S.E.2d 735 (1987) (decided under former O.C.G.A. § 24-9-61).

Trial court did not err by refusing to exclude the testimony of a state's witness for the witness's alleged violation of the rule of sequestration, as exclusion of testimony simply is not an appropriate remedy for a violation of the rule. Jefferson v. State, 256 Ga. 821, 353 S.E.2d 468, cert. denied, 484 U.S. 872, 108 S. Ct. 203, 98 L. Ed. 2d 154 (1987) (decided under former O.C.G.A. § 24-9-61).

Trial court did not err in denying defendant's motion for mistrial after the court learned that witnesses in the witness room had been discussing testimony with each other in violation of the rule of sequestration, since the only witness in the room who had not yet testified when these conversations allegedly occurred was a deputy who did not personally observe the crime but merely took the defendant into custody. Hicks v. State, 256 Ga. 715, 352 S.E.2d 762, cert. denied, 482 U.S. 931, 107 S. Ct. 3220, 96 L. Ed. 2d 706 (1987) (decided under former O.C.G.A. § 24-9-61).

Trial court did not abuse the court's discretion in allowing the state to present a witness in violation of the sequestration rule as defense counsel's cross-examination cast doubt upon the witness's testimony and the jury knew that the witness was present during previous testimony. Rakestrau v. State, 278 Ga. 872, 608 S.E.2d 216 (2005) (decided under former O.C.G.A. § 24-9-61).

Party's remedy for a violation of the sequestration rule is to request the trial court to charge the jury that the violation should be considered in determining the weight and credit to be given the testimony of the witness. Johnson v. State, 258 Ga. 856, 376 S.E.2d 356 (1989) (decided under former O.C.G.A. § 24-9-61).

Witness not automatically disqualified if rule violated. — Generally, the testimony of a witness who has violated the rule of sequestration is admissible although the witness may be guilty of contempt. Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653 (1981) (decided under former Code 1933, § 38-1703).

Even if the rule of sequestration has

Testimony of Witnesses Not Sequestered (Cont'd)

been violated, this does not automatically disqualify the witness or render the witness incompetent; the trial court is vested with broad discretion in this regard. Stancil v. State, 158 Ga. App. 147, 279 S.E.2d 457 (1981) (decided under former O.C.G.A. § 24-9-61); Hayes v. State, 175 Ga. App. 135, 332 S.E.2d 917 (1985) (decided under former O.C.G.A. § 24-9-61).

Admitting testimony of witnesses not placed under rule when invoked. — Witnesses who have not been called and put under the rule may testify in rebuttal of a prisoner's statement if the court is satisfied that the ends of justice require such testimony. Metropolitan St. R.R. v. Johnson, 90 Ga. 500, 16 S.E. 49 (1892) (decided under former Code 1882, § 3863); Keiley v. Bristol, 30 Ga. App. 725, 119 S.E. 334, cert. denied, 30 Ga. App. 801 (1923) (decided under former Civil Code 1910, § 5869); Edwards v. State, 55 Ga. App. 187, 189 S.E. 678 (1937) (decided under former Code 1933, § 38-1703); Ricks v. State, 209 Ga. 2, 70 S.E.2d 373 (1952) (decided under former Code 1933, § 38-1703); Dye v. State, 220 Ga. 113, 137 S.E.2d 465 (1964) (decided under former Code 1933, § 38-1703); Shelton v. State, 220 Ga. 610, 140 S.E.2d 839, answer conformed to, 111 Ga. App. 351, 141 S.E.2d 776, cert. denied, 382 U.S. 917, 86 S. Ct. 291, 15 L. Ed. 2d 232 (1965) (decided under former Code 1933, § 38-1703); Pippins v. State, 224 Ga. 462, 162 S.E.2d 338 (1968) (decided under former Code 1933, § 38-1703); Stuart v. State, 123 Ga. App. 311, 180 S.E.2d 581 (1971) (decided under former Code 1933, § 38-1703); Still v. State, 142 Ga. App. 312, 235 S.E.2d 737 (1977) (decided under former Code 1933, § 38-1703); Banks v. State, 144 Ga. App. 471, 241 S.E.2d 587 (1978) (decided under former Code 1933, § 38-1703); Stroming v. State, 152 Ga. App. 129, 262 S.E.2d 193 (1979) (decided under former Code 1933, § 38-1703); Jordan v. State, 247 Ga. 328, 276 S.E.2d 224 (1981) (decided under former Code 1933, § 38-1703); Blanchard v. State, 247 Ga. 415, 276 S.E.2d 593 (1981) (decided under former Code 1933, § 38-1703).

After the trial court conducted an evidentiary hearing out of the presence of the jury before permitting a witness to testify as a rebuttal witness, and although the witness had not been present in the courtroom prior to the time at which the witness was called to testify, the witness admitted to having conversations with fellow officers who had already testified or been present during testimony, there was no abuse of discretion in permitting the witness to testify. Gibby v. State, 166 Ga. App. 413, 304 S.E.2d 518 (1983) (decided under former O.C.G.A. § 24-9-61).

When the assistant district attorney tried a case in another courtroom and was not present when the rule of sequestration was invoked, the fact that the assistant district attorney entered the courtroom and sat at the prosecution table, and was subsequently called to testify did not require the trial court to prohibit the assistant district attorney's testimony. Cheeks v. State, 203 Ga. App. 47, 416 S.E.2d 336, cert. denied, 203 Ga. App. 905, 416 S.E.2d 336 (1992) (decided under former O.C.G.A. § 24-9-61).

Unsequestered witness may be called after others testify. — Based upon a showing by the state of some need not to call the unsequestered witness first, the trial court is authorized, in the court's discretion, to allow the unsequestered witness to be called to the stand after other witnesses have testified. Jefferson v. State, 159 Ga. App. 740, 285 S.E.2d 213 (1981) (decided under former Code 1933, § 38-1703).

Admitting testimony of witness who complied with sequestration rule after defendant insisted. — Trial court did not err in allowing the owner of a burglarized house to testify without a cautionary instruction to the jury because the owner had violated the rule of sequestration by being present in court when the arresting officer testified; defendant did not show that the defendant insisted upon the rule until after the arresting officer had begun to testify, at which point it appeared the witnesses complied. Johnson v. State, 275 Ga. App. 21, 619 S.E.2d 731 (2005) (decided under former O.C.G.A. § 24-9-61).

Excluding testimony of witnesses not sequestered. — Exclusion of testi-

mony offered by a witness who has remained in the courtroom after grant of a sequestration order is within the discretion of the trial court. May v. State, 90 Ga. 793, 17 S.E. 108 (1893) (decided under former Code 1882, § 3863); Groover v. Simmons, 161 Ga. 93, 129 S.E. 778 (1925) (decided under former Penal Code 1910, § 1043); Star Jewelers, Inc. v. Durham, 147 Ga. App. 68, 248 S.E.2d 51 (1978) (decided under former Code 1933, § 38-1703); Dowdy v. State, 154 Ga. App. 700, 269 S.E.2d 530 (1980) (decided under former Code 1933, § 38-1703).

Disregard of a sequestration order may subject the offender to punishment for contempt. Hoxie v. State, 114 Ga. 19, 39 S.E. 944 (1901) (decided under former Penal Code 1895, § 1017); McWhorter v. State, 118 Ga. 55, 44 S.E. 873 (1903) (decided under former Penal Code 1895, § 1017); Phillips v. State, 121 Ga. 358, 49 S.E. 290 (1904) (decided under former Penal Code 1895, § 1017). See also Rooks v. State, 65 Ga. 330 (1880) (decided under former Code 1873, § 3863); Lassiter v. State, 67 Ga. 739 (1881) (decided under former Code 1873, § 3863); Bone v. State, 86 Ga. 108, 12 S.E. 205 (1890) (decided under former Code 1882, § 3863); Green v. State, 125 Ga. 742, 54 S.E. 724 (1906) (decided under former Penal Code 1895, § 1017); Thomas v. State, 7 Ga. App. 615, 67 S.E. 707 (1919) (decided under former Penal Code 1910, § 1043); Higdon v. State, 46 Ga. App. 346, 167 S.E. 782 (1933) (decided under former Penal Code 1910, § 1043); Edwards v. State, 55 Ga. App. 187, 189 S.E. 678 (1937) (decided under former Code 1933, § 38-1703); McCartney v. McCartney, 217 Ga. 200, 121 S.E.2d 785 (1961) (decided under former Code 1933, § 38-1703); Rozier v. State, 124 Ga. App. 481, 184 S.E.2d 203 (1971) (decided under former Code 1933, § 38-1703); Baker v. State, 131 Ga. App. 48, 205 S.E.2d 79 (1974) (decided under former Code 1933, § 38-1703); Pearley v. State, 235 Ga. 276, 219 S.E.2d 404 (1975) (decided under former Code 1933, § 38-1703); Watts v. State, 239 Ga. 725, 238 S.E.2d 894 (1977) (decided under former Code 1933, § 38-1703); Bryan v. State, 148 Ga. App. 428, 251 S.E.2d 338 (1978) (decided under former Code 1933, § 38-1703); International Ass'n of Bridge Ironworkers, Local 387 v. Moore, 149 Ga. App. 431, 254 S.E.2d 438 (1979) (decided under former Code 1933, § 38-1703).

Violation of sequestration by interested parties who are not witnesses. — By permitting persons actively interested in the result of the case to intermingle with witnesses who have been ordered to be sequestered there is a probability that their testimony may be influenced and molded to the prejudice of either of the parties in the cause. Hightower v. State, 14 Ga. App. 246, 80 S.E. 684 (1914) (decided under former Penal Code 1910, § 1043).

Violation of sequestration after testifying. — Sequestered witness is not disqualified for reintroduction even though the witness may have heard other witnesses after testifying. Lyman v. State, 69 Ga. 404 (1882) (decided under former Code 1873, § 3863); Taylor v. State, 132 Ga. 235, 63 S.E. 1116 (1909) (decided under former Penal Code 1895, § 1017).

Since state's witnesses to whom sheriff talked were witnesses who had already testified, and, the sheriff, who was a witness, was allowed to stay in the courtroom by consent, and the witnesses involved for the state were not called to the stand again, there was no violation of the sequestration rule. Talley v. State, 2 Ga. App. 395, 58 S.E. 667 (1907) (decided under former Penal Code 1895, § 1017). See also Heywood v. State, 12 Ga. App. 643, 77 S.E. 1130 (1913) (decided under former Penal Code 1910, § 1043); Hudgins v. State, 13 Ga. App. 489, 79 S.E. 367 (1913) (decided under former Penal Code 1910, § 1043); Finley v. State, 101 Ga. App. 61, 113 S.E.2d 144 (1960) (decided under former Code 1933, § 38-1703).

Sequestered witness is not disqualified for reintroduction even though the witness may have heard other witnesses after testifying. Lyman v. State, 69 Ga. 404 (1882) (decided under former Code 1873, § 3863); Taylor v. State, 132 Ga. 235, 63 S.E. 1116 (1909) (decided under former Penal Code 1910, § 1043).

Preclusion of testimony of defendant's spouse under sequestration

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rule proper. — Application of the former O.C.G.A. § 24-9-61 sequestration rule was discretionary, and the trial court did not err by allowing the defendant's wife to sit at the defense table and assist in the defendant's defense of a driving under the influence charge, thereby precluding the wife's testimony under the sequestration rule; moreover, if there was error, the defendant induced the error. The issues were explained to the defendant, the defendant and the wife considered the pros and cons of the wife's role as a witness, and they decided that the wife would not testify. Hernandez v. State, 297 Ga. App. 177, 676 S.E.2d 795 (2009) (decided under former O.C.G.A. § 24-9-61).

Jury instructions. — Violation of the sequestration rule does not affect admissibility of the testimony, but the party's recourse is to seek instructions from the court informing the jury that the presence of the witness in the courtroom in violation of the rule should be considered in determining the weight and credit to be given to the testimony of the witness. Wright v. State, 246 Ga. 53, 268 S.E.2d 645 (1980) (decided under former Code 1933, § 38-1703); Jordan v. State, 247 Ga. 328, 276 S.E.2d 224 (1981) (decided under former Code 1933, § 38-1703).

RESEARCH REFERENCES

ALR. — Exclusion from courtroom of expert witnesses during taking of testimony in civil case, 85 ALR2d 478.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 ALR3d 1360.

Effect of witness's violation of order of exclusion, 14 ALR3d 16.

Counsel's reference, in presence of sequestered witness in state criminal trial, to testimony of another witness as ground for mistrial or reversal, 24 ALR4th 488.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case, 74 ALR4th 705.

Exclusion of witnesses under Rule 615 of Federal Rules of Evidence, 181 ALR Fed. 549.

24-6-616. Presence in courtroom of victim of criminal offense.

Subject to the provisions of Code Section 17-17-9, the victim of a criminal offense shall be entitled to be present in any court exercising jurisdiction over such offense. (Code 1981, § 24-6-616, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-61.1 are included in the annotations for this Code section.

Discretion of court. — In a prosecution for aggravated assault, the trial court did not abuse the court's discretion in allowing a victim, who was comatose and in a wheelchair, to remain in the courtroom since the victim's injuries as a result of the shooting were relevant to the accusation. Lewis v. State, 215 Ga. App. 161, 450 S.E.2d 448 (1994) (decided under former O.C.G.A. § 24-9-61.1).

Trial court properly allowed the victim in defendant's child molestation trial to remain in court after the defense moved for sequestration because former O.C.G.A. § 24-9-61.1 provided that the victim of a criminal offense could be entitled to be present in any court exercising jurisdiction over such offense, and it was within the sole discretion of the trial judge to determine when to allow such victim to be present in such court, and as the prosecu-

tor had requested that the victim remain present to assist in the case, the trial court did not abuse the court's discretion. Flowers v. State, 255 Ga. App. 660, 566 S.E.2d 339 (2002) (decided under former O.C.G.A. § 24-9-61.1).

Rule of sequestration was not violated. — Procedure of the trial judge in allowing the victim to remain in the courtroom while a detective and polygraph examiner testified, and then letting the victim give testimony was fully within the court's discretion and did not constitute reversible error. Shepherd v. State, 245 Ga. App. 386, 537 S.E.2d 777 (2000) (decided under former O.C.G.A. § 24-9-61.1).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state constitutional or statutory victims' bill of rights, 91 ALR5th 343.

ARTICLE 2

CREDIBILITY

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-6-620. Credibility a jury question.

The credibility of a witness shall be a matter to be determined by the trier of fact, and if the case is being heard by a jury, the court shall give the jury proper instructions as to the credibility of a witness. (Code 1981, § 24-6-620, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-9-80, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decision in Strozier v. Carroll, 31 Ga. 557 (1860).

Law reviews. — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5294, former Penal Code 1895, § 1028, former Civil Code 1910, § 5883, former Penal Code 1910, § 1054, former Code 1933, § 38-1805, and former O.C.G.A. § 24-9-80 are included in the annotations for this Code section.

General Consideration (Cont'd)

Weight of evidence and credibility of witnesses are matters for jury. — See Sindy v. State, 120 Ga. 202, 47 S.E. 554 (1904) (decided under former Penal Code 1895, § 1028); Trammell v. State, 183 Ga. 711, 189 S.E. 529 (1937) (decided under former Code 1933, § 38-1805); A.A.A. Hwy. Express, Inc. v. Hagler, 72 Ga. App. 519, 34 S.E.2d 462 (1945) (decided under former Code 1933, § 38-1805); Davis v. State, 424 Ga. 901, 252 S.E.2d 443 (1979) (decided under former Code 1933, § 38-1805); Johnson v. State, 150 Ga. App. 405, 258 S.E.2d 22 (1979) (decided under former Code 1933, § 38-1805); Parks v. State, 150 Ga. App. 446, 258 S.E.2d 66 (1979) (decided under former Code 1933, § 38-1805); A & N Inv., Inc. v. Cronic, 151 Ga. App. 738, 261 S.E.2d 469 (1979) (decided under former Code 1933, § 38-1805); Armour v. State, 154 Ga. App. 740, 270 S.E.2d 22 (1980) (decided under former Code 1933, § 38-1805); Harris v. State, 155 Ga. App. 530, 271 S.E.2d 668 (1980) (decided under former Code 1933, § 38-1805); Price v. State, 159 Ga. App. 662, 284 S.E.2d 676 (1981) (decided under former O.C.G.A. § 24-9-80); Alonso v. State, 190 Ga. App. 26, 378 S.E.2d 354 (1989) (decided under former O.C.G.A. § 24-9-80); Jenkins v. State, 269 Ga. 282, 498 S.E.2d 502 (1998), cert. denied, 525 U.S. 968, 119 S. Ct. 416, 142 L. Ed. 2d 338 (1998) (decided under former O.C.G.A. § 24-9-80).

Determination of a witness's credibility is within the discretion of the trier of fact. Burnette v. State, 165 Ga. App. 768, 302 S.E.2d 621 (1983) (decided under former O.C.G.A. § 24-9-80).

Any question as to credibility of a witness is for the jury to resolve. Murff v. State, 165 Ga. App. 808, 302 S.E.2d 697, rev'd on other grounds, 251 Ga. 478, 306 S.E.2d 267 (1983) (decided under former O.C.G.A. § 24-9-80).

In jury trial, jurors are sole judges of credibility of witnesses. Godfrey v. State, 187 Ga. App. 319, 370 S.E.2d 183 (1988); Ward v. State, 205 Ga. App. 584, 423 S.E.2d 288 (1992) (decided under former O.C.G.A. § 24-9-80).

Testimony that victim was "genuine". — Trial court did not abuse the court's discretion in refusing to grant defendant's motion for a mistrial after a witness improperly testified that a victim was "genuine" as defendant failed to renew the motion for a mistrial following a curative instruction; further, the curative instruction was the proper corrective measure as the credibility of the witness was a matter for the jury. Cook v. State, 276 Ga. App. 803, 625 S.E.2d 83 (2005) (decided under former O.C.G.A. § 24-9-80).

Resolution of conflicting theories drawn from evidence is for jury and it is not the court's province to reweigh the evidence and the jury's inferences drawn from the evidence. Robinson v. State, 203 Ga. App. 759, 417 S.E.2d 404, cert. denied, 203 Ga. App. 907, 417 S.E.2d 404 (1992) (decided under former O.C.G.A. § 24-9-80).

Defendant's motion for a directed verdict of acquittal in trial for theft by taking a motor vehicle was properly denied since the jury properly assessed the evidence, although conflicting, and found each fact necessary to make out the state's case. Sherls v. State, 272 Ga. App. 152, 611 S.E.2d 780 (2005) (decided under former O.C.G.A. § 24-9-80).

Trial without jury. — When the judge tried the accused without intervention of a jury, the credibility of the witnesses was for the judge's determination. Boynton v. State, 11 Ga. App. 268, 75 S.E. 9 (1912) (decided under former Penal Code 1910, § 1054).

Under former O.C.G.A. § 24-9-80, in a trial, the credibility of the witnesses was a matter which should be resolved by the jurors who have heard all of the relevant evidence, and not by the text of the pretrial order. Ballard v. Meyers, 275 Ga. 819, 572 S.E.2d 572 (2002) (decided under former O.C.G.A. § 24-9-80).

Alibi evidence need not be accepted. — When defendant's alibi witnesses were unimpeached, the trial court, sitting as trier of fact, was not bound to accept the evidence introduced of alibi as true, since the trier of fact determines the credibility of the witnesses and weight to be given their testimony. Gatling v. State, 203 Ga. App. 407, 416 S.E.2d 877 (1992) (decided under former O.C.G.A. § 24-9-80).

Value of testimony. — It was for the jury to determine whether the testimony of a witness was so vague, indefinite, and uncertain as to be worthless, or whether the testimony, though contradictory in some respects, possessed some degree of probative value. Sappington v. Bell, 115 Ga. 856, 42 S.E. 233 (1902) (decided under former Civil Code 1895, § 5294); O'Brien v. Ellarbee, 14 Ga. App. 333, 80 S.E. 864 (1914) (decided under former Civil Code 1910, § 5883); Sherman v. Stephens, 30 Ga. App. 509, 118 S.E. 567 (1923) (decided under former Civil Code 1910, § 5883); Reaves v. Columbus Elec. & Power Co., 32 Ga. App. 140, 122 S.E. 824, cert. denied, 32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5883).

In a negligence action seeking compensatory damages for a disabling injury, because the injured plaintiff's use of morphine at the time of trial raised a credibility issue, the trial court did not abuse the court's discretion in overruling plaintiff's relevance objection. Imm v. Chaney, 287 Ga. App. 606, 651 S.E.2d 855 (2007) (decided under former O.C.G.A. § 24-9-80).

Only limitation to power of jury to credit witnesses is when the facts testified to are inherently at variance with the common knowledge and experience of mankind. Haywood v. State, 114 Ga. 111, 39 S.E. 948 (1901) (decided under former Penal Code 1895, § 1028); Alexander v. State, 1 Ga. App. 289, 57 S.E. 996 (1907) (decided under former Penal Code 1895, § 1028); Reed v. State, 130 Ga. 52, 60 S.E. 191 (1908) (decided under former Penal Code 1895, § 1028); Watson v. State, 13 Ga. App. 181, 78 S.E. 1014 (1913) (decided under former Penal Code 1895, § 1054).

Contradictory statements as affecting credibility. — When witness testified as to defendant's reputation in community, any subsequent contradiction simply went to the witness's credibility with the jury, and it was error for the court to strike such witness's testimony in toto. Hudson v. State, 163 Ga. App. 845, 295 S.E.2d 123 (1982) (decided under former O.C.G.A. § 24-9-80).

Reconciliation of conflicts. — When there are conflicts in the testimony of witnesses, it is the duty of the jury to reconcile these conflicts if possible so as to make every witness speak the truth. However, if this cannot be done, it then becomes the duty of the jury to believe those whom the jury thinks most entitled to credit. Cotton v. State, 81 Ga. App. 753, 59 S.E.2d 741 (1950) (decided under former Code 1933, § 38-1805).

It is the function of the jury to determine the credibility of the witnesses, and the jurors must weigh and resolve any conflicts presented by the evidence; the appellate court must view the evidence in the light most favorable to the jury's verdict. King v. State, 157 Ga. App. 733, 278 S.E.2d 491 (1981) (decided under former Code 1933, § 38-1805).

Jury may not arbitrarily disregard testimony. — Rule that the uncontradicted testimony of unimpeached witnesses cannot be arbitrarily disregarded does not mean that the jurors are obliged to believe testimony which the jurors in fact discredit, but means that the jurors are to consider the testimony of every witness who is sworn, and not arbitrarily disregard the testimony of any witness. Fincher v. Harlow, 56 Ga. App. 578, 193 S.E. 452 (1937) (decided under former Code 1933, § 38-1805); Lankford v. Holton, 187 Ga. 94, 200 S.E. 243 (1938), later appeal, 195 Ga. 317, 24 S.E.2d 292 (1943) (decided under former Code 1933, § 38-1805); Stow v. Hargrove, 203 Ga. 735, 48 S.E.2d 454 (1948) (decided under former Code 1933, § 38-1805); Wilson v. Professional Ins. Corp., 151 Ga. App. 712, 261 S.E.2d 450 (1979) (decided under former Code 1933, § 38-1805).

Rejection of part of evidence. — Jury in arriving at a conclusion upon disputed issues of fact may believe part of the testimony of a witness or witnesses, and reject another part. Brown v. O'Neal, 59 Ga. App. 560, 1 S.E.2d 601 (1939) (decided under former Code 1933, § 38-1805); Lawhon v. Henshaw, 63 Ga. App. 683, 11 S.E.2d 846 (1940) (decided under former Code 1933, § 38-1805); Johnson v. State, 69 Ga. App. 663, 26 S.E.2d 482 (1943) (decided under former Code 1933, § 38-1805); Johnson v. Woodward Lumber Co., 76 Ga. App. 152, 45 S.E.2d 294 (1947) (decided under former Code 1933, § 38-1805); Nashville, C. & St. L. Ry. v. Ham, 78 Ga. App. 403, 50

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S.E.2d 831 (1948) (decided under former Code 1933, § 38-1805); Davis v. State, 205 Ga. 248, 53 S.E.2d 454 (1949) (decided under former Code 1933, § 38-1805); Frazier v. State, 152 Ga. App. 743, 264 S.E.2d 35 (1979) (decided under former Code 1933, § 38-1805).

Jury may disbelieve witness. — If a witness is impeached or discredited in some legal manner, a jury, or a trial judge in a nonjury case, may disbelieve the witness altogether. Mustang Transp., Inc. v. W.W. Lowe & Sons, 123 Ga. App. 350, 181 S.E.2d 85 (1971) (decided under former Code 1933, § 38-1805).

Sufficient evidence supported the defendant's convictions of false statements under O.C.G.A. § 16-10-20 and conspiracy to commit theft by shoplifting under O.C.G.A. § 16-4-8, as the co-conspirator testified as to the defendant's request for specific items to be stolen, the special agent testified about the defendant's false statements, and the defendant gave a statement admitting to the conduct; the testimony of the co-conspirator and of the special agent established the elements of the offenses, and the jury, under former O.C.G.A. § 24-9-80, had the right to disbelieve the defendant's testimony to the contrary. Acey v. State, 281 Ga. App. 197, 635 S.E.2d 814 (2006) (decided under former O.C.G.A. § 24-9-80).

Single witness may be believed by jury in preference to any number of witnesses whose testimony may contradict the single witness. Pyles v. State, 3 Ga. App. 29, 59 S.E. 193 (1907) (decided under former Penal Code 1895, § 1028); Jolly v. State, 5 Ga. App. 454, 63 S.E. 520 (1909) (decided under former Penal Code 1895, § 1028); Gordon v. State, 7 Ga. App. 691, 67 S.E. 893 (1910) (decided under former Penal Code 1895, § 1028); Lambert v. State, 11 Ga. App. 764, 76 S.E. 73 (1912); Cook v. State, 13 Ga. App. 308, 79 S.E. 87 (1913) (decided under former Penal Code 1910, § 1054).

Rejection of defendant's explanation. — When defendant's statements are not consistent with and do not explain other direct and circumstantial evidence, defendant's explanation may be rejected by the trier of fact. Green v. State, 155 Ga. App. 795, 272 S.E.2d 761 (1980) (decided under former Code 1933, § 38-1805).

Testimony and circumstances. — Jury is to look to the testimony itself, as well as to the circumstances attending the testimony's introduction, in determining the testimony's probative value. Smith v. State, 124 Ga. 213, 52 S.E. 329 (1905) (decided under former Penal Code 1895, § 1028).

Demeanor of witness. — Trier of facts in determining the worthiness of belief of a witness may take into consideration the witness's appearance, the witness's demeanor, or the witness's manner upon the stand. Mustang Transp., Inc. v. W.W. Lowe & Sons, 123 Ga. App. 350, 181 S.E.2d 85 (1971) (decided under former Code 1933, § 38-1805).

Interest of witness in the result of the suit may always be considered in passing upon the witness's credibility; and, if there are circumstances inconsistent with the truth of the witness's testimony, the jury is not obliged to believe the witness, even though the witness is not contradicted by any other witness. Fincher v. Harlow, 56 Ga. App. 578, 193 S.E. 452 (1937) (decided under former Code 1933, § 38-1805); Lankford v. Holton, 187 Ga. 94, 200 S.E. 243 (1938), later appeal, 195 Ga. 317, 24 S.E.2d 292 (1943) (decided under former Code 1933, § 38-1805); Smith v. Davis, 203 Ga. 175, 45 S.E.2d 609 (1947) (decided under former Code 1933, § 38-1805); Dunagan v. Elder, 154 Ga. App. 728, 270 S.E.2d 18 (1980) (decided under former Code 1933, § 38-1805).

Implications inconsistent with testimony may arise from proven facts; and in still other ways the question of what is the truth may remain as an issue of fact despite uncontradicted evidence in regard thereto. Short & Paulk Supply Co. v. Dykes, 120 Ga. App. 639, 171 S.E.2d 782 (1969) (decided under former Code 1933, § 38-1805).

Allowance of impeachment of witness by prior inconsistent statement which is indirectly material to the issue in the case is not error. Hudson Properties, Inc. v. Citizens & S. Nat'l Bank, 168 Ga. App. 331, 308 S.E.2d 708 (1983) (decided under former O.C.G.A. § 24-9-80).

Statement not admissible as prior inconsistent statement. — Doctor's conversation in the hospital with a patient was not admissible as a prior consistent statement to show that the patient had pointed out a lesion to the doctor as the excluded testimony was not as specific to that issue as the patient claimed; the doctor testified that the patient felt that the doctor had delayed the treatment and that the doctor told the patient that they should concentrate on the patient getting well and that the doctor would discuss it with the patient later in the office. Davis v. Reid, 272 Ga. App. 312, 612 S.E.2d 112 (2005) (decided under former O.C.G.A. § 24-9-80).

Excluded testimony of two witnesses that a patient told the witnesses that the patient had pointed out a bump on the patient's breast to a doctor and that the doctor told the patient not to be concerned about it was not admissible as prior consistent statements as the doctor did not place the patient's veracity at issue; the fact that the doctor's testimony was at odds with the patient's testimony did not open the door to the admission of hearsay evidence and, further, the witnesses were allowed to testify that the patient showed the witnesses the lesion and that after the check-up, the patient was relieved Davis v. Reid, 272 Ga. App. 312, 612 S.E.2d 112 (2005) (decided under former O.C.G.A. § 24-9-80).

Interference with verdict by court. — Only in very extreme cases ought the court to interfere with a verdict turning on the credit to be given to the witnesses testifying on the trial. Wright v. State, 34 Ga. 110 (1864) (decided under former law); Whitten v. State, 47 Ga. 297 (1872) (decided under former law); Crawford v. State, 50 Ga. 249 (1873) (decided under former law); May v. State, 94 Ga. 76, 20 S.E. 251 (1894) (decided under former law).

Credibility as basis for denial of summary judgment. — When, on motion for summary judgment, the credibility of a witness or witnesses upon whose testimony the grant of the summary judgment depends is at issue in the case, neither the trial court nor the Court of Appeals will resolve the matter or is concerned with the credibility but will leave this matter to the jury, rather than grant summary judgment. Raven v. Dodd's Auto Sales & Serv., Inc., 117 Ga. App. 416, 160 S.E.2d 633 (1968) (decided under former Code 1933, § 38-1805).

Former Civil Code 1910, § 5884 (see now O.C.G.A. §§ 24-6-620 and 24-6-621) was not an abridgment of the absolute right of the jury to determine the credibility of witnesses. Brown v. State, 10 Ga. App. 50, 72 S.E. 537 (1911) (decided under former Civil Code 1910, § 5883).

State's repeated questions to the state's witness specifically pertaining to defendant's credibility were improper under former O.C.G.A. § 24-9-80. Griffin v. State, 267 Ga. 586, 481 S.E.2d 223 (1997) (decided under former O.C.G.A. § 24-9-80).

Improper bolstering cured by instruction. — Trial court properly denied defendant's motion for a mistrial pursuant to former O.C.G.A. § 24-9-80 during trial on a charge of child molestation as the trial court took remedial measures to cure testimony which tended to bolster the victim's credibility by giving a general instruction concerning improper bolstering of another witness's credibility. Howell v. State, 278 Ga. App. 634, 629 S.E.2d 398 (2006) (decided under former O.C.G.A. § 24-9-80).

Defendant failed to establish ineffective assistance of counsel with regard to defendant's trial and conviction for child molestation based on trial counsel's failure to object to certain testimony by the investigating officer that commented upon the victim's credibility as, even though trial counsel did not object, the trial court gave a curative instruction that specifically informed the jury to disregard the officer's testimony commenting on the victim's credibility, which was adequate to correct any harm. Williams v. State, 290 Ga. App. 841, 660 S.E.2d 740 (2008) (decided under former O.C.G.A. § 24-9-80).

Improper bolstering was prejudicial error. — It was improper bolstering of an officer's credibility for a special agent to testify that based upon the agent's experience and training, the agent thought that the officer had acted appropriately during a traffic stop of the defen-

General Consideration (Cont'd)

dant; special agent had not witnessed the stop, and agent's testimony was not admissible as an expert opinion on an issue beyond the ken of the average layperson, and because credibility of the officer and of defendant was the pivotal issue and there was no other disinterested testimony and no ameliorative instructions, error was not harmless. Bly v. State, 283 Ga. 453, 660 S.E.2d 713 (2008) (decided under former O.C.G.A. § 24-9-80).

Testimony by a defendant's sister, who was also a second victim's aunt, that the sister knew that the second victim was telling the truth when the second victim told the sister that the defendant wanted to have sex with the second victim should have been objected to as the credibility of the second victim was a matter for the jury's determination under former O.C.G.A. § 24-9-80; because the defendant denied touching the second victim and there was no evidence of the crime other than the second victim's testimony, defense counsel's error was prejudicial, and a conviction for child molestation against the second victim had to be reversed. Walker v. State, 296 Ga. App. 531, 675 S.E.2d 270 (2009) (decided under former O.C.G.A. § 24-9-80).

No improper bolstering of other witness's testimony. — Testimony of the treating psychologist of a child sexual abuse victim that the results of the psychologist's testing were "consistent" with the victim's statements that the victim had been sexually abused was not improper bolstering, and a caseworker who testified was not expressing an opinion about the victim's truthfulness when the caseworker testified that the caseworker's own investigation was closed with a determination of substantiated sexual abuse since the caseworker was testifying as to why the caseworker's investigation was closed and why the caseworker did not continue to follow the family; the caseworker's statement that the victim seemed very truthful and honest violated former O.C.G.A. § 24-9-80, but since the trial court immediately gave a curative instruction, and it was highly probable that this testimony did not contribute to the verdict, this did not require a reversal. Williams v. State, 266 Ga. App. 578, 597 S.E.2d 621 (2004) (decided under former O.C.G.A. § 24-9-80).

Defendant's argument that defense counsel was ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object to the testimony of two of the state's witnesses that bolstered the credibility of the victims in violation of former O.C.G.A. § 24-9-80, failed; one of the allegedly bolstering statements was stricken and the jury was instructed to disregard that statement, one of the statements did not express an opinion about whether the victims were telling the truth because that statement related to the officer's investigation and the implications of a probable cause finding, and the statement by the expert that the expert's findings were consistent with the sexual abuse allegations was a permissible comment on medical or scientific tests. Zepp v. State, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007) (decided under former O.C.G.A. § 24-9-80).

With regard to a defendant's conviction for terroristic threats, an officer's testimony that indicated the victim's statements were consistent with the officer's observations of the victim's injuries and the disarray in a hotel room where the alleged incident occurred did not constitute improper bolstering or a comment on the victim's veracity. Mullins v. State, 298 Ga. App. 368, 680 S.E.2d 474 (2009) (decided under former O.C.G.A. § 24-9-80).

Despite improper bolstering, no prejudice to defendant. — Trial court erred in admitting a child molestation victim's prior consistent statements made to her mother and to an expert on child abuse because the statements did not predate her alleged motive to fabricate her claims against her step-father so that he would be removed from her home; however, the defendant failed to show prejudice from the statements. Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011) (decided under former O.C.G.A. § 24-9-80).

Failure to charge statute is not error in the absence of a timely written request.

Fraser v. State, 52 Ga. App. 92, 182 S.E. 418 (1935) (decided under former Code 1933, § 38-1805); Benton v. State, 185 Ga. 254, 194 S.E. 166 (1937) (decided under former Code 1933, § 38-1805); Brooks v. State, 63 Ga. App. 575, 11 S.E.2d 688 (1940) (decided under former Code 1933, § 38-1805); Georgia Power Co. v. Burger, 63 Ga. App. 784, 11 S.E.2d 834 (1940) (decided under former Code 1933, § 38-1805); Tiller v. State, 196 Ga. 508, 26 S.E.2d 883 (1943) (decided under former Code 1933, § 38-1805); Grier v. State, 196 Ga. 515, 26 S.E.2d 889 (1943) (decided under former Code 1933, § 38-1805); Hodnett v. State, 197 Ga. 730, 30 S.E.2d 606 (1944) (decided under former Code 1933, § 38-1805); Shewmade v. State, 71 Ga. App. 349, 30 S.E.2d 816 (1944) (decided under former Code 1933, § 38-1805); Guy v. State, 72 Ga. App. 395, 33 S.E.2d 853 (1945) (decided under former Code 1933, § 38-1805); Summerour v. State, 85 Ga. App. 94, 68 S.E.2d 158 (1951) (decided under former Code 1933, § 38-1805); Wheeler v. State, 220 Ga. 535, 140 S.E.2d 258 (1965) (decided under former Code 1933, § 38-1805); Tanner v. State, 228 Ga. 829, 188 S.E.2d 512 (1972) (decided under former Code 1933, § 38-1805); Bentley v. State, 131 Ga. App. 425, 205 S.E.2d 904 (1974) (decided under former Code 1933, § 38-1805).

Charge substantially in language of statute, in the absence of any request for a more specific charge on the subject, was sufficient. Central of Ga. Ry. v. McGuire, 10 Ga. App. 483, 73 S.E. 702 (1912) (decided under former Civil Code 1910, § 5883). Chandler v. Alabama Power Co., 104 Ga. App. 521, 122 S.E.2d 317 (1961), rev'd on other grounds, 217 Ga. 550, 123 S.E.2d 767 (1962) (decided under former Code 1933, § 38-1805).

Instructions proper in the following cases: Hall v. Burpee, 176 Ga. 270, 168 S.E. 39 (1933); Coates v. State, 192 Ga. 130, 15 S.E.2d 240 (1941); Crosby v. State, 92 Ga. App. 335, 88 S.E.2d 523 (1955); Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977) (decided under former Code 1933, § 38-1805).

Trial court's instruction that "you must not base your verdict on inferences or speculation or anything that is not supported by the evidence" was a correct statement of the law and was not plain error on the basis of a claim that such instruction interfered with the jury's function as sole arbiter of the credibility of witnesses. Caldwell v. State, 247 Ga. App. 191, 542 S.E.2d 564 (2000) (decided under former O.C.G.A. § 24-9-80).

Use of jury instruction that the jury could consider the level of certainty shown by a witness about identification of the defendant is error. — Trial court erred in charging the jury that one of the factors to be considered when evaluating the reliability of an eyewitness identification is "the level of certainty shown by the witness about her identification." Brodes v. State, 279 Ga. 435, 614 S.E.2d 766 (2005) (decided under former O.C.G.A. § 24-9-80); Brown v. State, 277 Ga. App. 396, 626 S.E.2d 596 (2006) (decided under former O.C.G.A. § 24-9-80).

Civil Cases

Credibility when issue is attorney's fees. — When plaintiff, a former client of defendant attorney, appealed the grant of summary judgment to defendant in defendant's suit over unpaid attorney fees, and there was a dispute that defendant and plaintiff had agreed that defendant was to spend as much time as reasonable to produce a second brief, that there was no cap on the fee, and that $5,000 was reasonable, the matter of the parties' credibility was peculiarly for the jury. Brygider v. Atkinson, 192 Ga. App. 424, 385 S.E.2d 95 (1989) (decided under former O.C.G.A. § 24-9-80).

Value of condemned property. — When a lessee of condemned property testified as to the lessee's business' diminished value, based on loss of customers and other factors, as a result of relocating due to the condemnation, whether there was adequate supporting data for one's conclusion was a jury question. Fulton County v. Dangerfield, 195 Ga. App. 208, 393 S.E.2d 285, rev'd on other grounds, 260 Ga. 665, 398 S.E.2d 14 (1990) (decided under former O.C.G.A. § 24-9-80).

Testimony in a lease agreement. — Verdict by jury for past rent owed to a landlord by a tenant who defaulted in the tenant's monthly lease payments, and as

Civil Cases (Cont'd)

to the jury's finding that the tenant had failed to exercise an option to purchase in the lease, was supported by sufficient evidence since there was a showing by the landlord of a lease agreement and supporting testimony by the landlord; an alternate, allegedly forged lease submitted by the tenant, together with the tenant's testimony, were all issues that went to the weight and credibility and were properly resolved by the jury. Burnett v. Reeves, 258 Ga. App. 846, 575 S.E.2d 747 (2002) (decided under former O.C.G.A. § 24-9-80).

Expert witness. — In an action to recover for disability, the jurors were not bound to credit an expert medical opinion since the rule prescribing the arbitrary rejection of testimony applies, by definition, to direct and positive testimony, as distinguished from circumstantial, opinion, or actually negative testimony. Wilson v. Professional Ins. Corp., 151 Ga. App. 712, 261 S.E.2d 450 (1979) (decided under former Code 1933, § 38-1805).

Judge's favorable comments in divorce case about witness required new trial. — Judgment in a divorce case was reversed and a new trial was ordered after the trial court, in comments made to the jury following the testimony of a witness, stated the court's high opinion of the witness and bolstered the witness's credibility, influencing an issue that was solely for the jury to determine. Hubbard v. Hubbard, 277 Ga. 729, 594 S.E.2d 653 (2004) (decided under former O.C.G.A. § 24-9-80).

Verdict precluded by jury's insufficient opportunity to determine credibility of witness testimony. — Verdict against an accountant was precluded by judicial admissions by an investor's cousin that the cousin alone took the investor's money because there were no admissions in pleadings or in response to requests for admissions from the cousin, only the cousin's testimony at trial; pursuant to former O.C.G.A. § 24-9-80, any witness's testimony was subject to a determination of credibility by the jury. McIntee v. Deramus, 313 Ga. App. 653, 722 S.E.2d 377 (2012) (decided under former O.C.G.A. § 24-9-80).

Criminal Cases

Credibility of victim in rape prosecution. — In a rape trial, the trial court properly sustained an objection to a question asked of the victim's examining physician which called for a comment on the credibility of the victim. Lamb v. State, 196 Ga. App. 665, 396 S.E.2d 497 (1990) (decided under former O.C.G.A. § 24-9-80).

Testimony of rape victim. — Trial court properly denied the defendant's motion for a directed verdict of acquittal, and the defendant's rape conviction was upheld on appeal, given the victim's testimony at trial that the defendant's sexual organ penetrated hers after telling the defendant to stop was sufficient in and of itself, and no evidence was presented that directly contradicted this statement; hence, the jury had the right to accept the victim's testimony depicting non-consensual, forcible intercourse, as satisfying the requirements of O.C.G.A. § 16-6-1. Scott v. State, 281 Ga. App. 106, 635 S.E.2d 582 (2006) (decided under former O.C.G.A. § 24-9-80).

Witnesses' credibility is for jury. — Evidence of defendant's conduct in confronting victim, that defendant stood over the victim just after the victim had been shot and announcing the victim had been warned about what would happen, and that defendant calmly walked away after that was sufficient to find defendant guilty of murder and aggravated assault even though a codefendant actually shot the victim even though defendant claimed that certain witness's testimony was unreliable since witness's credibility was an issue for the jury's determination. Dillingham v. State, 275 Ga. 665, 571 S.E.2d 777 (2002) (decided under former O.C.G.A. § 24-9-80).

Evidence was sufficient to support the defendant's conviction for forgery because whatever purported inconsistencies could have existed in a witness's testimony were for the finder of fact to weigh and pass upon, and the trial court found that although the witness was not the most credible of witnesses, the witness's testimony was an inculpatory statement against the witness's penal interests, and there was no reason not to believe the testimony; the

trial court considered the validity of the witness's testimony in light of the impeaching evidence, and it was not within the purview of the court of appeals to upset that judgment. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871 (2010) (decided under former O.C.G.A. § 24-9-80).

Misdemeanor theft conviction. — Evidence was legally sufficient to support defendant's convictions for misdemeanor theft in violation of O.C.G.A. § 16-8-2 and for practicing dentistry without a license in violation of an earlier version of O.C.G.A. § 43-11-50, after defendant held oneself out as a dentist to numerous individuals, obtained loans for business ventures involving a dentistry practice, obtained services for the dentist practice which the dentist did not pay for, and performed services on patients; the jury resolved the credibility and weight of the evidence issues pursuant to former O.C.G.A. § 24-9-80. McMillan v. State, 266 Ga. App. 729, 598 S.E.2d 17 (2004), overruled in part by Gidwell v. State, 279 Ga. App. 114, 630 S.E.2d 621 (2006) (decided under former O.C.G.A. § 24-9-80).

Criminal convictions supported. — On appeal from the defendant's aggravated assault, possession of a firearm during the commission of a crime, and first-degree criminal damage to property convictions, the court held that the testimony provided by two of the victims identifying the defendant as one of the perpetrators was sufficient to uphold the conviction as: (1) the testimony of a single witness was generally sufficient to establish a fact; and (2) under former O.C.G.A. § 24-9-80, the credibility of a witness was a matter to be determined by the jury under proper instructions from the court. Reid v. State, 281 Ga. App. 640, 637 S.E.2d 62 (2006) (decided under former O.C.G.A. § 24-9-80).

Credibility of witnesses at a probation revocation hearing is for the court. Caldwell v. State, 166 Ga. App. 657, 305 S.E.2d 407 (1983) (decided under former O.C.G.A. § 24-9-80).

When self-defense is claimed. — Consideration of the uncorroborated testimony of the victim, non-recovery of the weapon used in an assault, and the defendant's claim of self-defense go only to the weight and credibility of the witnesses' testimony, not to the sufficiency of the evidence, and are solely within the domain of the jury. Landers v. State, 236 Ga. App. 368, 511 S.E.2d 889 (1999) (decided under former O.C.G.A. § 24-9-80).

Self-defense a jury question. — Witness credibility is to be determined by the jury, as is the question of self-defense when there is conflicting evidence on the issue. Holmes v. State, 273 Ga. 644, 543 S.E.2d 688 (2001) (decided under former O.C.G.A. § 24-9-80).

Instruction in criminal case. — Charge to the jury on the question of credibility of witnesses is a correct abstract principle of law applicable even in a criminal case. Blackston v. State, 209 Ga. 160, 71 S.E.2d 221 (1952) (decided under former Code 1933 § 38-1805).

Jury can disregard confession of another if evidence shows defendant's guilt. — When the evidence was sufficient to find the defendant guilty of armed robbery beyond a reasonable doubt, the confession of the defendant's brother to the commission of the crime was properly disregarded by the jury in the jury's capacity as fact-finder. Burkes v. State, 177 Ga. App. 90, 338 S.E.2d 522 (1985) (decided under former O.C.G.A. § 24-9-80).

Police officer's testimony about commission of offense. — Police officer's testimony that the officer observed the defendant run a stop sign that was "clearly visible" to oncoming traffic was sufficient to authorize the trial court's finding that the defendant was guilty, beyond a reasonable doubt, of disregarding a stop sign. Evans v. State, 235 Ga. App. 877, 510 S.E.2d 619 (1999) (decided under former O.C.G.A. § 24-9-80).

Testimony of officer regarding belief of victim. — Permitting the state to introduce a police officer's testimony bolstering a child molestation victim's credibility was reversible error since the truthfulness or credibility of the victim was not beyond the ken of the jurors. Guest v. State, 201 Ga. App. 506, 411 S.E.2d 364 (1991) (decided under former O.C.G.A. § 24-9-80).

Trial court erred in allowing an officer to testify regarding whether the officer be-

Criminal Cases (Cont'd)

lieved or disbelieved what the victim said during an interview as the truthfulness of the victim's testimony was a question for the jury; since there was no physical evidence presented, the victim's testimony was the only evidence against defendant, and any bolstering of that testimony was harmful to defendant. Orr v. State, 262 Ga. App. 125, 584 S.E.2d 720 (2003) (decided under former O.C.G.A. § 24-9-80).

Defendant failed to establish ineffective assistance of counsel under Ga. Const. 1983, Art. I, Sec. I, Para. XIV due to defense counsel's failure to request a mistrial when a police officer testified that the officer believed that the victim in the child molestation case was telling the truth; while the witness was prohibited under former O.C.G.A. § 24-9-80 from bolstering the victim's testimony, it was not clear that the trial court would have granted a mistrial if the defendant requested one as the defense counsel objected to the statement and the trial court issued a curative instruction. Goldstein v. State, 283 Ga. App. 1, 640 S.E.2d 599 (2006), cert. denied, No. S07C0623, 2007 Ga. LEXIS 338 (Ga. 2007) (decided under former O.C.G.A. § 24-9-80).

In rape prosecution, defendant cannot ask victim's mother whether she believed daughter's statements about the offense or could tell her daughter was lying from her body language. Nichols v. State, 221 Ga. App. 600, 473 S.E.2d 491 (1996) (decided under former O.C.G.A. § 24-9-80).

In a prosecution for statutory rape, the trial court properly prohibited the defendant from presenting evidence that the victim's family and friends did not believe her statements about the sexual assault by the defendant since credibility of a witness is a matter solely within the province of the jury. Patterson v. State, 233 Ga. App. 776, 505 S.E.2d 518 (1998) (decided under former O.C.G.A. § 24-9-80).

Expert witness. — Former O.C.G.A. § 24-9-80 was not violated by the testimony of a pediatrician, who gave an opinion that the results of an examination of a child victim were consistent with the victim's claim of child molestation. Harris v. State, 279 Ga. App. 570, 631 S.E.2d 772 (2006) (decided under former O.C.G.A. § 24-9-80).

Trial court did not err in denying the defendant's motion in limine to exclude a nurse's testimony, stating that the victim's normal physical examination was consistent with claims of molestation, as the nurse simply testified that the victim's physical examination results were consistent with the allegations, and as such was a permissible expression of the expert's opinion. Noe v. State, 287 Ga. App. 728, 652 S.E.2d 620 (2007) (decided under former O.C.G.A. § 24-9-80).

Value of stolen property for purposes of restitution. — When an owner of stolen property is attempting to establish value for purposes of restitution by the thief, if there is any doubt as to whether the witness has shown a sufficient basis or foundation for the witness's opinion as to value, there are particularly sound reasons of justice why the evidence ought to be admitted, and the evidence's weight and credibility, and indeed the question of whether the witness has given sufficient foundation, should be left to the trier of fact. Maddox v. State, 157 Ga. App. 696, 278 S.E.2d 480 (1981) (decided under former O.C.G.A. § 24-9-80).

Impeachment of witness by conviction. — Trial court did not abuse the court's discretion in denying the defendant's motion for mistrial even though the state's question to the defendant's parent was an improper attempt to impeach or destroy the credibility of the parent by showing that the parent was incarcerated in jail because the parent was not crucial to the defense as the parent was not an eyewitness to the crime and could not bolster any self-defense claim since the parent was not present when the crime occurred; the trial court instructed the jurors to disregard the question and struck the question from the consideration of the jury. Cannon v. State, 288 Ga. 225, 702 S.E.2d 845 (2010) (decided under former O.C.G.A. § 24-9-80).

Children

Testimony from child molestation victim. — Although defendant testified that he had not molested the victim, the

victim, his 15-year-old stepdaughter, testified that defendant had been molesting her since she was three years old, and other evidence indicated that the victim told several witnesses it was her half-brother who impregnated her, such conflicts in the evidence only raised issues of credibility, which were for the jury to decide, and the jury's verdict finding defendant guilty of two counts of molestation of the victim was upheld since sufficient evidence supported the convictions. Dowd v. State, 261 Ga. App. 306, 582 S.E.2d 235 (2003) (decided under former O.C.G.A. § 24-9-80).

Credibility of children. — Although after a preliminary examination the court may hold a child competent to testify, the credibility of the witness is for the jury; and in determining whether or not the jury will credit the testimony of such witness, the age of the witness and the witness's understanding or lack of understanding as to the nature of an oath, as developed on the examination before the jury, are matters for the consideration of the jury. Young v. State, 122 Ga. 725, 50 S.E. 996 (1905) (decided under former Penal Code 1895, § 1028); Frasier v. State, 143 Ga. 322, 85 S.E. 124 (1915) (decided under former Penal Code 1910, § 1054).

In a prosecution for child molestation and aggravated rape, the trial court committed reversible error in allowing the victim's grandmother to testify that she had never had "any problems with the victim's telling stories." Lagana v. State, 219 Ga. App. 220, 464 S.E.2d 625 (1995) (decided under former O.C.G.A. § 24-9-80).

In a prosecution for child molestation, the trial court did not err in refusing defendant's requested instruction as follows: "The fact that one or more of the witnesses in this case is a child should not ... bring any more weight to her or their testimony." Patterson v. State, 222 Ga. App. 166, 473 S.E.2d 255 (1996) (decided under former O.C.G.A. § 24-9-80).

Testimony of an expert regarding the expert's conclusion that child victims' allegations of sexual abuse were the result of projection and payback was properly excluded. Duncan v. State, 232 Ga. App. 157, 500 S.E.2d 603 (1998) (decided under former O.C.G.A. § 24-9-80).

Trial court erred by allowing a state's expert to testify, over the defendant's objection, that the expert did not believe the victim made up the allegations against the defendant, as such was an ultimate issue of fact, and nothing suggested that the determination of the victim's credibility was beyond the ken of the jurors; thus, to the extent that Smith v. State, 257 Ga. App. 88, 570 SE2d 400 (2002), allowed an expert to give an opinion on a witness's credibility or to express an opinion on the ultimate issue of defendant's guilt to rehabilitate the credibility of a witness whose veracity was attacked, it was overruled. Patterson v. State, 278 Ga. App. 168, 628 S.E.2d 618 (2006) (decided under former O.C.G.A. § 24-9-80).

Trial court did not abuse the court's discretion in admitting a videotaped forensic interview of a child molestation victim because the victim testified at trial and was subject to cross-examination about the circumstances surrounding the videotaped interview and statements the victim made during the interview; accordingly, it was the jury's responsibility, as the trier of fact, to resolve any inconsistencies in the victim's statements and judge the victim's credibility. Lynn v. State, 300 Ga. App. 170, 684 S.E.2d 325 (2009) (decided under former O.C.G.A. § 24-9-80).

Expert witness on ability of child to distinguish truth. — An expert witness may testify generally about the ability of children of a certain age to distinguish truth from reality. The witness may also express an opinion as to whether medical or other objective evidence in the case is consistent with the victim's story. However, an expert witness may not put the expert's stamp of believability on the victim's story. State v. Oliver, 188 Ga. App. 47, 372 S.E.2d 256 (1988); Roberson v. State, 214 Ga. App. 288, 447 S.E.2d 640 (1994); Buice v. State, 239 Ga. App. 52, 520 S.E.2d 258 (1999), aff'd, 528 S.E.2d 788 (2000); Alford v. State, 243 Ga. App. 212, 534 S.E.2d 81 (2000) (decided under former O.C.G.A. § 24-9-80).

Credibility of recanting child witness. — Witnesses testified pursuant to

Children (Cont'd)

former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) that the defendant's stepchild, then 12, told the witnesses about being repeatedly raped and molested by the defendant. That the stepchild recanted these statements at trial did not render the hearsay inadmissible under former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), and as the stepchild's credibility was for the jury to decide, the evidence was sufficient to support the defendant's convictions for rape, incest, and child molestation. Harvey v. State, 295 Ga. App. 458, 671 S.E.2d 924 (2009) (decided under former O.C.G.A. § 24-9-80).

Child's inconsistent testimony. — Fact that a child's testimony may have been inconsistent does not render child incompetent to testify, but goes to the child's credibility as a witness. Hayes v. State, 152 Ga. App. 858, 264 S.E.2d 307 (1980) (decided under former Code 1933, § 38-1805).

There was no abuse of discretion in the trial court's decision to allow a twenty-minute conference between the prosecutor and the defendant's eight-year-old son, especially given the tender age of the victim, the nature of the charges, and the child's admitted fear of the defendant. To the extent that the witness altered the witness's testimony after the recess, the credibility of the witness's testimony was for the jury to determine. Carter v. State, 195 Ga. App. 489, 393 S.E.2d 746 (1990) (decided under former O.C.G.A. § 24-9-80).

Raising issue of victim's veracity. — Because it was necessary for trial counsel, as part of the trial strategy, to raise the issue of the minor sexual abuse victim's veracity, the trial counsel could not subsequently object to the victim's prior consistent statement, which was entered to verify the victim's testimony. Mealor v. State, 266 Ga. App. 274, 596 S.E.2d 632 (2004) (decided under former O.C.G.A. § 24-9-80).

No improper bolstering of other witness's testimony. — In defendant's appeal from a verdict convicting defendant of voluntary manslaughter, the court rejected defendant's claim that a detective's testimony that the detective received no statements inconsistent with the testimony of other trial witnesses did not improperly bolster the opinion of another witness in violation of former O.C.G.A. § 24-9-80. Lester v. State, 262 Ga. App. 707, 586 S.E.2d 408 (2003) (decided under former O.C.G.A. § 24-9-80).

Directed verdict of acquittal unwarranted as: (1) the credibility of the child victim and any the conflicts in the trial testimony were matters solely within the province of the jury to decide; (2) physical findings were not required to corroborate the charges of child molestation, aggravated sexual battery, and aggravated child molestation; and (3) the victim's testimony alone was sufficient to authorize the jury to find the defendant guilty of the crimes charged under the standard of Jackson v. Virginia, 443 U.S. 307 (1979). Hutchinson v. State, 287 Ga. App. 415, 651 S.E.2d 523 (2007) (decided under former O.C.G.A. § 24-9-80).

Appeals

Test on appeal. — On appeal, the appellate tribunal does not determine the credibility of witnesses or the preponderance of the evidence, but rather utilizes the "any evidence test," which is not available to the trier of facts in deciding disputed factual issues. Crawley v. Marta, 147 Ga. App. 293, 248 S.E.2d 555 (1978) (decided under former Code 1933, § 38-1805).

Acceptance by appellate court. — Unless it appears from the testimony itself that the fact testified to is a physical impossibility, contrary to known physical laws, or is incredible, impossible, or inherently improbable, the appellate court must accept its veracity as the jury has done. Bell v. State, 52 Ga. App. 249, 183 S.E. 93 (1935); Hayslip v. Liberty Mut. Ins. Co., 72 Ga. App. 509, 34 S.E.2d 319 (1945) (decided under former Code 1933, § 38-1805).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 283, 285, 479 et seq.

ALR. — Cross-examination for purpose of showing bias or hostility on part of witness, 74 ALR 1157.

Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses, 111 ALR 742.

Admissibility, in support of general credibility of an accomplice-witness who has not been impeached, of evidence from nonaccomplice witness not otherwise relevant or of probative value as against defendant, 138 ALR 1266.

Cross-examination of witness in criminal case as to whether, and with whom, he has discussed facts of case, 35 ALR2d 1045.

Preventing or limiting cross-examination of prosecution's witness as to his motive for testifying, 62 ALR2d 610.

Credibility of witness giving uncontradicted testimony as matter for court or jury, 62 ALR2d 1191.

Propriety, and prejudicial effect of, comments by counsel vouching for credibility of witness, 81 ALR2d 1240.

Propriety of specific jury instructions as to credibility of accomplices, 4 ALR3d 351.

Necessity and admissibility of expert testimony as to credibility of witness, 20 ALR3d 684.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Cross-examination of witness as to his mental state or condition, to impeach competency or credibility, 44 ALR3d 1203.

Propriety and prejudicial effect of instructions on credibility of alibi witnesses, 72 ALR3d 617.

Propriety of consideration of credibility of witness in determining probable cause at state preliminary hearing, 84 ALR3d 811.

Instructions to jury as to credibility of child's testimony in criminal case, 32 ALR4th 1196.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witness—state cases, 45 ALR4th 602.

Propriety, and prejudicial effect, of comments by counsel vouching for credibility of witness—federal cases, 78 ALR Fed. 23.

24-6-621. Impeachment by contradiction.

A witness may be impeached by disproving the facts testified to by the witness. (Code 1981, § 24-6-621, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Analysis

General Consideration
Instructions

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3871, former Code 1882, § 3871, former Civil Code 1895, § 5291, former Penal Code 1895, § 1025, former Civil Code 1910, § 5880, former Penal Code 1910, § 1051, former Code 1933, § 38-1802, and former O.C.G.A. § 24-9-82 are included in the annotations for this Code section.

In general. — Witness may be impeached by proving that the statements made by the witness in the witness's testimony are not the truth. Middle Ga. & A. Ry. v. Barnett, 104 Ga. 582, 30 S.E. 771 (1898) (decided under former Civil Code 1895, § 5291).

Criminal defendant is subject to impeachment, and defendant may be im-

General Consideration (Cont'd)

peached by disproving the facts to which defendant testified. Laney v. State, 159 Ga. App. 609, 284 S.E.2d 114 (1981) (decided under former Code 1933, § 38-1802).

Witness can be impeached as to matters relevant to the witnesses testimony and to the case, and by disproving facts testified to by the witness. Morris v. State Farm Mut. Auto. Ins. Co., 203 Ga. App. 839, 418 S.E.2d 119 (1992) (decided under former O.C.G.A. § 24-9-82).

Former statute applied whenever there was a conflict in testimony. Southern Ry. v. O'Bryan, 119 Ga. 147, 45 S.E. 1000 (1903) (decided under former Civil Code 1895, § 5291); Yaryan Rosin & Turpentine Co. v. Haskins, 29 Ga. App. 753, 116 S.E. 913 (1923) (decided under former Civil Code 1910, § 5880); Wilcox v. Wilcox, 31 Ga. App. 486, 119 S.E. 445 (1923) (decided under former Civil Code 1910, § 5880); Swift & Co. v. Lawson, 95 Ga. App. 35, 97 S.E.2d 168 (1957) (decided under former Code 1933, § 38-1802).

Impeachment by unconstitutionally obtained evidence. — Even evidence which violates constitutional standards of due process, such as unlawfully obtained confessions, may be admitted for impeachment purposes. Ensley v. Jordan, 244 Ga. 435, 260 S.E.2d 480 (1979) (decided under former Code 1933, § 38-1802).

No foundation is required for impeachment. Deaton v. Swanson, 196 Ga. 833, 28 S.E.2d 126 (1943) (decided under former Code 1933, § 38-1802); Swift & Co. v. Lawson, 95 Ga. App. 35, 97 S.E.2d 168 (1957) (decided under former Code 1933, § 38-1802); Cartin v. Boles, 155 Ga. App. 248, 270 S.E.2d 799 (1980) (decided under former Code 1933, § 38-1802).

Challenge of witness on cross-examination is not required before the witness's testimony could be impeached by another witness. Martin v. State, 205 Ga. App. 591, 422 S.E.2d 876, cert. denied, 205 Ga. App. 900, 422 S.E.2d 876 (1992) (decided under former O.C.G.A. § 24-9-82).

Immaterial matter. — Witness is not to be discredited because of a discrepancy as to a wholly immaterial matter. Daniels v. Luton, 40 Ga. App. 741, 151 S.E. 659 (1930); Gilbert v. State, 159 Ga. App. 326, 283 S.E.2d 361 (1981) (decided under former Code 1933, § 38-1802).

While a witness may be impeached on a collateral issue which is indirectly material to the issue in the case, a witness may not be impeached because of a discrepancy as to a wholly immaterial matter. Strickland v. State, 166 Ga. App. 702, 305 S.E.2d 434 (1983) (decided under former O.C.G.A. § 24-9-82).

Witness may not be impeached because of a discrepancy as to a wholly immaterial matter. Thomas v. State, 168 Ga. App. 587, 309 S.E.2d 881 (1983) (decided under former O.C.G.A. § 24-9-82).

Although a witness may be impeached by disproving the facts testified to by the witness, a witness may not be impeached based upon a discrepancy relating to a wholly immaterial matter. Brown v. State, 260 Ga. 153, 391 S.E.2d 108 (1990).

Testimony that was properly excluded as irrelevant to the issues of the case was not admissible for impeachment purposes. Goss v. Total Chipping, Inc., 220 Ga. App. 643, 469 S.E.2d 855 (1996) (decided under former O.C.G.A. § 24-9-82).

In a prosecution for rape, kidnapping, and sodomy, the defendant did not receive ineffective assistance of trial counsel merely because counsel failed to impeach the victim's credibility with evidence concerning a 1996 drug arrest as: (1) the evidence was irrelevant to the circumstances surrounding the defendant's attack on the victim; and (2) the victim never opened the door to an issue of good character. Pierce v. State, 281 Ga. App. 821, 637 S.E.2d 467 (2006) (decided under former O.C.G.A. § 24-9-82).

Evidence of prior crimes or bad acts can be admitted when such evidence is necessary and relevant to impeach defendant's specific testimony. Lucas v. State, 215 Ga. App. 293, 450 S.E.2d 313 (1994) (decided under former O.C.G.A. § 24-9-82).

Certified record of a prior conviction allegedly of a witness for obstruction and giving false information was properly excluded because: (1) the witness testified that the signature on the certified record

was not the witness's signature; (2) the witness opined that the person named in the record of conviction was the witness's cousin, who had the same name, and explained that the defendant and defendant's cousin were only a few months apart and that the cousin also had a criminal record; (3) the witness testified unequivocally that defendant was never indicted, tried, convicted, or sentenced for the offenses charged in the certified record; and (4) defendant offered no further proof that the person named in the exhibit was in fact the witness. Payne v. State, 273 Ga. App. 483, 615 S.E.2d 564 (2005) (decided under former O.C.G.A. § 24-9-82).

It was proper to admit evidence of driving under the influence and suspended license convictions to impeach the defendant, who had denied having a Georgia driver's license or ever having been convicted of driving with a suspended license. Walsh v. State, 283 Ga. App. 817, 642 S.E.2d 879 (2007) (decided under former O.C.G.A. § 24-9-82).

Trial court did not err by allowing the state to place the defendant's character in issue by introducing evidence of defendant's prior arrest for possession of marijuana through the police sergeant because the defendant opened the door to the sergeant's testimony; since the defendant testified that the defendant's prior marijuana charge only involved "a couple of joints behind the seat" of which the defendant was unaware and that the charge had been dismissed because the defendant was not guilty, it was not error to allow the state to attempt to impeach the defendant through the rebuttal testimony of the sergeant. Martinez v. State, 303 Ga. App. 166, 692 S.E.2d 766 (2010) (decided under former O.C.G.A. § 24-9-82).

While a criminal defendant was not subject to impeachment by proof of general bad character or prior convictions, when defense counsel opened the door to asking about the defendant's being in trouble before, the prosecutor could then impeach the defendant with other convictions that the defendant neglected to mention. Scruggs v. State, 309 Ga. App. 569, 711 S.E.2d 86 (2011) (decided under former O.C.G.A. § 24-9-82).

Testimony that facts are true. — State may introduce testimony to the effect that the facts stated by the state's witness, whose character is under attack, are true, even though such corroboration involves information received from the witness. Stevenson v. State, 69 Ga. 68 (1882) (decided under former Code 1873, § 3871).

Disproving facts only. — When police officer's purported statement to plaintiff's mother that the officer had found plaintiff not to be at fault would have, if at all, served only to rebut that portion of the officer's own testimony wherein the officer tacitly opined the accident was due to plaintiff's fault; such a purported statement did not rebut a fact to which the officer testified and was inadmissible. Campbell v. Cozad, 207 Ga. App. 175, 427 S.E.2d 515 (1993) (decided under former O.C.G.A. § 24-9-82).

Trial court properly allowed a prosecutor to question defendant about any prior positive drug screens as the purpose was to impeach defendant's unsolicited assertion that the drug screen that was the basis of defendant's prosecution was defendant's only positive drug screen; accordingly, although character and conduct in other transactions is generally irrelevant unless defendant first puts defendant's character in issue, pursuant to former O.C.G.A. §§ 24-2-2 and 24-9-20(b) (see now O.C.G.A. §§ 24-4-404, 24-4-405, 24-4-413, and 24-5-506), evidence may be used for impeachment purposes in order to disprove facts testified to by defendant pursuant to former O.C.G.A. § 24-9-82. Lockaby v. State, 265 Ga. App. 527, 594 S.E.2d 729 (2004) (decided under former O.C.G.A. § 24-9-82).

Trial court did not err by not disclosing a disciplinary report in a police officer's personnel file as: (1) no attempt was made to impeach the officer by disproving the facts testified to by the officer under former O.C.G.A. § 24-9-82; (2) there was no showing that any of the documents disallowed contained any contradictory statements previously made by the officer as to matters relevant to the officer's testimony and the case under former O.C.G.A. § 24-9-83 (see now O.C.G.A. §§ 24-6-608 and 24-6-613); (3) there was no contention

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that the officer had been convicted of a crime involving moral turpitude; and (4) the evidence was, at best, related solely to specific bad acts and not to the general bad character of the officer, which was not admissible as impeachment material under former .C.G.A. § 24-9-84 (see now O.C.G.A. § 24-6-608). Lopez v. State, 267 Ga. App. 178, 598 S.E.2d 898 (2004) (decided under former O.C.G.A. § 24-9-82).

In a criminal case, the trial court properly excluded impeachment testimony about the victim's relationship with the victim's employees; the evidence did not disprove facts to which the victim testified, but was evidence of prior specific acts or bad character. Jones v. State, 283 Ga. App. 631, 642 S.E.2d 331 (2007) (decided under former O.C.G.A. § 24-9-82).

Photographs. — In a prosecution for child molestation, photographs showing defendant naked in defendant's home were admissible to impeach the defendant's testimony that the defendant never walked around the house nude. Kelley v. State, 233 Ga. App. 244, 503 S.E.2d 881 (1998) (decided under former O.C.G.A. § 24-9-82).

Alibi witnesses. — State was obligated to respond to defendants' notification of their intention to rely upon alibi as a defense; neither the state's general witness list nor the state's entitlement to rebut or impeach a witness's testimony with conflicting testimony or statements under former O.C.G.A. §§ 24-9-82 and 24-9-83 (see now O.C.G.A. §§ 24-6-608, 24-6-613, and 24-6-621) was a substitute for compliance with O.C.G.A. § 17-16-5(b). Hayes v. State, 249 Ga. App. 857, 549 S.E.2d 813 (2001) (decided under former O.C.G.A. § 24-9-82).

Bias of witness. — Proffered testimony of a witness for the propounder of a will, that bad feeling existed between the testator and one of the witnesses for the caveators, who testified that when the witness saw the testator on the day the will was executed the testator did not recognize the witness and did not speak to the witness, and who denied that the testator was unfriendly towards the witness because the witness had testified against the testator in a case in which the testator was a party, was admissible to explain why the testator did not speak to the caveators' witness, and to impeach the witness as to the feeling existing between the witness and the testator. Orr v. Blalock, 195 Ga. 863, 25 S.E.2d 668 (1943) (decided under former Code 1933, § 38-1802).

Character evidence. — Witness who is not impeached otherwise than by disproving the truth of the witness's evidence cannot be supported by proof of the witness's general good character. Miller v. Western & Atl. R.R., 93 Ga. 480, 21 S.E. 52 (1893) (decided under former Code 1882, § 3871). Bell v. State, 100 Ga. 78, 27 S.E. 669 (1896) (decided under former Penal Code 1895, § 1025); Surles v. State, 148 Ga. 537, 97 S.E. 538 (1918) (decided under former Code 1933, § 38-1802).

Trial court did not err by allowing the state to cross-examine the defendant's biological daughter about having previously worked as a stripper and having abused drugs because the evidence was offered by the state in rebuttal to the daughter's testimony after the defendant intentionally elicited the testimony as to defendant's and the daughter's own good character; since the only conceivable purpose of the questions defense counsel asked the daughter was to elicit testimony concerning the character of the defendant and the daughter, the trial court did not err when it held that the state could introduce rebuttal evidence on the same subject. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010) (decided under former O.C.G.A. § 24-9-82).

Effect of proof of own declaration. — Witness impeached by proof of contradictory statements cannot be sustained by proof of witness's own declarations, consistent with witness's evidence at the trial, made at other times and places, whether prior or subsequent to the time of making the contradictory statements imputed to the witness. Fussell v. State, 93 Ga. 450, 21 S.E. 97 (1893) (decided under former Code 1882, § 3871).

Person charged with crime remaining silent. — Plaintiff having testified that a third person stated in the hearing of defendant that the defendant commit-

ted a crime, to which the defendant made no response, and this third person when examined in behalf of defendant having denied making the statement, it was error not to allow the plaintiff, in reply, to prove by another witness that the defendant was present and heard the defendant's witness make the statement at the time and place mentioned by the plaintiff in plaintiff's testimony. Bray v. Latham, 81 Ga. 640, 8 S.E. 64 (1888) (decided under former Code 1882, § 3871).

Mere commission, arrest, or confinement for crime insufficient to impeach. — Witness may be impeached by proof of a crime involving moral turpitude, but not by showing that the witness has committed, been arrested for, confined for, or even indicted for such an offense. Strickland v. State, 166 Ga. App. 702, 305 S.E.2d 434 (1983) (decided under former O.C.G.A. § 24-9-82).

Showing of mere accusation of offense. — Prosecutor's cross-examination of defendant about recently having been charged with pointing a pistol at someone was an improper line of questioning, although defendant had denied using a gun during the previous year; competent evidence disproving that testimony would have been proper impeachment but merely showing an accusation of the misdemeanor offense was insufficient for that purpose. Williams v. State, 181 Ga. App. 693, 353 S.E.2d 563 (1987) (decided under former O.C.G.A. § 24-9-82).

Evidence of prior DUI admissible. — Defendant's testimony that defendant had never taken a breath alcohol test opened the door for the state to impeach defendant with the defendant's previous DUI conviction. Renn v. State, 234 Ga. App. 790, 508 S.E.2d 174 (1998) (decided under former O.C.G.A. § 24-9-82).

Introduction of prior alcohol-related accident. — There is no error in allowing the state to produce evidence of a prior alcohol-related motorcycle accident by the defendant for the purpose of impeaching the testimony of the defendant that the defendant did not ride the defendant's motorcycle when the defendant had been drinking. Hammond v. State, 169 Ga. App. 97, 311 S.E.2d 523 (1983) (decided under former O.C.G.A. § 24-9-82).

Alco-sensor results. — Officer's testimony that the numerical value of defendant's alco-sensor test was .089 was properly admitted to impeach and rebut defendant's testimony that the result was .06. Capps v. State, 273 Ga. App. 696, 615 S.E.2d 821 (2005) (decided under former O.C.G.A. § 24-9-82).

Evidence of prior interest in drug trafficking admissible. — When a defendant was charged with marijuana trafficking, testimony that, two years prior to the subject sale of marijuana, the defendant expressed an interest in trafficking in illegal drugs logically tended to disprove defendant's defense, and thus was clearly relevant as rebuttal, even though the testimony did not allege participation in the crime at bar and was inadmissible as impeachment testimony. Kraus v. State, 169 Ga. App. 54, 311 S.E.2d 493 (1983) (decided under former O.C.G.A. § 24-9-82).

Prior drug conviction admissible. — Defendant was properly impeached by defendant's former contradictory statement after defendant's statement on the stand that the defendant did not "mess with dope" was construed as a denial by the defendant that the defendant had ever been involved with drugs. Thrasher v. State, 204 Ga. App. 413, 419 S.E.2d 516 (1992) (decided under former O.C.G.A. § 24-9-82).

Question as to prior arrest. — It is not error to allow a witness to be questioned as to a prior arrest to impeach the witness's testimony that the witness had "never been in a situation dealing with the law." Parker v. State, 169 Ga. App. 557, 313 S.E.2d 751 (1984) (decided under former O.C.G.A. § 24-9-82).

Prior adjudication of delinquency admissible. — Any error in admitting impeaching evidence of defendant's prior adjudication of delinquency was harmless because, at the time it was admitted pursuant to former O.C.G.A. § 24-9-82, the trial court instructed the jury that the evidence was admitted for the limited purpose of refuting defendant's testimony that defendant was not familiar with criminal cases, and that it could not be considered for any other purpose; it was highly probable that admission of the ev-

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idence did not contribute to the jury's finding of guilt. Emberson v. State, 271 Ga. App. 773, 611 S.E.2d 83 (2005) (decided under former O.C.G.A. § 24-9-82).

In action for fraud and breach of warranties, oral testimony concerning other lawsuits would be incompetent for impeachment purposes unless it contradicted the witness's testimony at trial; it cannot be used merely to expose the witness's intelligence, memory, accuracy, judgment, and veracity. Haley v. Oaks Apts., Ltd., 173 Ga. App. 44, 325 S.E.2d 602 (1984) (decided under former O.C.G.A. § 24-9-82).

Province of jury. — When a witness is sought to be impeached by disproving the facts testified to by the witness in such way that there results only a conflict between the witness's testimony and the testimony of other witnesses, it is the province of the jury to determine which of the witnesses has spoken the truth even if in order to do so it is necessary to impute perjury to one or the other. Champion v. State, 84 Ga. App. 163, 65 S.E.2d 280 (1951) (decided under former Code 1933, § 38-1802).

Disbelief of impeached witness. — When a witness has been successfully impeached, the witness ought not to be believed, and it is the duty of the trier of fact to disregard the witness's testimony unless the testimony is corroborated, in which case the testimony may be believed. Pike v. Greyhound Bus Lines, 140 Ga. App. 863, 232 S.E.2d 143 (1977) (decided under former Code 1933, § 38-1802).

Impeachment as to certain facts does not necessarily exclude the jury from believing the witness as to other facts testified to. Elliot v. State, 138 Ga. 23, 74 S.E. 691 (1912) (decided under former Penal Code 1910, § 1051).

In a condemnation proceeding, after a city's witness not only directly supported the city's main contention that a landowner's property could not be developed or removed from the flood plain, but the city's appraiser based a valuation on the witness's representations to that effect, the witness's testimony was critical, and the landowner had a right to interview the witness, check the facts to which the witness would testify, and, if indicated, arrange to secure rebuttal evidence or to impeach the witnesses. Shepherd Interiors v. City of Atlanta, 263 Ga. App. 869, 589 S.E.2d 640 (2003) (decided under former O.C.G.A. § 24-9-82).

Defendant was not unfairly denied impeachment because defendant was prohibited from asking an ambiguous and prolix question of a witness which, in effect, asked for the witness's opinion concerning the witness's own bad reputation for veracity. Sewell v. State, 244 Ga. App. 449, 536 S.E.2d 173 (2000) (decided under former O.C.G.A. § 24-9-82).

Criminal defendant. — While a criminal defendant is not subject to impeachment by proof of general bad character or prior convictions until the defendant put defendant's general good character in evidence, the defendant is subject to impeachment the same as any other witness. Favors v. State, 145 Ga. App. 864, 244 S.E.2d 902 (1978) (decided under former O.C.G.A. § 24-9-82).

Prosecution for rape. — Former Code 1933, § 38-202.1 (see now O.C.G.A. § 24-4-412) provided the exclusive means for admitting evidence relating to the past sexual behavior of the complaining witness in prosecutions for rape; the res gestae rule, impeachment techniques, and other traditional means for introducing evidence which is otherwise inadmissible are inapplicable. Johnson v. State, 146 Ga. App. 277, 246 S.E.2d 363 (1978) (decided under former Code 1933, § 38-1802).

Trial court did not err in refusing to permit defendant to cross-examine prosecutor. Gresham v. State, 169 Ga. App. 525, 314 S.E.2d 111 (1984) (decided under former O.C.G.A. § 24-9-82).

Disregarding conflicting testimony. — Since there was a material conflict in the testimony of the plaintiff and that of the agent for the insurance company who procured the application, the jury was authorized under former Code 1933, §§ 38-1802 and 38-1806 (see O.C.G.A. §§ 24-6-620 and 24-6-621) to disregard the testimony of the agent. Gulf Life Ins. Co. v. Moore, 90 Ga. App. 791, 84 S.E.2d 696 (1954) (decided under former Code 1933, § 38-1802).

Evidence of prior killing. — There is no error in allowing the district attorney to present evidence of a prior killing by defendant for the purpose of impeaching the testimony of the defendant that defendant had never killed anyone in defendant's whole life. Lumpkin v. State, 151 Ga. App. 896, 262 S.E.2d 208 (1979) (decided under former Code 1933, § 38-1802).

Railroad engineer. — If the jury believed that the horse and colt crossed the track in front of the train immediately before the train struck plaintiff's mule, as testified to by two witnesses, the witnesses would be authorized to infer that the engineer was not keeping a proper lookout ahead, although the engineer swore that the engineer was. Atlantic Coast Line R.R. v. Hodges, 90 Ga. App. 870, 84 S.E.2d 711 (1954) (decided under former Code 1933, § 38-1802).

Admissibility of evidence initially excluded. — In a prosecution for driving under the influence of alcohol, results of a breath test which had been excluded because the arresting officer had failed to advise defendant of defendant's right to an additional test were admissible to rebut the testimony of defendant's expert witness. Charlton v. State, 217 Ga. App. 842, 459 S.E.2d 455 (1995) (decided under former O.C.G.A. § 24-9-82).

In an action for physical injuries allegedly received in a rear-end collision, the defendant was allowed to show that plaintiff had settled a lawsuit arising from an earlier accident in order to impeach plaintiff's testimony that the complaint had been dismissed. Bischoff v. Payne, 239 Ga. App. 824, 522 S.E.2d 257 (1999) (decided under former O.C.G.A. § 24-9-82).

Although a trial court granted an employee's motion in limine to exclude evidence that the employee had been taken out of service several hours prior to a workplace accident, once the employee submitted to questioning on the issue without seeking to enforce the limine ruling, the employee opened the door to being impeached by the employee's supervisors' depositions that the employee had been taken out of service due to a safety violation. Smith v. CSX Transp., Inc., 306 Ga. App. 897, 703 S.E.2d 671 (2010), aff'd 289 Ga. 903, 717 S.E.2d 209 (2011) (decided under former O.C.G.A. § 24-9-82).

Evidence found admissible. — Fact that one brother had considerable assets and another brother had none is admissible to impeach testimony that the two brothers had shared the benefit of real property equally, and it is not error to admit such evidence. Fletcher v. Fletcher, 242 Ga. 158, 249 S.E.2d 530 (1978) (decided under former Code 1933, § 38-1802).

Once defendant testified that the defendant always stopped after one drink if the defendant was going to drive, the state was properly allowed to impeach this testimony by questioning appellant about defendant's prior DUI convictions. Wyatt v. State, 179 Ga. App. 327, 346 S.E.2d 387 (1986) (decided under former O.C.G.A. § 24-9-82).

In an action for battery, a witness should have been allowed to impeach defendant's statement that defendant had never ordered defendant's bodyguard or anyone else to strike another person. Williams v. Knight, 211 Ga. App. 420, 439 S.E.2d 507 (1994) (decided under former O.C.G.A. § 24-9-82).

When defendant implied on direct examination that defendant had only one prior conviction for a weapons offense, defendant's testimony in this regard was subject to rebuttal proof of other weapons offenses defendant had committed. Francis v. State, 266 Ga. 69, 463 S.E.2d 859 (1995) (decided under former O.C.G.A. § 24-9-82).

In a prosecution for driving under the influence, evidence offered by the state concerning defendant's breath test was admissible to rebut defendant's testimony on direct examination that defendant had consumed two and one-half beers on the night of defendant's arrest. Goodwin v. State, 222 Ga. App. 285, 474 S.E.2d 84 (1996) (decided under former O.C.G.A. § 24-9-82).

In a personal injury action, since plaintiff specifically denied any prior back, neck, or leg pain at trial, plaintiff's medical records showing otherwise were admissible under former O.C.G.A. § 24-9-82. Barone v. Law, 242 Ga. App. 102, 527 S.E.2d 898 (2000) (decided under former O.C.G.A. § 24-9-82).

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In a prosecution for rape and kidnapping, the trial court should have permitted defendant to impeach the victim by calling witnesses to show that the victim used crack cocaine on the day of the incident, before encountering defendant, because the victim's consumption of drugs shortly before the incident occurred was not immaterial, inasmuch as it might have affected the victim's recollection of events. Curry v. State, 243 Ga. App. 712, 534 S.E.2d 168 (2000) (decided under former O.C.G.A. § 24-9-82).

State was entitled to question defendant as to whether defendant changed defendant's name because the authorities in North Carolina were looking for defendant because defendant had been accused of rape in that state after defendant introduced this area of inquiry by offering another reason for leaving North Carolina to explain having two sets of identification in defendant's possession when the defendant was arrested. Vehaun v. State, 244 Ga. App. 136, 534 S.E.2d 873 (2000) (decided under former O.C.G.A. § 24-9-82).

Trial court did not err in denying defendant's motion for a mistrial made as to a testifying officer's rebuttal testimony as that testimony was admissible as impeachment going to defendant's veracity, pursuant to former O.C.G.A. § 24-9-82. Cox v. State, 263 Ga. App. 266, 587 S.E.2d 205 (2003) (decided under former O.C.G.A. § 24-9-82).

In a homeowner's suit against a construction company for failing to remedy a defect in the homeowner's house, when the company's representative claimed remorse in the phase of the trial in which the amount of punitive damages was being determined, a letter from the company to the homeowner threatening to sue the homeowner for abusive litigation if the homeowner pursued a claim was properly admitted. Bowen & Bowen Constr. Co. v. Fowler, 265 Ga. App. 274, 593 S.E.2d 668 (2004) (decided under former O.C.G.A. § 24-9-82).

Portion of defendant's pre-trial statement to police in which the defendant admitted to another robbery was properly admitted, even though it reflected negatively on the defendant's character, because it rebutted the defendant's prior testimony. Jones v. State, 270 Ga. App. 233, 606 S.E.2d 288 (2004) (decided under former O.C.G.A. § 24-9-82).

Evidence that defendant knew defendant would be incarcerated for 90 days beginning one week after the offense charged contradicted the testimony that defendant expected to be steadily employed in the weeks following the offense; accordingly, the trial court did not abuse the court's discretion in allowing the evidence to impeach defendant's testimony. Cooper v. State, 272 Ga. App. 209, 612 S.E.2d 42 (2005) (decided under former O.C.G.A. § 24-9-82).

Since, at trial, the defendant's girlfriend testified that the girlfriend was certain that the defendant's mother had never told the girlfriend about her son's statement of regret about the victim's murder, but, the girlfriend had earlier told detectives that the conversation had, in fact, happened, and since the defendant's mother also took the witness stand and testified both specifically that the defendant had never told the mother that the defendant had any regret about the crime and more generally that the mother never discussed the crime with the defendant at all, the statement the defendant's girlfriend made to police directly contradicted the facts as recounted by both the defendant's mother and the girlfriend; as such, the girlfriend's prior statement was admissible to impeach both. Williams v. State, 280 Ga. 539, 630 S.E.2d 410 (2006) (decided under former O.C.G.A. § 24-9-82).

In a personal injury action filed by a couple, including an injured wife, against a tractor-trailer's owner and its driver, the trial court did not err in admitting doctors' reports outlining that the wife "passed out" before the collision: (1) as substantive evidence, given that the wife was present at trial and subject to cross-examination; and (2) as prior inconsistent statements to impeach the wife based upon earlier testimony that the wife never lost consciousness. Collins v. Mitchell, 282 Ga. App. 860, 640 S.E.2d 364 (2006) (decided under former O.C.G.A. § 24-9-82).

It was error under former O.C.G.A.

§ 24-9-82 (see now O.C.G.A. § 24-6-621) not to allow a defendant to introduce witness testimony and evidence of negative employer drug tests to rebut an officer's testimony that the defendant admitted using drugs. Doyal v. State, 287 Ga. App. 667, 653 S.E.2d 52 (2007) (decided under former O.C.G.A. § 24-9-82).

In a medical malpractice action, the trial court did not abuse the court's discretion by permitting the plaintiff to cross-examine the defendant doctor with regard to the status of the doctor's medical license from another state for impeachment purposes; the limited investigation by the plaintiff into whether the out-of-state license was renewed or not was permissible after the doctor testified that the doctor had allowed the license to expire. Barngrover v. Hins, 289 Ga. App. 410, 657 S.E.2d 14 (2008) (decided under former O.C.G.A. § 24-9-82).

Trial court did not err in overruling the defendant's objection to an officer's testimony that the officer and another officer recovered a 9 mm handgun from the defendant when the officers arrested the defendant because there was no basis for concluding that either officer committed perjury, but rather, it appeared that the memory of one of the officers could have faded as to that detail during the two years that elapsed between the defendant's arrest and trial; although the discrepancy could have given the defendant the opportunity to impeach the credibility of the officer who testified at trial by disproving a fact to which the officer testified, the fact that the officer's recollection of the events differed from the other officer's pretrial testimony did not render the testimony about the gun inadmissible, but rather, the matter was one of credibility for the jury to resolve. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012) (decided under former O.C.G.A. § 24-9-82).

Trial court did not err in allowing the prosecutor to read defendant's entire criminal history into evidence because the basis for admitting the evidence pursuant to former O.C.G.A. § 24-9-82 was to disprove defendant's lie by omission in response to a question at trial involving the defendant's previous encounters with law enforcement. McNeal v. State, 289 Ga. 711, 715 S.E.2d 95 (2011) (decided under former O.C.G.A. § 24-9-82).

Trial court did not abuse the court's discretion in allowing a railroad to cross-examine an employee and in admitting the testimony of supervisors for purposes of disproving certain facts to which the railroad had testified because the circumstances surrounding the employee's dispute with the supervisors was at least indirectly material to the matters at issue in the case; the employee opened the door to being impeached with evidence that tended to disprove the employee's testimony. CSX Transp., Inc. v. Smith, 289 Ga. 903, 717 S.E.2d 209 (2011) (decided under former O.C.G.A. § 24-9-82).

Trial court erred in disallowing testimony of a defense witness offered to disprove facts testified to by a prosecution witness. Childress v. State, 266 Ga. 425, 467 S.E.2d 865 (1996) (decided under former O.C.G.A. § 24-9-82).

Ineffective assistance of counsel claims based on impeachment of witnesses. — Defense counsel's failure to object or move for a mistrial based on the state's introduction of evidence relating to a witness's misconduct that fell short of a conviction was not ineffective assistance under circumstances in which counsel's decisions not to object to the state's pursuit of the topic of the witness's misdemeanor driving violations, and to attempt to rehabilitate the witness by showing the minor nature of one of the violations, were objectively reasonable; when the state broached the subject of the witness's incarceration just before the night in question, it might have gone on to uncover proof of that fact, which would have been admissible as contradictory of the witness's testimony that the witness was in the car with the defendant on the night before the defendant's arrest. Defense counsel could not have been faulted for failing to complete the state's work for it, or for declining to highlight any of this testimony. Noellien v. State, 298 Ga. App. 47, 679 S.E.2d 75 (2009) (decided under former O.C.G.A. § 24-9-82).

Evidence found not admissible. — Testimony which showed the defendant

General Consideration (Cont'd)

had been in possession of a large quantity of marijuana was not admissible as impeachment evidence of the defendant's character in a prosecution for trafficking in cocaine because the fact that defendant at some time in the past possessed a substantial amount of marijuana did not contradict defendant's assertion that the defendant did not deal in cocaine. Seabrooks v. State, 164 Ga. App. 747, 297 S.E.2d 745 (1982), aff'd, 251 Ga. 564, 308 S.E.2d 160 (1983) (decided under former O.C.G.A. § 24-9-82).

When a physician testified on cross-examination that the physician had never written a history and physical examination in a chart for a patient when the physician had not performed the history and physical examination, the physician's testimony was subject to impeachment by calling the widow of a former patient who testified that the physician had not performed the physical examinations and history on the widow's late husband contrary to the physician's written entry on the medical chart. Weaver v. Ross, 192 Ga. App. 568, 386 S.E.2d 43 (1989) (decided under former O.C.G.A. § 24-9-82).

State had no basis for impeaching the testimony of a witness by the witness's driving record after the witness immediately revised the witness's testimony that the witness had been "pulled over" three or four times to state that the witness did not know the exact number of times the witness had been pulled over. Waters v. State, 210 Ga. App. 305, 436 S.E.2d 44 (1993) (decided under former O.C.G.A. § 24-9-82).

In a prosecution for aggravated assault, carrying a concealed weapon, and possession of cocaine, when defendant's prior conviction was for misdemeanor obstruction of a law enforcement officer, which offense did not involve the element of violence, neither a conviction thereof nor an indictment charging a greater offense was admissible to impeach a defense witness's testimony as to defendant's nonviolent character. Daniel v. State, 211 Ga. App. 455, 439 S.E.2d 720 (1993) (decided under former O.C.G.A. § 24-9-82).

Erroneous consideration of impeachment evidence harmless error. — Although the defendant's prior burglary conviction, admitted by stipulation of counsel for the purpose of establishing modus operandi, could not be considered by the jury for purposes of impeaching the defendant's testimony, the error did not require reversal due to the overwhelming evidence of the defendant's guilt. Howard v. State, 202 Ga. App. 574, 415 S.E.2d 45 (1992) (decided under former O.C.G.A. § 24-9-82).

Cited in Thompson v. State, 739 S.E.2d 434, No. A12A2000, 2013 Ga. App. LEXIS 141 (2013).

Instructions

Instructions generally. — It is not error for the trial court, in the absence of request, to charge on the subject of impeachment of witnesses. Hand v. State, 90 Ga. App. 452, 83 S.E.2d 276 (1954) (decided under former Code 1933, § 38-1802).

Defendant who wishes to have trial judge give limiting instructions for impeachment evidence used in the mode of disproving facts testified to, which incidentally injects character, must request such instructions; the judge is not required to give instructions on the judge's own motion. Byrd v. State, 255 Ga. 665, 341 S.E.2d 455 (1986) (decided under former O.C.G.A. § 24-9-82).

Conflict in testimony. — When there is a conflict between the testimony of the defendant and a state's witness, a charge on impeachment is not improper. McNeill v. State, 135 Ga. App. 876, 219 S.E.2d 613 (1975) (decided under former Code 1933, § 38-1802).

Failure to charge all methods of impeachment. — When the judge having charged correctly upon one of the modes or methods of impeachment, to wit, impeachment by contradictory statements, the judge's failure to charge also upon the other modes of impeachment of disproving facts testified to by the witness, and also on the method of impeachment when a witness's testimony shall be disregarded entirely, is not reversible error in the absence of a request. Milwaukee Mechanics Ins. Co. v. Davis, 79 Ga. App. 70, 52

S.E.2d 643 (1949) (decided under former Code 1933, § 38-1802).

Charging parts of sections. — Charge of the court was not error when part of the charge contained former Civil Code 1910, § 5880 (see O.C.G.A. § 24-6-621) and a part of former Civil Code 1910, § 5881 (see O.C.G.A. § 24-6-608 and 24-6-613) and the parts of both of those sections charged which were excepted to were applicable to the case. Hall v. Burpee, 176 Ga. 270, 168 S.E. 39 (1933) (decided under former Civil Code 1910, § 5880).

Contradiction of witness. — When no attempt was made during the trial of a case to impeach a witness by disproving the facts testified to by the witness, except insofar as different witnesses testify in a conflicting manner to their impression of a given state of facts, a charge of the court in the language of former Code 1933, § 38-1806 (see O.C.G.A. §§ 24-6-620 and 24-6-621) that when a witness shall be successfully contradicted as to a material matter the witness's credit as to other matters was for the jury, included the substance of former Code 1933, § 38-1802 (see O.C.G.A. § 24-6-621). Aiken v. Glass, 95 Ga. App. 849, 99 S.E.2d 426 (1957) (decided under former Code 1933, § 38-1802).

No evidence of bad character. — In charging upon the law of impeachment of witnesses, when the court charges as to impeachment by disproving facts testified to, and by contradictory statements, it is not error to omit to charge the law of impeachment by proof of general bad character, when there is no evidence seeking to impeach any witness upon that ground. Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945), overruled on other grounds, Milton v. State, 245 Ga. 20, 262 S.E.2d 789 (1980) (decided under former Code 1933, § 38-1802).

No evidence of good character. — When it was sought to impeach the sole witness for the defendant charged with murder, and no evidence of the good character of such witness was offered by the defendant, it was reversible error to state in the charge to the jury that when it is sought to impeach a witness, the witness may be sustained by proof of good character. Jones v. State, 193 Ga. 449, 18 S.E.2d 844 (1942) (decided under former Code 1933, § 38-1802).

Instruction proper. — Charge of court was not subject to exceptions because of verbal inaccuracies. Bart v. Scheider, 39 Ga. App. 467, 147 S.E. 430 (1929) (decided under former Civil Code 1910, § 5880).

Improper instruction not reversible error. — Charge on impeachment by proof of conviction was not reversible error even though defendant had not placed defendant's character in issue because of the overwhelming evidence of the defendant's guilt. Peterson v. State, 212 Ga. App. 147, 441 S.E.2d 481 (1994) (decided under former O.C.G.A. § 24-9-82).

In a married couple's personal injury case, the trial court did not err in not giving parts of the pattern charge on impeachment requested by an insurance carrier on the ground that the couple's trial testimony contradicted their previous statements or actions. Because the carrier did not offer evidence that disproved the facts to which the couple testified, the portion of the charge that pertained to impeachment by disproving facts was not applicable, and the trial court was thus authorized to refuse the entire charge; furthermore, the trial court's charge to the jury that the jury could consider the witnesses' manner of testifying and demeanor as well as the probability or improbability of their testimony and their personal credibility adequately covered the necessary principles. Ga. Farm Bureau Mut. Ins. Co. v. Turpin, 294 Ga. App. 63, 668 S.E.2d 518 (2008) (decided under former O.C.G.A. § 24-9-82).

RESEARCH REFERENCES

ALR. — Admissibility of affidavit to impeach witness, 14 ALR4th 828.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence, 83 ALR5th 277.

24-6-622. Witness's feelings and relationship to parties provable.

The state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury. (Code 1981, § 24-6-622, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For comment on Smith v. State, 225 Ga. 328, 168 S.E.2d 587 (1969) and the right to prove relationship of a witness to a party, see 21 Mercer L. Rev. 347 (1969).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3820, former Code 1873, § 3876, former Code 1882, § 3876, former Civil Code 1895, § 5289, former Penal Code 1895, § 1023, former Civil Code 1910, § 5878, former Penal Code 1910, § 1049, former Code 1933, § 38-1712, and former O.C.G.A. § 24-9-68 are included in the annotations for this Code section.

In general. — Public trial tends to ensure the truth by forcing those who testify to relate their memories without embellishment for fear that there may be those in attendance who could call the testimony into question if not truthful. Montgomery v. State, 156 Ga. App. 448, 275 S.E.2d 72 (1980) (decided under former Code 1933, § 38-1712).

As one party to the trial, the state is entitled to require common witnesses, both those charged and observers of the charged acts, to present their version of the occurrences in the presence of each other, thereby minimizing witness bias or the possibility of each defendant singly shifting blame to other absent defendants without opportunity of searching inquiry into the truth. Montgomery v. State, 156 Ga. App. 448, 275 S.E.2d 72 (1980) (decided under former Code 1933, § 38-1712).

History. — Statute was simply declaratory of a general common law principle. Georgia R.R. & Banking Co. v. Lybrend, 99 Ga. 421, 27 S.E. 794 (1896) (decided under former Civil Code 1895, § 5289).

Credibility. — As a general rule, a party may show any fact or circumstance that may affect the credibility of an opposing witness. Fowler v. Waldrip, 10 Ga. 350 (1851) (decided under former law); Simpson v. State, 78 Ga. 91 (1886) (decided under former Code 1882, § 3876); Daniel v. State, 103 Ga. 202, 29 S.E. 767 (1897) (decided under former Penal Code 1895, § 1023); Neill v. Hill, 32 Ga. App. 381, 123 S.E. 30 (1924) (decided under former Civil Code 1910, § 5878); Lloyd v. State, 40 Ga. App. 230, 149 S.E. 174 (1929) (decided under former Penal Code 1910, § 1049); Walker v. State, 74 Ga. App. 48, 39 S.E.2d 75 (1946) (decided under former Code 1933, § 38-1712); Quinn v. State, 132 Ga. App. 395, 208 S.E.2d 263 (1974) (decided under former Code 1933, § 38-1712); Southeast Transp. Corp. v. Hogan Livestock Co., 133 Ga. App. 825, 212 S.E.2d 638 (1975) (decided under former Code 1933, § 38-1712).

Relevancy. — In a criminal prosecution, it was error for the trial court to permit the state, in argument and in testimony, to identify a fingerprint expert who testified for the state as having originally been hired by the defendant; the

fact of the expert's original employment by defendant was irrelevant and could be prejudicial. Blige v. State, 264 Ga. 166, 441 S.E.2d 752 (1994) (decided under former O.C.G.A. § 24-9-68).

Former O.C.G.A. § 24-2-1 and 24-9-68 (see now O.C.G.A. §§ 24-4-401 to 24-4-403 and 24-6-622) should be considered in pari materia; thus, even if testimony sought to be admitted relates to the feelings a witness has toward a party, if that particular feeling would have no relevance to the questions being tried by the jury, then such evidence may be excluded in the sound discretion of the trial court. Lockett v. State, 217 Ga. App. 328, 457 S.E.2d 579 (1995) (decided under former O.C.G.A. § 24-9-68).

In a personal injury suit filed by a car driver against a truck driver because the trial court erred by admitting evidence of the car driver's prior DUI charges and testimony by the investigating officer about charges filed against the car driver in traffic court, and by excluding an admission by the car driver's treating emergency room physician, a new trial was ordered. Laukaitis v. Basadre, 287 Ga. App. 144, 650 S.E.2d 724 (2007) (decided under former O.C.G.A. § 24-9-68).

Criminal record. — It was not error to refuse to admit evidence pertaining to a witness's criminal record since there was nothing to show that the witness's past record would motivate the witness to be untruthful or "shade" the witness's testimony to please the state, there were no outstanding criminal charges against the witness, and the state did not open the door to admission of such evidence. Jenkins v. State, 215 Ga. App. 540, 451 S.E.2d 457 (1994) (decided under former O.C.G.A. § 24-9-68).

While it was error under former O.C.G.A. § 24-9-68 not to allow the defendant to cross-examine a witness about pending felony charges against the witness, it was highly probable that the error did not contribute to the verdict, and was therefore harmless error, because the witness was not present at the crime scene and the witness's testimony that the defendant bragged about committing an assault was put in doubt by another witness. Fields v. State, 285 Ga. App. 345, 646 S.E.2d 326 (2007) (decided under former O.C.G.A. § 24-9-68).

Officer making threat against defendant. — Although the trial court erred in excluding evidence that a supervising officer subsequently made a threat against the defendant because the evidence was admissible under former O.C.G.A. § 24-9-68, the trial court's exclusion of the evidence provided no ground for reversal since the supervising officer's testimony was corroborated by the testimony of two other witnesses, and the excluded evidence did not challenge the credibility of the other two witnesses; thus, the evidence that the defendant committed obstruction as charged in the accusation was overwhelming, and it was highly probable that the trial court's error did not contribute to the verdict. Edwards v. State, 308 Ga. App. 569, 707 S.E.2d 917 (2011) (decided under former O.C.G.A. § 24-9-68).

Jury charge not appropriate. — In the absence of any evidence regarding the feelings or bias of witnesses toward defendant, or why the witnesses were familiar with defendant's appearance, defendant's requested charge on the language of former O.C.G.A. § 24-9-68 was not authorized. Scruggs v. State, 227 Ga. App. 35, 488 S.E.2d 110 (1997) (decided under former O.C.G.A. § 24-9-68).

Jury charge appropriate. — Trial court did not err in refusing to charge the jury regarding former O.C.G.A. § 24-9-68, as it was sufficient that the jury was charged that, in passing upon credibility of witnesses, it could consider their interest or lack of interest in the occurrences about which the witnesses testified. Stinson v. State, 256 Ga. App. 902, 569 S.E.2d 858 (2002) (decided under former O.C.G.A. § 24-9-68).

Issue not preserved for appellate review. — Because the defendant never argued in the trial court that the testimony the prosecuting attorney elicited by the cross-examination of a defense witness was not probative of any relationship between the defendant and the witness under former O.C.G.A. § 24-9-68, there was nothing for the court of appeals to review on appeal; at trial, defense counsel never argued that the questions the pros-

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ecuting attorney proposed to ask, and ultimately did ask, of the witness would not elicit testimony showing some relationship between the two and that the proposed cross-examination, therefore, was not probative of a relationship under former O.C.G.A. § 24-9-68, and although defense counsel objected that the pending charge was not a conviction, that was a different objection than the one the defendant raised on appeal. Luckie v. State, 310 Ga. App. 859, 714 S.E.2d 358 (2011), cert. denied, No. S11C1803, 2011 Ga. LEXIS 965 (Ga. 2011) (decided under former O.C.G.A. § 24-9-68).

Feelings

In general. — State of the witness's feelings to the parties may always be proved for the consideration of the jury. Bishop v. State, 9 Ga. 121 (1850) (decided under former law); Whitlow v. State, 74 Ga. 819 (1855) (decided under former law); Durham v. State, 45 Ga. 516 (1872) (role of accused unpopular with witness) (decided under former Code 1868, § 3820); Skipper v. State, 59 Ga. 63 (1877); Georgia R.R. & Banking Co. v. Lybrend, 99 Ga. 421, 27 S.E. 794 (1896) (decided under former Code 1873, § 3876); Shaw v. State, 102 Ga. 660, 29 S.E. 477 (1897) (personal conduct) (decided under former Code 1873, § 3876); Patman v. State, 61 Ga. 379 (1878) (witness subject to similar acts of injury as done by accused) (decided under former Code 1882, § 3876); Daniel v. State, 103 Ga. 202, 29 S.E. 767 (1897) (decided under former Penal Code 1895, § 1023); Purdee v. State, 118 Ga. 798, 45 S.E. 606 (1903) (decided under former Penal Code 1895, § 1023); McDuffie v. State, 121 Ga. 580, 49 S.E. 708 (1905) (decided under former Penal Code 1895, § 1023); Sasser v. State, 129 Ga. 541, 59 S.E. 255 (1907) (decided under former Penal Code 1895, § 1023); Parker v. State, 11 Ga. App. 251, 75 S.E. 437 (1912), later appeal, 17 Ga. App. 252, 87 S.E. 705 (1915) (subordination of another witness) (decided under former Penal Code 1895, § 1023); Smith v. State, 12 Ga. App. 13, 76 S.E. 647 (1912) (decided under former Penal Code 1910, § 1049); Sisk v. Landers, 67 Ga. App. 538, 21 S.E.2d 449 (1942) (decided under former Penal Code 1910, § 1049); Walker v. State, 74 Ga. App. 48, 39 S.E.2d 75 (1946) (decided under former Code 1933, § 38-1712); Miller v. Smith, 302 F. Supp. 385 (N.D. Ga. 1968) (decided under former Code 1933, § 38-1712); Harrell v. State, 139 Ga. App. 556, 228 S.E.2d 723 (1976) (decided under former Code 1933, § 38-1712).

Statute relates to the state of the witness's feelings to the parties, and not the state of the feelings of a party toward the witness. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174 (1947) (decided under former Code 1933, § 38-1712).

Trial court did not err in refusing to permit the condemnee to show, by a witness for the condemnee, the bias and prejudice of a witness for the condemnor against the condemnee, where the questions asked the witness related to the feelings of the condemnor's witness at a time before the trial and did not attempt to show the feelings of the condemnor's witness at the time of the trial. Sutton v. State Hwy. Dep't, 103 Ga. App. 29, 118 S.E.2d 285 (1961) (decided under former Code 1933, § 38-1712).

Interest. — Cross-examination of an adverse witness as to interest, attitude, and feelings is admissible. Jeter & Forbes v. Haviland, Keese & Co., 24 Ga. 252 (1858) (decided under former law); Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 688 (1954) (decided under former Code 1933, § 38-1712); Miller v. Smith, 302 F. Supp. 385 (N.D. Ga. 1968) (decided under former Code 1933, § 38-1712); Quinn v. State, 132 Ga. App. 395, 208 S.E.2d 263 (1974) (decided under former Code 1933, § 38-1712); Harrell v. State, 139 Ga. App. 556, 228 S.E.2d 723 (1976) (decided under former Code 1933, § 38-1712).

Jury may not arbitrarily disregard the testimony of a witness by reason of interest in the result. Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668 (1954) (decided under former Code 1933, § 38-1712).

After a defendant was charged with aggravated assault, but claimed self defense, the trial court erred in prohibiting

the defendant from eliciting from the victim that the victim had pending a civil action against the defendant for the victim's injuries; the defendant was entitled to prove the victim's interest in the outcome of the criminal trial and so attack the victim's credibility, and to show the state of the witness's feelings toward the defendant and the witness's relationship to the defendant. Boggs v. State, 195 Ga. App. 605, 394 S.E.2d 401 (1990) (decided under former O.C.G.A. § 24-9-68).

Bias and prejudice. — Jury is authorized to consider the bias or prejudices of the witnesses in a criminal case, if any exist. Wall v. State, 153 Ga. 309, 112 S.E. 142 (1922) (decided under former Penal Code 1910, § 1049); Couch v. State, 73 Ga. App. 153, 35 S.E.2d 708 (1945) (decided under former Code 1933, § 38-1712); Dennis v. State, 216 Ga. 206, 115 S.E.2d 527 (1960) (decided under former Code 1933, § 38-1712).

Fact that, in the investigating officer's previous experience, most of the sexual abuse victims' mothers had sided with their defendant-husbands was not relevant to explain either the conduct or the testimony of the victim's mother in the instant case, insofar as the testimony did not relate to the state of specifically her feelings towards the parties and specifically her relationship to the parties. Lott v. State, 206 Ga. App. 886, 426 S.E.2d 667 (1992) (decided under former O.C.G.A. § 24-9-68).

In a prosecution for aggravated assault, when defendant was allowed to testify that the victim was a drug dealer who had furnished drugs to defendant's nephew, which had prompted the confrontation between them, the exclusion of additional evidence of the victim's drug dealing was not a curtailment of defendant's right to show the bias of the victim. Hayes v. State, 211 Ga. App. 801, 440 S.E.2d 539 (1994) (decided under former O.C.G.A. § 24-9-68).

In a criminal prosecution, when the state's eyewitness was never asked what the witness's personal feelings were toward defendant, further inquiry into the basis for any bias or prejudice that the witness might have against African-Americans would not have been relevant. Farley v. State, 225 Ga. App. 687, 484 S.E.2d 711 (1997) (decided under former O.C.G.A. § 24-9-68).

Racial bias of officer. — Trial court did not abuse the court's discretion in restricting the defendant's examination of an officer regarding the officer's alleged racial bias because the defendant had an opportunity to develop testimony regarding the officer's alleged racial bias but failed to do so, and, to the extent that the defendant's enumeration was premised upon evidence reflected in the officer's personnel file, the defendant failed to perfect the record with a sufficient proffer of the excluded evidence; although the officer's personnel file was presented to the trial court for consideration, such evidence was not introduced and included in the record for appellate review, and in the absence of the evidence, the court of appeals could not reach the merits of the claim. Williams v. State, 303 Ga. App. 222, 692 S.E.2d 820 (2010) (decided under former O.C.G.A. § 24-9-68).

Motive. — Intent or motive of a witness is a legitimate subject of inquiry, and the fact that a witness is influenced by financial considerations may affect a witness's credit and diminish the weight of a witness's testimony. Lloyd v. State, 40 Ga. App. 230, 149 S.E. 174 (1929) (decided under former Penal Code 1910, § 1049).

If an attempt be made to discredit a witness on the ground that the witness's testimony is given under the influence of some motive prompting the witness to make a false or colored statement, the witness may be allowed to show in reply that the witness made similar declarations at a time when the motive imputed to the witness did not exist. Fuller v. State, 197 Ga. 714, 30 S.E.2d 608 (1944); Quinn v. State, 132 Ga. App. 395, 208 S.E.2d 263 (1974) (decided under former Code 1933, § 38-1712).

Relationships

In general. — Relationship of a witness to a party is a relevant consideration for the jury. Fowler v. Waldrip, 10 Ga. 350 (1851) (decided under former law); Simpson v. State, 78 Ga. 91 (1886) (decided under former Code 1882, § 3876); Futch v. State, 90 Ga. 472, 16 S.E. 102

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(1892) (decided under former Code 1882, § 3876); Myers v. State, 97 Ga. 76, 25 S.E. 252 (1895) (decided under former Code 1882, § 3876); Shaw v. State, 102 Ga. 660, 29 S.E. 477 (1897) (decided under former Penal Code 1895, § 1023); Daniel v. State, 103 Ga. 202, 29 S.E. 767 (1897) (decided under former Penal Code 1895, § 1023); Brown v. State, 119 Ga. 572, 46 S.E. 833 (1904) (decided under former Penal Code 1895, § 1023); Perdue v. State, 126 Ga. 112, 54 S.E. 820 (1906) (decided under former Penal Code 1895, § 1023); Bates v. State, 4 Ga. App. 486, 61 S.E. 888 (1908) (bailor and bailee); Clark v. State, 5 Ga. App. 605, 63 S.E. 606 (1909) (decided under former Penal Code 1895, § 1023); Union v. State, 7 Ga. App. 27, 66 S.E. 24 (1909) (decided under former Penal Code 1895, § 1023); Billings v. State, 8 Ga. App. 672, 70 S.E. 36 (1911) (decided under former Penal Code 1895, § 1023); Watts v. State, 9 Ga. App. 500, 71 S.E. 766 (1911) (decided under former Penal Code 1910, § 1049); Smith v. State, 15 Ga. App. 713, 84 S.E. 159 (1915) (police work); Berry v. City of Jackson, 16 Ga. App. 479, 85 S.E. 683 (1915) (decided under former Penal Code 1910, § 1049); Lundy v. State, 144 Ga. 833, 88 S.E. 209 (1916) (decided under former Penal Code 1910, § 1049); Neill v. Hill, 32 Ga. App. 381, 123 S.E. 30 (1924) (decided under former Civil Code 1910, § 5878); Lloyd v. State, 40 Ga. App. 230, 149 S.E. 174 (1929) (decided under former Civil Code 1910, § 5878); Georgia Hwy. Express, Inc. v. Sturkie, 62 Ga. App. 741, 9 S.E.2d 683 (1940) (decided under former Penal Code 1910, § 1049); Walker v. State, 74 Ga. App. 48, 39 S.E.2d 75 (1946) (decided under former Code 1933, § 38-1712); Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668 (1954) (decided under former Code 1933, § 38-1712); Dennis v. State, 216 Ga. 206, 115 S.E.2d 527 (1960) (lover); Quinn v. State, 132 Ga. App. 395, 208 S.E.2d 263 (1974) (decided under former Code 1933, § 38-1712); (prosecutor); Southeast Transp. Corp. v. Hogan Livestock Co., 133 Ga. App. 825, 212 S.E.2d 638 (1975) (decided under former Code 1933, § 38-1712); (employer and employee); Fletcher v. Fletcher, 242 Ga. 158, 249 S.E.2d 530 (1978) (decided under former Code 1933, § 38-1712); (marital status); (decided under former Code 1933, § 38-1712).

Expert's relationship to party and to attorney. — In a personal injury action, it was not error to allow evidence showing the close relationship between the medical witness and the plaintiff, a long-time patient, and between the witness and plaintiff's counsel. Canada v. Shropshire, 232 Ga. App. 341, 501 S.E.2d 860 (1998) (decided under former O.C.G.A. § 24-9-68).

In defendant's trial on charges of malice murder and aggravated assault, the trial court did not err by allowing the state to ask an expert witness who opined that defendant was insane at the time defendant stabbed two people if the witness had been hired by defendant's counsel to testify in other cases and how much the witness was being paid to testify in defendant's case. Whitner v. State, 276 Ga. 742, 584 S.E.2d 247 (2003), overruled on other grounds, Ledford v. State, 289 Ga. 70, 709 S.E.2d 239 (2011) (decided under former O.C.G.A. § 24-9-68).

Expert testimony limited. — In a medical malpractice action, the trial court did not err in limiting a patient's cross-examination of the doctor's expert witness, and hence, the patient's ability to show bias on the expert's part as: (1) the rules of evidence specifically prohibited a party from eliciting evidence that the expert had testified in a previous lawsuit, as such would have shown that the doctor had been sued before and suggested a proclivity for negligent conduct; and (2) the mere fact that a juror with an interest in the doctor's liability insurer would have been stricken for cause did not grant the patient an allowance to cross-examine a witness about that witness's interest in the insurer. Carlisle v. Abend, 288 Ga. App. 150, 653 S.E.2d 388 (2007) (decided under former O.C.G.A. § 24-9-68).

Sexual. — Trial court did not err in allowing the state to ask a defense witness whether the witness had a sexual relationship with defendant, not to impeach the witness by reason of the immorality, but to show the witness's intimate relations with the accused and the witness's

probable bias as a witness. Watkins v. State, 206 Ga. App. 701, 426 S.E.2d 238 (1992) (decided under former O.C.G.A. § 24-9-68).

Even though the evidence already shows close friendship and cohabitation, a lesbian relationship between a party and a witness on the party's behalf may be proved to show their intimate relations and the witness's potential bias. Orkin Exterminating Co. v. McIntosh, 215 Ga. App. 587, 452 S.E.2d 159 (1994) (decided under former O.C.G.A. § 24-9-68).

Homosexuality. — State was entitled to establish the homosexual relationship between the defendant and the state's key witness pursuant to former O.C.G.A. § 24-9-68 (see now O.C.G.A. 24-6-622), and the state did not attempt to belabor the issue beyond this limited purpose. Moreover, trial counsel sought through voir dire to eliminate jurors who may have held biases against those practicing homosexuality. State v. Abernathy, 289 Ga. 603, 715 S.E.2d 48 (2011) (decided under former O.C.G.A. § 24-9-68).

Alibi witness. — In a criminal prosecution, proof that the alibi witness had accused the defendant, her boyfriend, of kidnapping and rape but then declined to prosecute her paramour was relevant and admissible to show bias on her part as an alibi witness. Hood v. State, 245 Ga. App. 391, 537 S.E.2d 788 (2000) (decided under former O.C.G.A. § 24-9-68).

Employer and employee. — Jury could consider whether a witness had an interest in providing testimony favorable to the employer that insulated the employer from liability and whether the witness/employee received a promotion and pay increase as a reward for such testimony. McNeely v. Wal-Mart Stores, Inc., 246 Ga. App. 852, 542 S.E.2d 575 (2000) (decided under former O.C.G.A. § 24-9-68).

Evidence of defendant's gang affiliation shared with an alibi witnesses and a police officer's testimony that the name of the gang meant "I will die for you, you will die for me" was relevant to show the state of the witnesses' feelings toward defendant and the witnesses' relationship to the defendant. Hayes v. State, 265 Ga. 1, 453 S.E.2d 11 (1995). But see Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (1999) (decided under former O.C.G.A. § 24-9-68).

Cross examination of mother of child abuse victim. — Because the defendant did not perfect the record with a sufficient proffer of the testimony of the victim's mother, the court of appeals was unable to reach the merits of the defendant's claim that his cross-examination of the mother would have shown that she had a possible bias or motive for testifying against the defendant and that the mother had made prior allegations that one of her children had been molested; even if review of the alleged error had not been waived, the defendant did not show how the trial court's ruling prevented him from showing any bias or prejudice against him on the part of the mother because the defendant was not prohibited from cross-examining the mother about the state of her feelings toward him pursuant to former O.C.G.A. § 24-9-68 and about his relationship with her, and the evidence at trial included the direct testimony of the victim, who testified as to the offenses the defendant committed against her, as well as the chemical evidence of the defendant's semen on the victim's bed sheets. Miceli v. State, 308 Ga. App. 225, 707 S.E.2d 141 (2011) (decided under former O.C.G.A. § 24-9-68).

RESEARCH REFERENCES

ALR. — Admissibility, to show bias or interest of witness, of evidence that he or his employer had compensated the party for whom he testified, in circumstances creating right to subrogation, 128 ALR 1110.

Cross-examination of adversary witness regarding compromise or settlement of his claim against the party calling him, for purpose of affecting his credibility, 161 ALR 395.

Relationship between party and witness as giving rise to or affecting presumption or inference from failure to produce or examine witness, 5 ALR2d 893.

Right of accused in homicide case to

cross-examine prosecution's witness as to latter's pending or contemplated civil action against accused arising out of same transaction, 41 ALR2d 1205.

Preventing or limiting cross-examination of prosecution's witness as to his motive for testifying, 62 ALR2d 610.

Necessity and sufficiency of foundation for discrediting evidence showing bias or prejudice of adverse witness, 87 ALR2d 407.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction, 98 ALR3d 1060.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases, 76 ALR4th 812.

Adverse presumption or inference based on party's failure to produce or question examining doctor—modern cases, 77 ALR4th 463.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney—modern cases, 78 ALR4th 571.

Adverse presumption or inference based on party's failure to produce or examine witness who was occupant of vehicle involved in accident—modern cases, 78 ALR4th 616.

Adverse presumption or inference based on party's failure to produce or examine spouse—modern cases, 79 ALR4th 694.

Adverse presumption or inference based on party's failure to produce or examine friend—modern cases, 79 ALR4th 779.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases, 80 ALR4th 337.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel — modern cases, 81 ALR4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue — modern cases, 81 ALR4th 939.

24-6-623. Treatment of witness.

It shall be the right of a witness to be examined only as to relevant matters and to be protected from improper questions and from harsh or insulting demeanor. (Code 1981, § 24-6-623, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

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Harsh or Insulting Demeanor

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5281, former Civil Code 1910, § 5870, former Code 1933, § 38-1704, and former O.C.G.A. § 24-9-62 are included in the annotations for this Code section.

In general. — Right of a witness to be protected from improper questioning must be balanced against the right of parties to a thorough and sifting cross-examination. White v. Knapp, 31 Ga. App. 344, 120 S.E. 796 (1923) (decided

under former Civil Code 1910, § 5870); Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130 (1931) (decided under former Civil Code 1910, § 5870); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-1704); Thomas v. State, 85 Ga. App. 868, 70 S.E.2d 131 (1952) (decided under former Code 1933, § 38-1704); Cochran v. Neely, 123 Ga. App. 500, 181 S.E.2d 511 (1971) (decided under former Code 1933, § 38-1704); Wanzer v. State, 232 Ga. 523, 207 S.E.2d 466 (1974) (decided under former Code 1933, § 38-1704); Crawford v. State, 144 Ga. App. 622, 241 S.E.2d 492 (1978), overruled on other grounds, Stephens v. State, 245 Ga. 835, 268 S.E.2d 330 (1980) (decided under former Code 1933, § 38-1704).

Witness's rights under former O.C.G.A. § 24-9-62 (see now O.C.G.A. §§ 24-6-611 and 24-6-623) must be balanced with the party's right under former O.C.G.A. § 24-9-64 (see now O.C.G.A. § 24-6-611) to a thorough and sifting cross-examination. Carco Supply Co. v. Clem, 194 Ga. App. 566, 391 S.E.2d 134 (1990) (decided under former O.C.G.A. § 24-9-62); Palmer v. Taylor, 215 Ga. App. 546, 451 S.E.2d 486 (1994) (decided under former O.C.G.A. § 24-9-62).

Questioning reluctant witnesses. — It is the privilege of counsel and the duty of courts to propound such questions to reluctant witnesses as will strip the witnesses of the subterfuges to which the witnesses resort to evade telling the truth. Kelly v. State, 19 Ga. 425 (1856) (decided under former law).

Repeated questions. — Trial court properly prevented a defendant from questioning a witness for the fourth time as to whether the witness would tell a lie after the witness had answered the first three times with some variant of the word "no." Butler v. State, 285 Ga. 518, 678 S.E.2d 92 (2009) (decided under former O.C.G.A. § 24-9-62).

Improper Questions

Protection of witness. — It is the duty of the trial court to protect the witness on cross-examination from being unfairly dealt with. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-1704).

Testing intelligence, memory, accuracy, or veracity. — Question propounded by counsel on cross-examination is allowable for the purpose of testing the intelligence of the witness, or memory, accuracy, and veracity, but must not be argumentative. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-1704).

Illegal or immoral conduct. — Until a foundation showing the relevancy of a line of questioning is established so as to come within the "other crime" exception, one may not, under the guise of attacking the witness's credibility, ask questions suggesting illegal or immoral conduct in areas other than that before the court. Lancette v. State, 151 Ga. App. 740, 261 S.E.2d 405 (1979) (decided under former Code 1933, § 38-1704).

Accuracy. — When in a suit on an account, in which the defendant denied receiving a certain portion of the goods, defendant's evidence was self-contradictory and in some degree inconsistent with the testimony of other witnesses, the trial judge did not abuse the judge's discretion in permitting counsel for the plaintiff to state to the defendant, by way of cross-examination, "I want to give you one more opportunity to correct your statement that you did not receive these two shipments of merchandise." Cohen v. Saffer, 43 Ga. App. 746, 160 S.E. 130 (1931) (decided under former Code 1933, § 38-1704).

Veracity. — It is not proper that a question to a witness should assume that the witness has made a statement which, the witness says, the witness has not made. Sanderlin v. Sanderlin, 24 Ga. 583 (1858) (decided under former law).

When a witness testified that the witness had previously sworn in the case, a question by the counsel asking the witness if the witness had sworn the same then as the witness does now was properly objected to by the court. Andrews v. State, 118 Ga. 1, 43 S.E. 852 (1903) (decided under former Civil Code 1895, § 5281).

Chastity. — Witnesses cannot be impeached by showing their lack of chastity since this bears no relevance to the case. Smith v. State, 235 Ga. 327, 219 S.E.2d

Improper Questions (Cont'd)

440 (1975) (decided under former Code 1933, § 38-1704).

In a prosecution for rape, the trial court properly barred defendant's cross-examination of a police officer about whether the victim's stepfather told the officer that someone had told the stepfather that the victim was pregnant. Lee v. State, 241 Ga. App. 182, 525 S.E.2d 426 (1999) (decided under former O.C.G.A. § 24-9-62).

Harsh or Insulting Demeanor

Speaking too loudly. — Trial court did not err by admonishing defendant's counsel for speaking too loudly when counsel questioned a 12-year old witness since the trial court did limit the type of questions that defendant could ask or in any way comment on the evidence, but rather, the trial court merely exercised the court's broad discretion to protect a witness from harsh or insulting demeanor. Schneider v. State, 267 Ga. App. 508, 603 S.E.2d 663 (2004) (decided under former O.C.G.A. § 24-9-62).

Life style. — It is improper argument to infer that witnesses are not worthy of belief because the witnesses are living in the same apartment while unmarried. Smith v. State, 235 Ga. 327, 219 S.E.2d 440 (1975) (decided under former Code 1933, § 38-1704).

RESEARCH REFERENCES

ALR. — Abuse of witness by counsel as ground for new trial or reversal, 4 ALR 414.

Propriety of cross-examining witness as to illicit relations with defendant in criminal case, 25 ALR3d 537.

Privilege of witness to refuse to give answers tending to disgrace or degrade him or his family, 88 ALR3d 304.

ARTICLE 3

USE OF SIGN LANGUAGE AND INTERMEDIARY INTERPRETER IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Cross references. — Arrest of hearing impaired persons, § 17-4-30.

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-6-650. State policy on hearing impaired persons.

It is the policy of the State of Georgia to secure the rights of hearing impaired persons who, because of impaired hearing, cannot readily understand or communicate in spoken language and who consequently cannot equally participate in or benefit from proceedings, programs, and activities of the courts, legislative bodies, administrative agencies, licensing commissions, departments, and boards of this state and its political subdivisions unless qualified interpreters are available to assist such persons. (Code 1981, § 24-6-650, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-100 are included in the annotations for this Code section.

Failing to object to presence of interpreters. — With regard to two defendants' convictions for murder, the defendants failed to show that the defendants received ineffective assistance of counsel based on the defendants' respective trial counsel failing to object to the presence of two sign language interpreters in the jury room as the trial court had the two interpreters take an oath swearing that, during jury deliberations, the interpreters would merely interpret and not interject the interpreters' personal opinions, conclusions, or comments. The defendants failed to present a shred of evidence that the interpreters did anything other than comply fully with the oath taken and that trial counsel had any reasons to suspect the interpreters did otherwise. Smith v. State, 284 Ga. 599, 669 S.E.2d 98 (2008) (decided under former O.C.G.A. § 24-9-100).

Adequate accommodation for defendant's hearing loss. — Defendant's claim of a due process violation because the defendant's hearing impairment prevented the defendant from comprehending the witnesses' testimony was properly rejected. The trial court accommodated the defendant by moving the defendant closer to the witness stand and obtaining a hearing device for the defendant to use, and the defendant's conduct during the trial and statements to defense counsel indicated that the defendant was able to understand the testimony. Neugent v. State, 294 Ga. App. 284, 668 S.E.2d 888 (2008) (decided under former O.C.G.A. § 24-9-100).

24-6-651. Definitions.

As used in this article, the term:

(1) "Agency" means any agency, authority, board, bureau, committee, commission, court, department, or jury of the legislative, judicial, or executive branch of government of this state or any political subdivision thereof.

(2) "Court qualified interpreter" means any person licensed as an interpreter for the hearing impaired pursuant to Code Section 15-1-14.

(3) "Hearing impaired person" means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken in a normal conversational tone.

(4) "Intermediary interpreter" means any person, including any hearing impaired person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between the variance of sign language by acting as an intermediary between a hearing impaired person and a qualified interpreter.

(5) "Proceeding" means any meeting, hearing, trial, investigation, or other proceeding of any nature conducted by an agency.

(6) "Qualified interpreter" means any person certified as an interpreter for hearing impaired persons by the Registry of Interpreters

for the Deaf or a court qualified interpreter. (Code 1981, § 24-6-651, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-6-652. Appointment of interpreters for hearing impaired persons interested in or witness at agency proceedings.

(a) The agency conducting any proceeding shall provide a qualified interpreter to the hearing impaired person:

(1) Whenever the hearing impaired person is a party to the proceeding or a witness before the proceeding; or

(2) Whenever a person who is below the age of 18 years is a party to the proceeding or a witness before the proceeding conducted by an agency whose parents are hearing impaired persons or whose guardian is a hearing impaired person.

(b) A hearing impaired person shall notify the agency not less than ten days, excluding weekends and holidays, prior to the date of the proceeding of the need for a qualified interpreter. If the hearing impaired person received notice of the proceeding less than ten days, excluding weekends and holidays, prior to the proceeding, such person shall notify the agency as soon as practicable after receiving such notice. (Code 1981, § 24-6-652, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 24-9-102 are included in the annotations for this Code section.

Hearing impaired juror. — Subsection (a) of former O.C.G.A. § 24-9-102 did not require that a court provide an interpreter for a hearing impaired prospective juror. 1987 Op. Att'y Gen. No. U87-11 (decided under former O.C.G.A. § 24-9-102).

24-6-653. Procedure for interrogation and taking of statements from hearing impaired persons arrested for violation of criminal laws.

(a) An arresting law enforcement agency shall provide a qualified interpreter to any hearing impaired person whenever a hearing impaired person is arrested for allegedly violating any criminal law or ordinance of this state or any political subdivision thereof.

(b)(1) Except as provided in paragraph (2) of this subsection, no interrogation, warning, informing of rights, taking of statements, or other investigatory procedures shall be undertaken upon a hearing impaired person unless a qualified interpreter has been provided or the law enforcement agency has taken such other steps as may be

reasonable to accommodate such person's disability. No answer, statement, admission, or other evidence acquired through the interrogation of a hearing impaired person shall be admissible in any criminal or quasi-criminal proceedings unless such was knowingly and voluntarily given. No hearing impaired person who has been taken into custody and who is otherwise eligible for release shall be detained because of the unavailability of a qualified interpreter.

(2) If a qualified interpreter is not available, an arresting officer may interrogate or take a statement from such person, provided that if the hearing impaired person cannot hear spoken words with a hearing aid or other sound amplification device, such interrogation and answers thereto shall be in writing and shall be preserved and turned over to the court in the event such person is tried for the alleged offense. (Code 1981, § 24-6-653, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For casenote, "Rodriguez v. State: Addressing Georgia's Implied Consent Requirements for Non-English-Speaking Drivers," see 54 Mercer L. Rev. 1253 (2003).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-103 are included in the annotations for this Code section.

Hearing impaired person arrested for driving under the influence was not entitled to a qualified interpreter before the person's rights under the implied consent law were conveyed to the person by the arresting officer. State v. Webb, 212 Ga. App. 872, 443 S.E.2d 630 (1994) (decided under former O.C.G.A. § 24-9-103).

Giving implied consent card inadequate. — Qualified interpreter was required to be present to convey implied consent warnings and rights to an impaired person before any questioning or advice was given and an officer's giving the person an "implied consent card" to read and writing an explanation were not sufficient. Allen v. State, 218 Ga. App. 844, 463 S.E.2d 522 (1995) (decided under former O.C.G.A. § 24-9-103).

Impact of one-hour waiting period. — When police have made a request for an interpreter and one has been provided, after the one-hour waiting period elapses, the police may proceed with their investigation under the implied consent laws. If, however, the impaired person intelligently waives the one-hour requirement, the police may proceed with written interrogatories and the person should answer in writing, and then the police may proceed under the implied consent law. Allen v. State, 218 Ga. App. 844, 463 S.E.2d 522 (1995) (decided under former O.C.G.A. § 24-9-103).

Arresting officer failed to comply with statutory procedures. — DUI conviction was reversed when the arresting officer failed to comply with the statutory procedures for communicating with a hearing-impaired detainee because the requirements in the statute were mandatory, and if not met, the evidence acquired was not admissible under former O.C.G.A. § 24-9-103. Yates v. State, 248 Ga. App. 35, 545 S.E.2d 169 (2001) (decided under former O.C.G.A. § 24-9-103).

Non hearing-impaired defendant's equal protection argument failed when the defendant could not meet the defendant's burden to show that former O.C.G.A. § 24-9-103 was arbitrary or otherwise not rationally related to a legitimate state interest. Sisson v. State, 232

Ga. App. 61, 499 S.E.2d 422 (1998) (decided under former O.C.G.A. § 24-9-103).

Failing to object to presence of interpreters. — With regard to two defendants' convictions for murder, the defendants failed to show that the defendants received ineffective assistance of counsel based on the defendants' respective trial counsel failing to object to the presence of two sign language interpreters in the jury room as the trial court had the two interpreters take an oath swearing that, during jury deliberations, the interpreters would merely interpret and not interject the interpreters' personal opinions, conclusions, or comments. The defendants failed to present a shred of evidence that the interpreters did anything other than comply fully with the oath taken and that trial counsel had any reasons to suspect the interpreters did otherwise. Smith v. State, 284 Ga. 599, 669 S.E.2d 98 (2008) (decided under former O.C.G.A. § 24-9-103).

Impact of failure to comply with procedure. — When the arresting officer failed to comply with the procedure in former O.C.G.A. § 24-9-103, such failure rendered blood test results inadmissible. State v. Woody, 215 Ga. App. 448, 449 S.E.2d 615 (1994) (decided under former O.C.G.A. § 24-9-103).

Application to Spanish speaking people. — Defendant's constitutional claims to the implied consent statutes were without merit since defendant, a Spanish speaking person, was not similarly situated to a hearing impaired person and, although similarly situated to an English-speaking person, there was a rational basis for requiring the implied consent warnings to be read in English. Rodriguez v. State, 275 Ga. 283, 565 S.E.2d 458 (2002) (decided under former O.C.G.A. § 24-9-103).

24-6-654. Indigent hearing impaired defendants to be provided with interpreters.

(a) A court shall provide a court qualified interpreter to any hearing impaired person whenever the hearing impaired person has been provided with a public defender or court appointed legal counsel.

(b) The court qualified interpreter authorized by this Code section shall be present at all times when the hearing impaired person is consulting with legal counsel. (Code 1981, § 24-6-654, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 24-9-108 are included in the annotations for this Code section.

Expenditure for interpreter for indigent criminal defendant. — When the superior court exercises the court's discretion to appoint an interpreter for an indigent criminal defendant who neither speaks nor understands English, the court has inherent power to assess the cost of the interpreter against the county. 1989 Op. Att'y Gen. No. U89-24 (decided under former O.C.G.A. § 24-9-108).

24-6-655. Waiver of right to interpreter.

Whenever a hearing impaired person shall be authorized to be provided a qualified interpreter, such person may waive the right to the use of such interpreter. Any such waiver shall be in writing and shall be

approved by the agency or law enforcement agency before which the hearing impaired person is to appear. In no event shall the failure of a hearing impaired person to request an interpreter be deemed to be a waiver of the hearing impaired person's right to a qualified interpreter. (Code 1981, § 24-6-655, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-6-656. Replacement of interpreters unable to communicate accurately with hearing impaired persons; appointment of intermediary interpreters.

Whenever a hearing impaired person shall be authorized to be provided a qualified interpreter, the agency or law enforcement agency shall determine whether the qualified interpreter so provided is able to communicate accurately with and translate information to and from the hearing impaired person. If it is determined that the qualified interpreter cannot perform these functions, the agency or law enforcement agency shall obtain the services of another qualified interpreter or shall appoint an intermediary interpreter to assist the qualified interpreter in communicating with the hearing impaired person. (Code 1981, § 24-6-656, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-6-657. Oath of interpreters; privileged communications; taping and filming of hearing impaired persons' testimony.

(a) Prior to providing any service to a hearing impaired person, any qualified interpreter or intermediary interpreter shall subscribe to an oath that he or she will interpret all communications in an accurate manner to the best of his or her skill and knowledge. The Supreme Court of Georgia may by rule of court prescribe the form of the oath for interpreters and intermediary interpreters for use in court and other judicial proceedings.

(b) Whenever a hearing impaired person communicates with any other person through the use of an interpreter and under circumstances which make such communications privileged or otherwise confidential, the presence of the interpreter shall not vitiate such privilege and the interpreter shall not be required to disclose the contents of such communication.

(c) Whenever a qualified interpreter is required by this article, the agency or law enforcement agency shall not begin the proceeding or take any action until such interpreter is in full view of and spatially situated so as to assure effective communication with the hearing impaired person.

(d) The agency or law enforcement agency may, upon its own motion or upon motion of any party, witness, or participant, order that the

testimony of the hearing impaired person be electronically and visually recorded. Any such recording may be used to verify the testimony given by the hearing impaired person. (Code 1981, § 24-6-657, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-6-658. Compensation of interpreters.

Any qualified interpreter or intermediary interpreter providing service under this article shall be compensated by the agency or law enforcement agency requesting such service. (Code 1981, § 24-6-658, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 24-9-108 are included in the annotations for this Code section.

Expenditure for interpreter for indigent criminal defendant. — When the superior court exercises the court's discretion to appoint an interpreter for an indigent criminal defendant who neither speaks nor understands English, the court has inherent power to assess the cost of the interpreter against the county. 1989 Op. Att'y Gen. No. U89-24 (decided under former O.C.G.A. § 24-9-108).

CHAPTER 7

OPINIONS AND EXPERT TESTIMONY

Sec.
24-7-701. Lay witness opinion testimony.
24-7-702. Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of federal law.
24-7-703. Bases of expert opinion testimony.
24-7-704. Ultimate issue opinion.
24-7-705. Disclosure of facts or data underlying expert opinion.
24-7-706. Court appointed experts.
24-7-707. Expert opinion testimony in criminal proceedings.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 enactment of this chapter, see 28 Ga. St. U.L. Rev. 1 (2011).

24-7-701. Lay witness opinion testimony.

(a) If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences shall be limited to those opinions or inferences which are:

(1) Rationally based on the perception of the witness;

(2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and

(3) Not based on scientific, technical, or other specialized knowledge within the scope of Code Section 24-7-702.

(b) Direct testimony as to market value is in the nature of opinion evidence. A witness need not be an expert or dealer in an article or property to testify as to its value if he or she has had an opportunity to form a reasoned opinion. (Code 1981, § 24-7-701, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-9-66, which contained comparable provisions to subsection (b) of this Code section, as effective January 1, 2013, was derived from the decision in Central R.R. & Banking Co. v. Skellie, 86 Ga. 686, 12 S.E. 1017 (1891).

Cross references. — Opinion testimony by lay witnessess, Fed. R. Evid. 701.

Law reviews. — For article analyzing Georgia business entries provisions, see 4 Mercer L. Rev. 313 (1953). For annual survey of evidence law, see 56 Mercer L. Rev. 235 (2004); 57 Mercer L. Rev. 187 (2005); and 58 Mercer L. Rev. 151 (2006). For annual 11th Circuit survey of evidence law, see 56 Mercer L. Rev. 1273 (2005); and 57 Mercer L. Rev. 1083 (2006).

For note on admissibility of expert psychological testimony in Georgia, see 4 Ga. St. U.L. Rev. 117 (1988).

For comment on Caldwell v. State, 82 Ga. App. 480, 61 S.E.2d 543 (1950), see 14 Ga. B.J. 241 (1951). For comment on Corley v. Russell, 92 Ga. App. 417, 88 S.E.2d 470 (1955), holding that the opinion of an expert is inadmissible in a negligence action, as that is the very issue the jury is impaneled to try, see 18 Ga. B.J. 338 (1956). For comment on Northwestern

Univ. v. Crisp, 211 Ga. 636, 88 S.E.2d 26 (1955), concerning the admissibility of lay opinions regarding the sanity of a testator, see 19 Ga. B.J. 82 (1956). For comment discussing the use of hypothetical questions to avoid the requirements of first-hand knowledge, see 19 Ga. B.J. 346 (1957). For comment on Western & A.R.R. v. Hart, 95 Ga. App. 810, 99 S.E.2d 302 (1957), holding that the accuracy of the opinion of a 12-year-old as to the speed of a train is a matter for the jury to decide and its admission into evidence was not error, see 20 Ga. B.J. 395 (1958). For comment on Hoard v. Wiley, 113 Ga. App. 328, 147 S.E.2d 782 (1966), see 3 Ga. St. B.J. 476 (1967). For comment on Hoard v. Wiley, 113 Ga. App. 328, 147 S.E.2d 782 (1966), see 3 Ga. St. B.J. 476 (1967).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3811, former Code 1873, § 3867, former Code 1882, § 3867, former Civil Code 1895, § 5285, former Penal Code 1895, § 1021, former Penal Code 1910, § 1047, former Civil Code 1910, §§ 5874, 5875, former Code 1933, §§ 38-1708, 38-1709, and former O.C.G.A. §§ 24-9-65 and 24-9-66 are included in the annotations for this Code section.

In general. — Class of questions here referred to must be such as lie within the range of common opinion, that is, an opinion which is supposed to be within the common knowledge, experience, and education of men. Cone v. Davis, 66 Ga. App. 229, 17 S.E.2d 849 (1941) (decided under former Code 1933, § 38-1708).

Former Code 1933, § 38-1710 (see former O.C.G.A. § 24-9-67) dealt with science, skill, trade, or like questions, in which matters experts may give their opinion based on facts as proved by other witnesses, but former Code 1933, § 38-1703 (see O.C.G.A. now § 24-7-701) dealt with opinions of lay witnesses. Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824 (1944) (decided under former Code 1933, § 38-1708).

Former statute plainly referred to two separate and distinct situations, and declares different rules in reference thereto: (1) when the question under examination and to be decided by the jury shall be one of opinion; and (2) when the issue shall be as to the existence of a fact. Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828 (1945) (decided under former Code 1933, § 38-1708).

Whether a question calls for a legal conclusion or principally a fact which incidentally involves a legal word or phrase is within the sound discretion of the trial court. Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345 (1980) (decided under former Code 1933, § 38-1708).

History. — Former statute was but a compendium of the common law. Central R.R. & Banking Co. v. Kelly, 58 Ga. 107 (1877) (decided under former Code 1873, § 3867).

Duty of trial court. — Determination as to whether a witness has established sufficient opportunity for forming a correct opinion or has stated a proper basis

for expressing an opinion is for the trial court. DOT v. McLaughlin, 163 Ga. App. 1, 292 S.E.2d 435, cert. denied, 250 Ga. 10, 297 S.E.2d 217 (1982), overruled on other grounds, 264 Ga. 393, 444 S.E.2d 734 (1994) (decided under former O.C.G.A. § 24-9-65).

Witness's opinion must be witness's own and the witness cannot act as a mere conduit for the opinions of others. Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653 (1981) (decided under former O.C.G.A. § 24-9-65).

Qualifying words. — An answer of a witness is not to be struck out because the witness qualified the witness's statement of fact by such statements as "I would judge," and "I think," nor because the witness used the word "opinion," since, from the context, the witness was merely qualifying the witness's statement of fact. Faucette v. State, 71 Ga. App. 331, 30 S.E.2d 808 (1944) (decided under former Code 1933, § 38-1708).

Plaintiff may not establish variance from standard of care in medical or legal malpractice cases without expert opinion testimony from which the jury could determine malpractice. This latter requirement is properly a prerequisite for the submission of a case to the jury. Savannah Valley Prod. Credit Ass'n v. Cheek, 248 Ga. 745, 285 S.E.2d 689 (1982) (decided under former O.C.G.A. § 24-9-65).

Status of witness as lay or expert goes not to admissibility, but credibility. McLelland v. State, 203 Ga. App. 93, 416 S.E.2d 340, cert. denied, 203 Ga. App. 907, 416 S.E.2d 340 (1992) (decided under former O.C.G.A. § 24-9-65).

Weight of opinion evidence is matter for jury. — Probative value and weight to be given the evidence and the credibility of the witness are matters to be determined by the jury. Blackman v. State, 80 Ga. 785, 7 S.E. 626 (1888) (decided under former Code 1882, § 3867); Caswell v. State, 5 Ga. App. 583, 63 S.E. 566 (1909) (decided under former Penal Code 1895, § 1021); Glover v. State, 15 Ga. App. 44, 82 S.E. 602 (1914) (decided under former Penal Code 1910, § 1047); Hayes v. State, 16 Ga. App. 20, 84 S.E. 497 (1915) (decided under former Penal Code 1910, § 1047); Bugg v. State, 17 Ga. App. 211, 86 S.E. 405 (1915) (decided under former Code 1933, § 38-1708); Hansberger Motor Transp. Co. v. Pate, 51 Ga. App. 877, 181 S.E. 796 (1935) (decided under former Code 1933, § 38-1708); Simmons v. Simmons, 194 Ga. 649, 22 S.E.2d 399 (1942) (decided under former Code 1933, § 38-1708); Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824 (1944) (decided under former Code 1933, § 38-1708); Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828 (1945) (decided under former Code 1933, § 38-1708); Barnes v. Thomas, 72 Ga. App. 827, 35 S.E.2d 364 (1945) (decided under former Code 1933, § 38-1708); Ford Motor Co. v. Hanley, 128 Ga. App. 311, 196 S.E.2d 454 (1973) (decided under former Code 1933, § 38-1708); Galloway v. Banks County, 139 Ga. App. 649, 229 S.E.2d 127 (1976) (decided under former Code 1933, § 38-1708); Tam v. Newsome, 141 Ga. App. 76, 232 S.E.2d 613 (1977) (decided under former Code 1933, § 38-1708).

Jury instructions. — In the absence of a timely written request, the mere fact that opinion evidence was introduced does not require an instruction as to the weight of such evidence. Fountain v. Smith, 103 Ga. App. 192, 118 S.E.2d 852 (1961) (decided under former Code 1933, § 38-1708); Vandable v. State, 127 Ga. App. 306, 193 S.E.2d 197 (1972) (decided under former Code 1933, § 38-1708).

Harmless error. — Expression of the opinion of a witness amounting to conclusion is harmless since there is ample evidence to support the inference. Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174 (1947) (decided under former Code 1933, § 38-1708).

Statement not an opinion. — Building contractor was not asked to give contractor's opinion but was asked for the contractor's impression, i.e., the contractor's understanding, of what a bid was to be based upon. This evidence was properly admitted to explain the contractor's future conduct and show contractor's understanding of the parties' oral agreement. Carco Supply Co. v. Clem, 194 Ga. App. 566, 391 S.E.2d 134 (1990) (decided under former O.C.G.A. § 24-9-65).

General Consideration (Cont'd)

Question not eliciting opinion. — State's question to victim's mother as to whether she believed victim's earlier allegation that she was molested by her natural father did not elicit inadmissible opinion evidence, and did not constitute impermissible bolstering of victim's credibility. Yebra v. State, 206 Ga. App. 12, 424 S.E.2d 318 (1992) (decided under former O.C.G.A. § 24-9-65).

Opinion Testimony Admissible

1. In General

Admissibility generally. — Opinion testimony is admissible when the question under examination is one of opinion. Alexander v. State, 118 Ga. 26, 44 S.E. 851 (1903) (decided under former Civil Code 1895, § 5285); Klein v. State, 104 Ga. App. 126, 121 S.E.2d 253 (1961) (decided under former Code 1933, § 38-1708); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349 (1980) (decided under former Code 1933, § 38-1708).

Opinions, even expert opinions, are allowed by way of exception to the general rule that a witness is to give facts observed, but not the expert's conclusions from those facts, and opinions are to be allowed only when there is real helpfulness or necessity to resort to the opinions. Barnes v. Thomas, 72 Ga. App. 827, 35 S.E.2d 364 (1945) (decided under former Code 1933, § 38-1708).

Testimony which in the main is a mere statement of fact may be admitted, even though it rests to a certain extent on the application of legal principles. Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345 (1980) (decided under former Code 1933, § 38-1708).

Defendant failed to show that defense counsel rendered ineffective assistance, in violation of U.S. Const., amend. 6, on the basis that counsel did not object when one of the victims testified that defendant stabbed the victim on purpose and not by accident, as there was no support for the proposition that such a statement was inadmissible opinion testimony under former O.C.G.A. § 24-9-65; even if it were deemed inadmissible, no prejudice was shown to defendant. Brown v. State, 275 Ga. App. 99, 619 S.E.2d 789 (2005) (decided under former O.C.G.A. § 24-9-65).

State of mind or mental condition generally. — Person's state of mind or mental condition is properly the subject of opinion testimony, and after narrating the facts and circumstances upon which the person's conclusion is based, a nonexpert witness may express the witness's opinion as to the state of mind or mental condition of another. O'Kelley v. State, 175 Ga. App. 503, 333 S.E.2d 838 (1985) (decided under former O.C.G.A. § 24-9-65).

Evidence not challenged. — An opinionative statement of a witness, even though it was a conclusion unsupported by such facts as were necessary to show its correctness, when no objection was urged thereto upon the trial, cannot be challenged for the first time upon review as incompetent and insufficient. Bailey v. Newberry, 52 Ga. App. 693, 184 S.E. 357 (1935) (decided under former Code 1933, § 38-1708); Johnson v. Woodward Lumber Co., 76 Ga. App. 152, 45 S.E.2d 294 (1947) (decided under former Code 1933, § 38-1708); Gazaway v. Secured Ins. Co., 109 Ga. App. 428, 136 S.E.2d 531 (1964) (decided under former Code 1933, § 38-1708).

After providing supporting facts. — Witness may give witness's belief or opinion when it is in connection with, and a mental deduction from, the facts which come within the witness's knowledge and to which the witness has testified. McGinnis v. State, 31 Ga. 236 (1860) (decided under former law); Executors of Riggins v. Brown, 12 Ga. 271 (1862) (decided under former law); Macon & W.R.R. v. Johnson, 38 Ga. 409 (1868) (decided under former Code 1868, § 3811); Ryder v. State, 100 Ga. 528, 28 S.E. 246, 62 Am. St. R. 334, 38 L.R.A. 721 (1897) (decided under former Penal Code 1895, § 1021); Yates v. State, 127 Ga. 813, 56 S.E. 1017 (1907) (decided under former Penal Code 1895, § 1021); Cranshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 S.E. 222 (1907) (decided under former Civil Code 1895, § 5285); Glover v. State, 129 Ga. 717, 59 S.E. 816 (1907) (decided under former Penal Code 1895, § 1021); Ray v. State, 142 Ga. 655, 83 S.E. 518 (1914)

(decided under former Penal Code 1910, § 1047); Bennett v. American Bank & Trust Co., 162 Ga. 718, 134 S.E. 781 (1926) (decided under former Civil Code 1910, § 5847); Hill v. State, 50 Ga. App. 191, 177 S.E. 270 (1934) (decided under former Code 1933, § 38-1708); Roberts v. Hardin, 180 Ga. 757, 180 S.E. 634 (1935) (decided under former Code 1933, § 38-1708); Musselwhite v. Ricks, 55 Ga. App. 58, 189 S.E. 597 (1936) (decided under former Code 1933, § 38-1708); Pollard v. Page, 56 Ga. App. 503, 193 S.E. 117 (1937) (decided under former Code 1933, § 38-1708); Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897 (1939) (decided under former Code 1933, § 38-1708); Faucette v. State, 71 Ga. App. 331, 30 S.E.2d 808 (1944) (decided under former Code 1933, § 38-1708); Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824 (1944) (decided under former Code 1933, § 38-1708); Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828 (1945) (decided under former Code 1933, § 38-1708); Beasley v. Burt, 201 Ga. 144, 39 S.E.2d 51 (1946) (decided under former Code 1933, § 38-1708); Sellers v. Johnson, 207 Ga. 166, 60 S.E.2d 352 (1950) (decided under former Code 1933, § 38-1708); McGahee v. Phillips, 211 Ga. 118, 84 S.E.2d 19 (1954) (decided under former Code 1933, § 38-1708); Atlantic Coast Line R.R. v. Godard, 211 Ga. 373, 86 S.E.2d 311 (1955), later appeal, 93 Ga. App. 671, 92 S.E.2d 626 (1956) (decided under former Code 1933, § 38-1708); Adams v. Adams, 213 Ga. 875, 102 S.E.2d 566 (1958) (decided under former Code 1933, § 38-1708); Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576 (1960) (decided under former Code 1933, § 38-1708); Wright v. Concrete Co., 107 Ga. App. 190, 129 S.E.2d 351 (1962) (decided under former Code 1933, § 38-1708); English v. Shivers, 220 Ga. 737, 141 S.E.2d 443 (1965) (decided under former Code 1933, § 38-1708); Atlanta Stove Works, Inc. v. Hollon, 112 Ga. App. 862, 146 S.E.2d 358 (1965) (decided under former Code 1933, § 38-1708); Sasser v. Coastal States Life Ins. Co., 113 Ga. App. 17, 147 S.E.2d 5 (1966) (decided under former Code 1933, § 38-1708); Southern Ry. v. Grogan, 113 Ga. App. 451, 148 S.E.2d 439 (1966) (decided under former Code 1933, § 38-1708); Griffin v. State, 123 Ga. App. 820, 182 S.E.2d 498 (1971) (decided under former Code 1933, § 38-1708); Lashley v. Ford Motor Co., 359 F. Supp. 363 (M.D. Ga. 1972), aff'd, 480 F.2d 158 (5th Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973) (decided under former Code 1933, § 38-1708); State Hwy. Dep't v. Raines, 129 Ga. App. 123, 199 S.E.2d 96 (1973) (decided under former Code 1933, § 38-1708); Spencer v. State, 236 Ga. 697, 224 S.E.2d 910, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 302 (1976) (decided under former Code 1933, § 38-1708); Galloway v. Banks County, 139 Ga. App. 649, 229 S.E.2d 127 (1976) (decided under former Code 1933, § 38-1708); Gaines v. DOT, 140 Ga. App. 741, 231 S.E.2d 829 (1976) (decided under former Code 1933, § 38-1708); Allen v. State, 152 Ga. App. 481, 263 S.E.2d 259 (1979) (decided under former Code 1933, § 38-1708); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349 (1980) (decided under former Code 1933, § 38-1708); Classic Restorations, Inc. v. Bean, 155 Ga. App. 694, 272 S.E.2d 557 (1980) (decided under former Code 1933, § 38-1708); Leonard v. State, 157 Ga. App. 37, 276 S.E.2d 94 (1981) (decided under former O.C.G.A. § 24-9-65); Peterson v. RTM Mid-America, Inc., 209 Ga. App. 691, 434 S.E.2d 521 (1993) (decided under former O.C.G.A. § 24-9-65).

When facts cannot be demonstrated. — Opinion of a nonexpert witness may be received in evidence if the witness observed the matter in issue and cannot adequately state or recite the data so fully and accurately as to put the jury completely in the witness's place and enable them to equally well draw the inference. Pride v. State, 133 Ga. 438, 66 S.E. 259 (1909) (decided under former Penal Code 1895, § 1021); Taylor v. State, 135 Ga. 622, 70 S.E. 237 (1911) (decided under former Civil Code 1910, § 5874); Jackson v. State, 148 Ga. 519, 97 S.E. 525 (1918) (decided under former Civil Code 1910, § 5874); Jefferson v. State, 56 Ga. App. 383, 192 S.E. 644 (1937) (decided under former Code 1933, § 38-1708); Harris v. State, 188 Ga. 745, 4 S.E.2d 651 (1939) (decided under former Code 1933, § 38-1708); Tillman v. State, 61 Ga. App.

Opinion Testimony
Admissible (Cont'd)
1. In General (Cont'd)

724, 7 S.E.2d 285 (1940) (decided under former Code 1933, § 38-1708); Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824 (1944) (decided under former Code 1933, § 38-1708); Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828 (1945) (decided under former Code 1933, § 38-1708); McGahee v. Phillips, 211 Ga. 118, 84 S.E.2d 19 (1954) (decided under former Code 1933, § 38-1708); Wilson v. Garrett, 92 Ga. App. 820, 90 S.E.2d 74 (1955) (decided under former Code 1933, § 38-1708); Atlantic Coast Line R.R. v. Blount, 116 Ga. App. 86, 156 S.E.2d 409 (1967) (decided under former Code 1933, § 38-1708).

Opinions from lay witnesses. — Lay witnesses may relate their opinions as to the existence of a fact so long as the opinions are based upon the witnesses' own observations, provided that the witnesses cannot adequately relate those observations without also relating a personal opinion formed through such observations. Johnson v. Knebel, 267 Ga. 853, 485 S.E.2d 451 (1997) (decided under former O.C.G.A. § 24-9-65).

2. Specific Examples

Appearance and conduct. — See Perdue v. State, 135 Ga. 277, 69 S.E. 184 (1910) (decided under former Penal Code 1910, § 1047); Leonard v. State, 157 Ga. App. 37, 276 S.E.2d 94 (1981) (decided under former O.C.G.A. § 24-9-65); Roberts v. State, 232 Ga. App. 745, 503 S.E.2d 614 (1998) (decided under former O.C.G.A. § 24-9-65); Thompson v. State, 240 Ga. App. 26, 521 S.E.2d 876 (1999) (decided under former O.C.G.A. § 24-9-65).

Trial court properly admitted a witness's testimony about the witness's observations of defendant's appearance and behavior and the assumptions that the witness made based upon such observations; the witness was not asked to, nor did the witness, express an opinion about whether defendant shot either or both of the victims or whether defendant possessed a firearm during the commission of any felony. Harris v. State, 279 Ga. 304, 612 S.E.2d 789 (2005) (decided under former O.C.G.A. § 24-9-65).

Cause of collision. — See Avant Trucking Co. v. Stallion, 159 Ga. App. 198, 283 S.E.2d 7 (1981) (decided under former Code 1933, § 38-1708).

Cause of death. — See Everett v. State, 62 Ga. 65 (1878) (decided under former Code 1873, § 3867); McLain v. State, 71 Ga. 279 (1883) (decided under former Code 1882, § 3867); Lanier v. State, 141 Ga. 17, 80 S.E. 5 (1913) (decided under former Penal Code 1910, § 1047); Bullard v. Metropolitan Life Ins. Co., 31 Ga. App. 641, 122 S.E. 75 (1924) (decided under former Civil Code 1910, § 5874).

Correctional officer's testimony. — With regard to a defendant's habeas corpus challenge to a finding that the defendant was not mentally retarded, a trial court did not err in the admission of the testimony of a correctional officer, who was called by the state to testify regarding the defendant's behavior while incarcerated with regard to testimony that the defendant was not housed in the area of the institution with those inmates the officer had been told were mentally retarded, as the officer's testimony was relevant to the issue of the defendant's adaptive skills and was not unduly prejudicial because the officer clarified that the officer was not diagnosing anyone. The testimony also did not constitute an impermissible lay opinion because the officer was never asked for, nor did the officer ever give, an opinion as to the ultimate issue, namely whether the defendant was or was not mentally retarded. Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747; reh'g denied, 554 U.S. 930, 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008) (decided under former O.C.G.A. § 24-9-65).

Damages. — See Atlanta S.R.R. v. Walker, 93 Ga. 462, 21 S.E. 48 (1893) (decided under former Code 1882, § 3867); City Elec. Ry. v. Smith, 121 Ga. 663, 49 S.E. 724 (1905) (decided under former Civil Code 1895, § 5285).

Owners failed to present competent evidence of damages under O.C.G.A. § 11-2-714(2) because an owner's affidavit

lacked a proper foundation as the owner failed to testify that any of the owner's past purchases included the purchase of a vehicle with the defects at issue, the owner did not have any specialized knowledge, and the owner's testimony was not supported by objective information on vehicles found in published valuation guides, such as the "Blue Book"; the value of the defective vehicle could not be established by the repair invoices as few, if any, of the repairs reflected costs incurred by the owners. Hill v. Mercedes-Benz USA, LLC, 274 Ga. App. 826, 619 S.E.2d 353 (2005) (decided under former O.C.G.A. § 24-9-65).

Trial court erred in entering summary judgment for a manufacturer on the owners' claim for damages due to the diminished value of a vehicle since the owner's opinion as to the diminished value of the vehicle was supported by: (1) experience in purchasing three other cars; (2) familiarity with information relating to the value of the vehicle; (3) research into the manufacturer's cars; (4) discussions as to price and features with several dealerships; (5) knowledge and familiarity with the vehicle and the vehicle's defects acquired over a three-year time period; and (6) use of the car, the car's mileage, and purchase price. Hill v. Mercedes Benz USA, LLC, 274 Ga. App. 826, 619 S.E.2d 353 (2005) (decided under former O.C.G.A. § 24-9-65).

Dangerousness. — Testimony of a golf course architect as to the dangerousness of a golf cart path was the architect's opinion and was admissible as such. American Golf Corp. v. Manley, 222 Ga. App. 7, 473 S.E.2d 161 (1996) (decided under former O.C.G.A. § 24-9-65).

Defendant's actions not accidental. — Any error in allowing a police officer to testify to the officer's opinion that defendant did not accidentally accelerate and hit another officer's car was harmless as the officer could properly testify that defendant could have escaped without driving straight at the other officer and the officer's car, and there was ample evidence to support the officer's opinion as two officers testified that defendant accelerated straight toward the officer and the officer's car, even though there was room for defendant to drive away without hitting the officer's car, a videotape was played for the jury, and there was testimony that the videotape showed that when defendant accelerated, defendant aimed defendant's car straight toward the officer and the officer's car. Lopez v. State, 267 Ga. App. 178, 598 S.E.2d 898 (2004) (decided under former O.C.G.A. § 24-9-65).

Distance. — See Hansberger Motor Transp. Co. v. Pate, 51 Ga. App. 877, 181 S.E. 796 (1935) (decided under former Code 1933, § 38-1708).

Divorce. — See West v. West, 199 Ga. 378, 34 S.E.2d 545 (1945) (decided under former Code 1933, § 38-1708).

Driving too fast for conditions testimony from expert. — In a personal injury case brought against a driver, a police officer, testifying as an expert on automobile collisions, stated in response to a hypothetical question that the driver was driving too fast for conditions if the driver was driving 55 miles per hour. As the officer did not offer an ultimate opinion as to whether the driver was at fault in the accident or was negligent, the officer's testimony was admissible. Kennebeck v. Glover, 294 Ga. App. 822, 670 S.E.2d 459 (2008) (decided under former O.C.G.A. § 24-9-65).

Embarrassment. — See Glover v. State, 15 Ga. App. 44, 82 S.E. 602 (1914) (decided under former Civil Code 1910, § 5874).

Excitement and alarm. — See Roberts v. State, 123 Ga. 146, 51 S.E. 374 (1905) (decided under former Penal Code 1895, § 1021).

Expert witnesses. — See Hook v. Stovall, Dunn & Co., 30 Ga. 418 (1860) (decided under former law); Allison v. Wall, 121 Ga. 822, 49 S.E. 831 (1905) (decided under former Civil Code 1895, § 5285); Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897 (1939) (decided under former Code 1933, § 38-1708); State Hwy. Dep't v. Parker, 114 Ga. App. 270, 150 S.E.2d 875 (1966) (decided under former Code 1933, § 38-1708); Lingo v. State, 224 Ga. 333, 162 S.E.2d 1, cert. denied, 393 U.S. 992, 89 S. Ct. 467, 21 L. Ed. 2d 455 (1968) (decided under former Code 1933, § 38-1708); Smith v. State, 247 Ga. 612,

Opinion Testimony
Admissible (Cont'd)
2. Specific Examples (Cont'd)

277 S.E.2d 678 (1981) (decided under former O.C.G.A. § 24-9-65).

Expert on similarly situated driver. — In a spouse's wrongful death suit against the Georgia Department of Transportation, the trial court did not err by allowing the spouse's expert to testify as to whether a driver in the victim's position could discern that the victim was approaching a more major road and would therefore be required to yield. In light of the witness's familiarity with the intersection gained during a site visit, as well as the photographs presented, it could not be said that the trial court abused the court's discretion in allowing the witness to testify as to a similarly-situated driver's opportunity to discern the nature of the upcoming intersection. DOT v. Baldwin, 292 Ga. App. 816, 665 S.E.2d 898 (2008) (decided under former O.C.G.A. § 24-9-65).

Fair trial issue. — See Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576 (1960) (decided under former Code 1933, § 38-1708).

Gunshot wounds. — See Nunn v. State, 143 Ga. 451, 85 S.E. 346 (1915) (decided under former Penal Code 1910, § 1047); Harris v. State, 74 Ga. App. 614, 40 S.E.2d 664 (1946) (decided under former Code 1933, § 38-1708).

Health of witness. — See Head v. Georgia Power Co., 70 Ga. App. 32, 27 S.E.2d 339 (1943) (decided under former Code 1933, § 38-1708).

Hearsay. — See Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22 (1974) (decided under former Code 1933, § 38-1708).

Hypothetical questions. — See Taylor v. Warren, 175 Ga. 800, 166 S.E. 225 (1932) (decided under former Civil Code 1910, § 5874); Lingo v. State, 224 Ga. 333, 162 S.E.2d 1, cert. denied, 393 U.S. 992, 89 S. Ct. 467, 21 L. Ed. 2d 455 (1968) (decided under former Code 1933, § 38-1708); Lashley v. Ford Motor Co., 359 F. Supp. 363 (M.D. Ga. 1972), aff'd, 480 F.2d 158 (5th Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973) (decided under former Code 1933, § 38-1708); Bowers v. State, 153 Ga. App. 894, 267 S.E.2d 309 (1980) (decided under former Code 1933, § 38-1708); Xiong v. Landford, 226 Ga. App. 126, 485 S.E.2d 534 (1997) (decided under former O.C.G.A. § 24-9-65).

Identity. — Under former O.C.G.A. § 24-9-65, a lay witness who had been a friend of the defendant's for 22 years could give an opinion as to whether the defendant was the person pictured in a videotape. The quality of the videotape and still photos taken from the videotape was such that it was not within the ability of average jurors to decide the issue for themselves; the witness testified that the defendant's appearance had changed in the four years between the recording and the trial; and the witness's testimony was based on the witness's personal observations of the defendant over the years. Dawson v. State, 283 Ga. 315, 658 S.E.2d 755 (2008), cert. denied, 129 S. Ct. 169, 172 L.Ed.2d 122 (2008) (decided under former O.C.G.A. § 24-9-65).

Trial court did not abuse its discretion in admitting a deputy's lay opinion testimony identifying the defendant on a surveillance videotape because the deputy's testimony was sufficient to identify the defendant as the perpetrator of the crime pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), and the testimony was probative of a fact in issue and based on the deputy's observations of the defendant at the time the surveillance photograph was taken; because the deputy testified to having previously worked at the police department and had met the defendant on several occasions, the deputy was in a unique position to recognize the defendant, given the deputy's familiarity with the defendant's personal appearance before and at the time of the offense. Strickland v. State, 302 Ga. App. 44, 690 S.E.2d 638 (2010) (decided under former O.C.G.A. § 24-9-65).

Identity of material. — See Faucette v. State, 71 Ga. App. 331, 30 S.E.2d 808 (1944) (decided under former Code 1933, § 38-1708); Wortham v. State, 158 Ga. App. 19, 279 S.E.2d 287 (1981) (decided under former O.C.G.A. § 24-9-65); Wright v. State, 220 Ga. App. 233, 469 S.E.2d 381 (1996) (decided under former O.C.G.A. § 24-9-65).

Intoxication. — See Pierce v. State, 53 Ga. 365 (1874) (decided under former Code 1873, § 3867); Suggs v. State, 9 Ga. App. 830, 72 S.E. 287 (1911) (decided under former Penal Code 1910, § 1047); Grier v. State, 72 Ga. App. 633, 34 S.E.2d 642 (1945) (decided under former Code 1933, § 38-1708); Fountain v. Smith, 103 Ga. App. 192, 118 S.E.2d 852 (1961) (decided under former Code 1933, § 38-1708).

Mental condition. — See Dennis v. Weekes, 51 Ga. 24 (1874) (decided under former Code 1873, § 3867); Strickland v. State, 137 Ga. 115, 72 S.E. 922 (1911) (decided under former Penal Code 1910, § 1047); Goss v. State, 14 Ga. App. 402, 81 S.E. 247 (1914) (decided under former Penal Code 1910, § 1047); Dyar v. Dyar, 161 Ga. 615, 131 S.E. 535 (1926) (decided under former Civil Code 1910, § 5874); Taylor v. Warren, 175 Ga. 800, 166 S.E. 225 (1932) (decided under former Civil Code 1910, § 5874); Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897 (1939) (decided under former Code 1933, § 38-1708); Espy v. Preston, 199 Ga. 608, 34 S.E.2d 705 (1945) (decided under former Code 1933, § 38-1708); Jarrard v. State, 206 Ga. 112, 55 S.E.2d 706 (1949) (decided under former Code 1933, § 38-1708); English v. Shivers, 220 Ga. 737, 141 S.E.2d 443 (1965) (decided under former Code 1933, § 38-1708); Lingo v. State, 224 Ga. 333, 162 S.E.2d 1, cert. denied, 393 U.S. 992, 89 S. Ct. 467, 21 L. Ed. 2d 455 (1968) (decided under former Code 1933, § 38-1708); Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1977) (decided under former Code 1933, § 38-1708); Currelley v. State, 145 Ga. App. 29, 243 S.E.2d 307 (1978) (decided under former Code 1933, § 38-1708); Moses v. State, 245 Ga. 180, 263 S.E.2d 916 (1980), overruled on other grounds, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993) (decided under former O.C.G.A. § 24-9-65); Leonard v. State, 157 Ga. App. 37, 276 S.E.2d 94 (1981) (decided under former O.C.G.A. § 24-9-65).

In a transfer hearing, a child's mental condition may be established by the testimony of a nonexpert witness, such as a court services worker, provided the witness gives sufficient facts and circumstances to establish the basis for the witness's opinion. L.K.F. v. State, 173 Ga. App. 770, 328 S.E.2d 394 (1985) (decided under former O.C.G.A. § 24-9-65).

Odor identification. — See Green v. State, 125 Ga. 742, 54 S.E. 724 (1906) (decided under former Penal Code 1895, § 1021).

Personal injury damages. — See Black & White Cab Co. v. Clark, 67 Ga. App. 170, 19 S.E.2d 570 (1942) (decided under former Code 1933, § 38-1708); Moore v. Graham, 221 Ga. App. 616, 472 S.E.2d 152 (1996) (decided under former O.C.G.A. § 24-9-65).

Quality of product. — See Wilcox v. State, 8 Ga. App. 536, 69 S.E. 1086 (1911) (decided under former Penal Code 1910, § 1047).

Rape. — See Epps v. State, 216 Ga. 606, 118 S.E.2d 574, cert. denied, 368 U.S. 849, 82 S. Ct. 81, 7 L. Ed. 2d 47 (1961) (decided under former Code 1933, § 38-1708).

Sanity. — See Henderson v. State, 157 Ga. App. 621, 278 S.E.2d 164 (1981) (decided under former O.C.G.A. § 24-9-65).

Size. — See Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783 (1947) (decided under former O.C.G.A. § 24-9-65).

Shoe size is matter within the common knowledge, experience, and education of mankind. Buchanan v. State, 168 Ga. App. 365, 308 S.E.2d 860 (1983) (decided under former O.C.G.A. § 24-9-65).

Solvency or insolvency. — See Crawford v. Andress, 6 Ga. 244 (1849) (decided under former law); Cabaniss v. State, 8 Ga. App. 129, 68 S.E. 849 (1910) (decided under former Penal Code 1910, § 1047); Spence v. State, 20 Ga. App. 61, 92 S.E. 555, cert. denied, 20 Ga. App. 832 (1917) (decided under former Penal Code 1910, § 1047); Lamb v. Sewell, 20 Ga. App. 250, 92 S.E. 1011 (1917) (decided under former Penal Code 1910, § 1047); Gay v. Smith, 51 Ga. App. 615, 181 S.E. 129 (1935) (decided under former Code 1933, § 38-1708); Bell v. State, 52 Ga. App. 249, 183 S.E. 93 (1935) (decided under former Code 1933, § 38-1708); Hill v. Kirk, 78 Ga. App. 310, 50 S.E.2d 785 (1948) (decided under former Code 1933, § 38-1708); Western & Atl. R.R. v. Hart, 95 Ga. App. 810, 99 S.E.2d 302 (1957) (decided under former Code 1933, § 38-1708); Hatcher v. State, 175 Ga. App.

Opinion Testimony
Admissible (Cont'd)
2. Specific Examples (Cont'd)

768, 334 S.E.2d 709 (1985) (decided under former O.C.G.A. § 24-9-65).

Speed. — Layman's opinion of speed is admissible when the layman has testified to the facts upon which the opinion is based. Wright v. State, 205 Ga. App. 149, 421 S.E.2d 331 (1992) (decided under former O.C.G.A § 24-9-65).

Stopping distance of vehicle. — See Fouts v. Builders Transp., Inc., 222 Ga. App. 568, 474 S.E.2d 746 (1996) (decided under former O.C.G.A § 24-9-65).

Trial court did not err in admitting the testimony of the retired police officer as to the police officer's opinion about the most reliable means of suspect identification as that testimony, which was lay opinion testimony, was based on the police officer's own experience and observations, and referred to a matter within the scope of the average juror's knowledge. Dillingham v. State, 275 Ga. 665, 571 S.E.2d 777 (2002) (decided under former O.C.G.A. § 24-9-65).

Time. — See Allison v. Wall, 121 Ga. 822, 49 S.E. 831 (1905) (decided under former Civil Code 1895, § 5285); Georgia Ry. & Power Co. v. Belote, 20 Ga. App. 454, 93 S.E. 62 (1917) (decided under former Civil Code 1910, § 5874).

Ultimate issue. — See Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897 (1939) (decided under former Code 1933, § 38-1708); Weather Bros. Transf. Co. v. Jarrell, 72 Ga. App. 317, 33 S.E.2d 805 (1945) (decided under former Code 1933, § 38-1708); Galloway v. Banks County, 139 Ga. App. 649, 229 S.E.2d 127 (1976) (decided under former Code 1933, § 38-1708); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349 (1980) (decided under former Code 1933, § 38-1708).

Trial court did not err in allowing the witnesses in defendant's trial for possession of illegal gambling machines to testify that the machines were "gambling devices," as the jury had to determine whether defendant sold a machine that detectives testified was set up for gambling to a witness, who then sold it to the detectives, and whether that machine was illegal under O.C.G.A. § 16-12-20(2); describing the machines the detectives seized as "gambling machines" did not answer those questions. Jones v. State, 276 Ga. App. 810, 625 S.E.2d 4 (2005) (decided under former O.C.G.A § 24-9-65).

Undue influence. — See Howell v. Howell, 59 Ga. 145 (1877) (decided under former Code 1873, § 3867).

Unusual or special situation. — See Allison v. Wall, 121 Ga. 822, 49 S.E. 831 (1905) (decided under former Civil Code 1895, § 5285).

Value. — See Ferguson v. Bank of Dawson, 50 Ga. App. 604, 179 S.E. 236 (1935) (decided under former Code 1933, § 38-1708); Simmons v. Simmons, 194 Ga. 649, 22 S.E.2d 399 (1942) (decided under former Code 1933, § 38-1708); Firemen's Ins. Co. v. Allmond, 105 Ga. App. 763, 125 S.E.2d 545 (1962) (decided under former Code 1933, § 38-1708); State Hwy. Dep't v. Parker, 114 Ga. App. 270, 150 S.E.2d 875 (1966) (decided under former Code 1933, § 38-1708); Edwards v. State, 116 Ga. App. 80, 156 S.E.2d 518 (1967) (decided under former Code 1933, § 38-1708); Johnson v. Rooks, 116 Ga. App. 394, 157 S.E.2d 527 (1967) (decided under former Code 1933, § 38-1708); Sisk v. Carney, 121 Ga. App. 560, 174 S.E.2d 456 (1970) (decided under former Code 1933, § 38-1708); Nelson v. Cheek, 127 Ga. App. 31, 192 S.E.2d 504 (1972) (decided under former Code 1933, § 38-1708); Hasty v. Meaders, 130 Ga. App. 62, 202 S.E.2d 263 (1973) (decided under former Code 1933, § 38-1708); Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22 (1974) (decided under former Code 1933, § 38-1708); Clark v. Peck, 134 Ga. App. 868, 216 S.E.2d 687 (1975) (decided under former Code 1933, § 38-1708); Gaines v. DOT, 140 Ga. App. 741, 231 S.E.2d 829 (1976) (decided under former Code 1933, § 38-1708); Ricker v. Hopkins Chevrolet, Inc., 147 Ga. App. 358, 248 S.E.2d 720 (1978) (decided under former Code 1933, § 38-1708); Citizens & S. Nat'l Bank v. Williams, 147 Ga. App. 205, 249 S.E.2d 289 (1978) (decided under former Code 1933, § 38-1708); DOT v. Brown, 155 Ga. App. 622, 271 S.E.2d 876

(1980) (decided under former Code 1933, § 38-1708); Four Oaks Properties, Inc. v. Carusi, 156 Ga. App. 422, 274 S.E.2d 783 (1980) (decided under former Code 1933, § 38-1708); Maddox v. State, 157 Ga. App. 696, 278 S.E.2d 480 (1981) (decided under former O.C.G.A § 24-9-65).

In a condemnation proceeding, in which the land owner maintained that the land's highest and best use was as a wetlands mitigation bank, while the land owner's president had no specific expertise in wetlands mitigation, the owner's 30 years experience in real estate development and the owner's familiarity with the land's topography and hydrology qualified the owner to give an opinion as to its value as a mitigation bank. DOT v. Southeast Timberlands, Inc., 263 Ga. App. 805, 589 S.E.2d 575 (2003) (decided under former O.C.G.A § 24-9-65).

Visibility. — See Carnes v. Woodall, 233 Ga. App. 797, 505 S.E.2d 537 (1998) (decided under former O.C.G.A § 24-9-65).

Opinion Testimony Not Admissible

1. In General

Intent or purpose contrary to statute. — Witness may not state a purpose or an intended result of a levy, seizure, and notice which purpose or intended result is contrary to the provisions of a plain statute, or constructions thereof which have been made by the courts. Summer v. Allison, 127 Ga. App. 217, 193 S.E.2d 177 (1972) (decided under former Code 1933, § 38-1708).

Existence of a fact. — When the issue shall be to the existence of a fact, opinions generally are inadmissible. Jones v. State, 101 Ga. App. 851, 115 S.E.2d 576 (1960) (decided under former Code 1933, § 38-1708).

Conclusion cannot be based on hearsay statements. — Police officer who investigates an accident cannot base the officer's opinion as to the manner in which the accident occurred upon hearsay statements which the officer receives during an investigation unless the statements are a part of the res gestae. Avant Trucking Co. v. Stallion, 159 Ga. App. 198, 283 S.E.2d 7 (1981) (decided under former O.C.G.A § 24-9-65).

Conclusions. — It is error to permit a witness over timely objection to testify to a conclusion. Hammock v. McBride, 6 Ga. 178 (1849) (decided under former law); Franklin v. Mayor of Macon, 12 Ga. 257 (1852) (decided under former law); Parker v. Chambers, 24 Ga. 518 (1858) (decided under former law); Howell v. Howell, 59 Ga. 145 (1877) (decided under former Code 1873, § 3867); Atlanta Masonic Temple Co. v. City of Atlanta, 162 Ga. 244, 133 S.E. 864 (1926) (decided under former Civil Code 1910, § 5874); Central of Ga. Ry. v. Evans, 35 Ga. App. 438, 134 S.E. 122 (1926) (decided under former Civil Code 1910, § 5874); Granger v. National Convoy & Trucking Co., 62 Ga. 294, 7 S.E.2d 915 (1940) (decided under former Code 1933, § 38-1708); Cooper v. State, 197 Ga. 611, 30 S.E.2d 177 (1944) (decided under former Code 1933, § 38-1708); Sanders v. Chandler, 71 Ga. App. 337, 30 S.E.2d 813 (1944) (decided under former Code 1933, § 38-1708); Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174 (1947) (decided under former Code 1933, § 38-1708); Brown-Rogers-Dixson Co. v. Southern Ry., 79 Ga. App. 449, 53 S.E.2d 702 (1949) (decided under former Code 1933, § 38-1708); Central of Ga. Ry. v. Brower, 106 Ga. App. 340, 127 S.E.2d 33, rev'd on other grounds, 218 Ga. 525, 128 S.E.2d 926 (1962) (decided under former Code 1933, § 38-1708); State Hwy. Dep't v. Raines, 129 Ga. App. 123, 199 S.E.2d 96 (1973) (decided under former Code 1933, § 38-1708); Marshall v. State, 154 Ga. App. 327, 268 S.E.2d 383 (1980) (decided under former Code 1933, § 38-1708).

Witness cannot state witness's mere conclusion that others than the witness know a fact. Summer v. Allison, 127 Ga. App. 217, 193 S.E.2d 177 (1972) (decided under former Code 1933, § 38-1708).

Witness cannot state a mere conclusion that others than the witness knew a particular fact since it is not established that the witness was qualified to testify as to the knowledge of others. Marshall v. State, 154 Ga. App. 327, 268 S.E.2d 383 (1980) (decided under former Code 1933, § 38-1708).

Witness invading province of jury. — Witness cannot state an opinion or

Opinion Testimony Not Admissible (Cont'd)
1. In General (Cont'd)

conclusion where the data or facts are such that a jury can make the jury's own calculation or conclusions. Blackman v. State, 80 Ga. 785, 7 S.E. 626 (1888) (decided under former Code 1882, § 3867); Robinson v. State, 128 Ga. 254, 57 S.E. 315 (1907) (decided under former Penal Code 1895, § 1021); Caswell v. State, 5 Ga. App. 483, 63 S.E. 566 (1909) (decided under former Penal Code 1895, § 1021); Glover v. State, 15 Ga. App. 44, 82 S.E. 602 (1914) (decided under former Penal Code 1910, § 1047); Hayes v. State, 16 Ga. App. 20, 84 S.E. 497 (1915) (decided under former Penal Code 1910, § 1047); Bugg v. State, 17 Ga. App. 211, 86 S.E. 405 (1915) (decided under former Penal Code 1910, § 1047); Hansberger Motor Transp. Co. v. Pate, 51 Ga. App. 877, 181 S.E. 796 (1935) (decided under former Code 1933, § 38-1708); Harris v. State, 188 Ga. 245, 4 S.E.2d 651 (1939) (decided under former Code 1933, § 38-1708); Whatley v. Henry, 65 Ga. App. 668, 16 S.E.2d 214 (1941) (decided under former Code 1933, § 38-1708); Simmons v. Simmons, 194 Ga. 649, 22 S.E.2d 399 (1942) (decided under former Code 1933, § 38-1708); Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824 (1944) (decided under former Code 1933, § 38-1708); Barron v. Chamblee, 199 Ga. 591, 34 S.E.2d 828 (1945) (decided under former Code 1933, § 38-1708); Barnes v. Thomas, 72 Ga. App. 827, 35 S.E.2d 364 (1945) (decided under former Code 1933, § 38-1708); McGahee v. Phillips, 211 Ga. 118, 84 S.E.2d 19 (1954) (decided under former Code 1933, § 38-1708); Klein v. State, 104 Ga. App. 126, 121 S.E.2d 253 (1961) (decided under former Code 1933, § 38-1708); Gazaway v. Secured Ins. Co., 109 Ga. App. 428, 136 S.E.2d 531 (1964) (decided under former Code 1933, § 38-1708); Ford Motor Co. v. Hanley, 128 Ga. App. 311, 196 S.E.2d 454 (1973) (decided under former Code 1933, § 38-1708); Galloway v. Banks County, 139 Ga. App. 649, 229 S.E.2d 127 (1976) (decided under former Code 1933, § 38-1708); Tam v. Newsome, 141 Ga. App. 76, 232 S.E.2d 613 (1977) (decided under former Code 1933, § 38-1708).

2. Specific Examples

Accident victims. — In an action against the Georgia Department of Transportation alleging negligent placement of safety devices at an intersection, the trial court properly excluded the testimony of a judge who was injured in an accident at an intersection located in the same road construction project where the plaintiffs' family members died, because the judge's accident occurred at a different intersection and the judge was not familiar with the intersection where the plaintiffs' family members died. McCorkle v. DOT, 257 Ga. App. 397, 571 S.E.2d 160 (2002) (decided under former O.C.G.A. § 24-9-65).

Conclusion of law. — See Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897 (1939) (decided under former Code 1933, § 38-1708); Wells v. State, 151 Ga. App. 416, 260 S.E.2d 374 (1979) (decided under former Code 1933, § 38-1708); Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345 (1980) (decided under former Code 1933, § 38-1708).

While a sheriff deputy's opinion that the defendant's string of harassing phone messages amounted to aggravated stalking in violation of a protective order was inadmissible testimony on an ultimate issue, the error was harmless given the defendant's own testimony establishing the elements of the offense without dispute. Shafer v. State, 285 Ga. App. 748, 647 S.E.2d 274 (2007), cert. denied, No. S07C1498, 2007 Ga. LEXIS 642 (Ga. 2007) (decided under former O.C.G.A. § 24-9-65).

Conspiracy. — See Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475 (1983) (decided under former O.C.G.A. § 24-9-65).

Contents of bottles. — See Gales v. State, 14 Ga. App. 450, 81 S.E. 364 (1914) (decided under former Penal Code 1910, § 1047).

Damages. — See Central R.R. & Banking Co. v. Kelly, 58 Ga. 107 (1877) (decided under former Code 1873, § 3867); Carter v. Carter Elec. Co., 156 Ga. 297, 119 S.E. 737 (1923) (decided under former Civil Code 1910, § 5874).

Experts. — Opinion of an expert accident reconstructionist was not admissible as lay testimony since the expert testified that it was based upon the expert's study of photographs of damaged cars; since the same photographs were before the jury, it was not necessary for the witness to relate the witness's personal opinion in order to adequately relate that information. Johnson v. Knebel, 267 Ga. 853, 485 S.E.2d 451 (1997) (decided under former O.C.G.A. § 24-9-65).

Expert opinion inadmissible as supporting facts not yet in record. — Trial court correctly ruled that a psychologist could not testify that at the time the defendant committed several crimes the defendant did not know right from wrong because the defendant was under the influence of the drug GHB because at the time the defendant sought to present that testimony, there was no evidence that the defendant had actually ingested the drug or was under the drug's influence. Kirkland v. State, 292 Ga. App. 73, 663 S.E.2d 408 (2008) (decided under former O.C.G.A. § 24-9-65).

Hair analysis results cannot be used to make positive identification of an individual. Hudson v. State, 166 Ga. App. 660, 305 S.E.2d 409 (1983) (decided under former O.C.G.A. § 24-9-65).

In rape prosecution, defendant cannot ask victim's mother whether she believed daughter's statements about the offense or could tell her daughter was lying from her body language. Nichols v. State, 221 Ga. App. 600, 473 S.E.2d 491 (1996) (decided under former O.C.G.A. § 24-9-65).

Inference from facts in testimony of others. — See Hook v. Stovall, Dunn & Co., 30 Ga. 418 (1860) (decided under former law); Southern Mut. Ins. Co. v. Hudson, 113 Ga. 434, 38 S.E. 964 (1901) (decided under former Civil Code 1895, § 5285); Taylor v. Warren, 175 Ga. 800, 166 S.E. 225 (1932) (decided under former Civil Code 1910, § 5874); Murray v. State, 201 Ga. 201, 39 S.E.2d 842 (1946) (decided under former Code 1933, § 38-1708); Jones v. State, 75 Ga. App. 610, 44 S.E.2d 174 (1947) (decided under former Code 1933, § 38-1708).

Inference requiring mixture of law and fact. Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345 (1980) (decided under former Code 1933, § 38-1708); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349 (1980) (decided under former Code 1933, § 38-1708).

Intent of deceased. — See Hudgins v. State, 2 Ga. 173 (1847) (decided under former law); Hawkins v. State, 25 Ga. 207, 71 Am. Dec. 166 (1858) (decided under former law).

Intent or purpose of another. — See Summer v. Allison, 127 Ga. App. 217, 193 S.E.2d 177 (1972) (decided under former Code 1933, § 38-1708).

Lay opinions. — Trial court did not err when the court did not permit a defense witness to give opinion testimony regarding an experiment the witness conducted at the scene of the crime because the issue of the visibility of the bulge produced by an object placed under carpeting since the defendant allegedly hid a murder weapon at the scene of the crime was not one of opinion. Jones v. State, 277 Ga. 36, 586 S.E.2d 224 (2003) (decided under former O.C.G.A. § 24-9-65).

Because the personal opinions of three potential witnesses were based on the defendant's work, and the limited interactions attendant thereto, and the witnesses could not offer any opinion and had no personal knowledge of the defendant's general reputation in the community, the failure to call the witnesses at trial for that purpose did not prejudice defendant's case. Thomas v. State, 282 Ga. 894, 655 S.E.2d 599 (2008) (decided under former O.C.G.A. § 24-9-65).

Measurement of missing article. — See Williams v. State, 145 Ga. 177, 88 S.E. 958 (1916) (decided under former Penal Code 1910, § 1047).

Mental condition. — See Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897 (1939) (decided under former Code 1933, § 38-1708); Livingston v. Barnett, 193 Ga. 640, 19 S.E.2d 385 (1942) (decided under former Code 1933, § 38-1708); McGahee v. Phillips, 211 Ga. 118, 84 S.E.2d 19 (1954) (decided under former Code 1933, § 38-1708).

Paranoia. — Since paranoia is a medical term relating to a mental disorder,

Opinion Testimony Not Admissible (Cont'd)
2. Specific Examples (Cont'd)

only a qualified expert such as a psychiatrist, psychologist, or medical doctor would be competent to diagnose and define such a mental disorder. Ellis v. State, 168 Ga. App. 757, 309 S.E.2d 924 (1983) (decided under former O.C.G.A. § 24-9-65).

Proving opinions of others. — See Wynes v. State, 182 Ga. 434, 185 S.E. 711 (1936) (decided under former Code 1933, § 38-1708).

Self-defense. — On a trial for murder, as to the defendant's theory of self-defense, apprehensions or opinions of third parties, that the accused is in imminent danger, are not relevant. But facts from which apprehension might reasonably be inferred, as distinct from opinions, are relevant when stated or shown by third parties. Lancaster v. State, 250 Ga. 871, 301 S.E.2d 882 (1983) (decided under former O.C.G.A. § 24-9-65).

Suicide. — See Trammell v. State, 18 Ga. App. 487, 89 S.E. 606 (1916) (decided under former Civil Code 1910, § 5874).

"Understanding" of ownership. — See Brooks v. State, 19 Ga. App. 3, 90 S.E. 989 (1916) (decided under former Penal Code 1910, § 1047).

Ultimate issue. — See Morgan v. Bell, 189 Ga. 432, 5 S.E.2d 897 (1939) (decided under former Code 1933, § 38-1708); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349 (1980) (decided under former Code 1933, § 38-1708).

Witness's medical condition. — Any statement of "opinion" made by or attributed to a nonexpert workers' compensation claimant which was to the effect that the claimant's CT scan of October 1983 (which was not in evidence) may have showed a second herniated disc at L4 was nonprobative hearsay as to that purported fact. Under former O.C.G.A. § 24-9-65, lay opinions must be based upon facts, not hearsay. Fidelity & Cas. Ins. Co. v. Cigna/Pacific Employers Ins. Co., 180 Ga. App. 159, 348 S.E.2d 702 (1986) (decided under former O.C.G.A. § 24-9-65).

Market Value Evidence

"Market value" defined. — What is meant by market value of property is what it will bring when sold for cash by a person ready and willing to sell, but under no obligation to sell, and when bought by a person ready and willing to buy, but under no obligation to buy. Housing Auth. v. Spink, 91 Ga. App. 72, 85 S.E.2d 80 (1954) (decided under former Code 1933, § 38-1709).

Duty of trial court. — Determination as to whether a witness has established sufficient opportunity for forming a correct opinion or has stated a proper basis for expressing an opinion is for the trial court. DOT v. McLaughlin, 163 Ga. App. 1, 292 S.E.2d 435, cert. denied, 250 Ga. 10, 297 S.E.2d 217 (1982), overruled on other grounds, 264 Ga. 393, 444 S.E.2d 734 (1994) (decided under former O.C.G.A. § 24-9-66).

1. Determination of Market Value

In general. — Opinion evidence is admissible when it is necessary for the jury to determine the reasonable value of services or property. Allison v. Wall, 121 Ga. 822, 49 S.E. 831 (1905) (decided under former Civil Code 1895, § 5285).

Market value may be established by either direct or circumstantial evidence. Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119 (1953) (decided under former Code 1933, § 38-1708); Citizens & S. Nat'l Bank v. Williams, 147 Ga. App. 205, 249 S.E.2d 289 (1978) (decided under former Code 1933, § 38-1708).

Question of value is a matter of opinion under former O.C.G.A. § 24-9-66, and as to questions of opinion, the witness may swear to the witness's opinion or belief, giving the witness's reasons therefor. Maddox v. State, 157 Ga. App. 696, 278 S.E.2d 480 (1981) (decided under former O.C.G.A. § 24-9-66).

Hearsay evidence. — See Garner v. Gwinnett County, 105 Ga. App. 714, 125 S.E.2d 563 (1962) (decided under former Code 1933, § 38-1709); Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22 (1974) (decided under former Code 1933,

§ 38-1709); Gibbs v. Clay, 137 Ga. App. 381, 224 S.E.2d 46 (1976) (decided under former Code 1933, § 38-1709); Dickens v. Adams, 137 Ga. App. 564, 224 S.E.2d 468 (1976) (decided under former Code 1933, § 38-1709); Burch v. Lawrence, 150 Ga. App. 351, 258 S.E.2d 35 (1979) (decided under former Code 1933, § 38-1709); Toney v. Johns, 153 Ga. App. 880, 267 S.E.2d 298 (1980) (decided under former Code 1933, § 38-1709); Apostle v. Prince, 158 Ga. App. 56, 279 S.E.2d 304 (1981) (decided under former O.C.G.A. § 24-9-66).

Market value may rest wholly or in part upon hearsay, provided the witness has had an opportunity of forming a correct opinion. B & L Serv. Co. v. Gerson, 167 Ga. App. 679, 307 S.E.2d 262 (1983) (decided under former O.C.G.A. § 24-9-66).

Debtor's testimony, standing alone, was insufficient under former O.C.G.A. § 24-9-66 to establish the fair and reasonable value of the debtor's car at the time the car was repossessed because the trial court was authorized to conclude that the debtor's "opinion" testimony about the value of the car two years earlier was based entirely upon hearsay and that, absent any evidence to show that the hearsay was reliable, the debtor failed to demonstrate a sufficient foundation for the debtor's conclusions; the debtor had no education or experience in the value of vehicles and the debtor presented no evidence of the price the debtor paid for the car, the condition of the car at the time the car was repossessed, the potential market for such cars, or other relevant factors to be considered in reaching a conclusion about the car's value. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011) (decided under former O.C.G.A. § 24-9-66).

It is peculiarly within the province of the jury to determine market value. National Ben Franklin Fire Ins. Co. v. Purvis, 61 Ga. App. 674, 7 S.E.2d 296 (1940) (decided under former Code 1933, § 38-1709); Simmons v. Simmons, 194 Ga. 649, 22 S.E.2d 399 (1942) (decided under former Code 1933, § 38-1709); Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119 (1953) (decided under former Code 1933, § 38-1709); Hayes v. O'Shield Buick Co., 94 Ga. App. 177, 94 S.E.2d 44 (1956) (decided under former Code 1933, § 38-1709); Youngblood v. Ruis, 96 Ga. App. 290, 99 S.E.2d 714 (1957) (decided under former Code 1933, § 38-1709); Dalon Contracting Co. v. Artman, 101 Ga. App. 828, 115 S.E.2d 377 (1960) (decided under former Code 1933, § 38-1709); Smith v. Fidelity Fed. Sav. & Loan Ass'n, 149 Ga. App. 730, 256 S.E.2d 43 (1979) (decided under former Code 1933, § 38-1709); Varnedoe v. Singleton, 154 Ga. App. 332, 268 S.E.2d 387 (1980) (decided under former Code 1933, § 38-1709); Murdock v. Godwin, 154 Ga. App. 824, 269 S.E.2d 905 (1980) (decided under former Code 1933, § 38-1709); DOT v. Brown, 155 Ga. App. 622, 271 S.E.2d 876 (1980) (decided under former Code 1933, § 38-1709).

Jury question as to weight of value evidence. — When defendants contended that plaintiff's testimony as to the value of plaintiff's motor vehicle was without the proper foundation and had no probative value, but plaintiff had related plaintiff's knowledge and familiarity with classic type vehicles, described the condition of the vehicle, and introduced photographs of the damage to the vehicle, it was held that after the plaintiff gave the basis for plaintiff's opinion, the weight and credibility of the testimony was for the jury, and since the witness had an opportunity for forming a correct opinion, the evidence was sufficient for the jury's consideration. Long v. Marion, 182 Ga. App. 361, 355 S.E.2d 711, aff'd, 257 Ga. 431, 360 S.E.2d 255 (1987) (decided under former O.C.G.A. § 24-9-66).

Qualification of witnesses. — Competency of a witness to testify an opinion of market value is a matter for the discretion of the trial court. Central Ga. Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912) (decided under former Civil Code 1910, § 5874); Haas & Howell v. Godby, 33 Ga. App. 218, 125 S.E. 897 (1924), cert. denied, 33 Ga. App. 829 (1925) (decided under former Civil Code 1910, § 5874); McDuffie County v. Gunn, 50 Ga. App. 198, 177 S.E. 363 (1934) (decided under former Code 1933, § 38-1708); United States ex rel. TVA v. Phillips, 50 F. Supp. 454 (N.D. Ga. 1943)

Market Value Evidence (Cont'd)
1. Determination of Market Value (Cont'd)

(decided under former Code 1933, § 38-1708); Dickens v. Adams, 137 Ga. App. 564, 224 S.E.2d 468 (1976) (decided under former Code 1933, § 38-1708); DOT v. Great S. Enters., Inc., 137 Ga. App. 710, 225 S.E.2d 80 (1976) (decided under former Code 1933, § 38-1708).

It is not a ground for objection to testimony that a witness, after testifying to a fact, testifies on cross-examination to facts that tend to show that the witness knows little or nothing about the facts as to which the witness previously testified on direct examination. Toney v. Johns, 153 Ga. App. 880, 267 S.E.2d 298 (1980) (decided under former Code 1933, § 38-1709).

Some evidence of market value mandatory. — There must be in evidence sufficient facts on which the jury may exercise the jury's own knowledge and ideas and draw a legitimate conclusion of market value. Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119 (1953) (decided under former Code 1933, § 38-1709); Mills v. Mangum, 111 Ga. App. 396, 141 S.E.2d 773 (1965) (decided under former Code 1933, § 38-1709); Nail v. Hiers, 116 Ga. App. 522, 157 S.E.2d 771 (1967) (decided under former Code 1933, § 38-1709); Citizens & S. Nat'l Bank v. Williams, 147 Ga. App. 205, 249 S.E.2d 289 (1978) (decided under former Code 1933, § 38-1709).

As to items of a common nature, such as automobiles, a plaintiff need not offer any opinion evidence as to value, and so long as the evidence contains facts upon which the jury may legitimately exercise their own knowledge and ideas, the question of value is properly left to the jury. White v. Miller, 194 Ga. App. 816, 392 S.E.2d 30 (1990) (decided under former O.C.G.A. § 24-9-66).

Jurors are not absolutely bound by opinion testimony as to market value, even though it is not contradicted, as jurors may exercise their own judgment based on their own experience and knowledge and the evidence as a whole. Widincamp v. McCall, 25 Ga. App. 733, 104 S.E. 642 (1920) (decided under former Civil Code 1910, § 5875); Black v. Automatic Sprinkler Co., 35 Ga. App. 8, 131 S.E. 543 (1926) (decided under former Civil Code 1910, § 5875); Bitting v. State, 165 Ga. 55, 139 S.E. 877 (1927) (decided under former Civil Code 1910, § 5875); Central of Ga. Ry. v. Cowart & Son, 38 Ga. App. 426, 144 S.E. 213 (1928) (decided under former Civil Code 1910, § 5875); Watson v. Tompkins Chevrolet Co., 83 Ga. App. 440, 63 S.E.2d 681 (1951) (decided under former Code 1933, § 38-1708); Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119 (1953) (decided under former Code 1933, § 38-1708); Hayes v. Carter, 91 Ga. App. 540, 86 S.E.2d 532 (1955) (decided under former Code 1933, § 38-1708); Hayes v. O'Shield Buick Co., 94 Ga. App. 177, 94 S.E.2d 44 (1956) (decided under former Code 1933, § 38-1708); Youngblood v. Ruis, 96 Ga. App. 290, 99 S.E.2d 714 (1957) (decided under former Code 1933, § 38-1708); Dalon Contracting Co. v. Artman, 101 Ga. App. 828, 115 S.E.2d 377 (1960); J.A. Jones Constr. Co. v. Greenbriar Shopping Ctr., 332 F. Supp. 1336 (N.D. Ga. 1971), aff'd, 461 F.2d 1269 (5th Cir. 1972) (decided under former Code 1933, § 38-1708); DOT v. Driggers, 150 Ga. App. 270, 257 S.E.2d 294 (1979) (decided under former Code 1933, § 38-1708); Smith v. Fidelity Fed. Sav. & Loan Ass'n, 149 Ga. App. 730, 256 S.E.2d 43 (1979) (decided under former Code 1933, § 38-1708); Murdock v. Godwin, 154 Ga. App. 824, 269 S.E.2d 905 (1980) (decided under former Code 1933, § 38-1708).

Credibility of a witness is a matter to be weighed by the jury. Central Ga. Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912) (decided under former Civil Code 1910, § 5874); Haas & Howell v. Godby, 33 Ga. App. 218, 125 S.E. 897 (1924), cert. denied, 33 Ga. App. 829 (1925) (decided under former Civil Code 1910, § 5874); McDuffie County v. Gunn, 50 Ga. App. 198, 177 S.E. 363 (1934) (decided under former Code 1933, § 38-1708); Dickens v. Adams, 137 Ga. App. 564, 224 S.E.2d 468 (1976) (decided under former Code 1933, § 38-1708).

Weight to be given opinion evidence of market value is a matter for the

jury. Central Ga. Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912) (decided under former Civil Code 1910, § 5875); Anderson v. Anderson, 27 Ga. App. 513, 108 S.E. 907, cert. denied, 27 Ga. App. 835 (1921) (decided under former Civil Code 1910, § 5875); Bitting v. State, 165 Ga. 55, 139 S.E. 877 (1927) (decided under former Civil Code 1910, § 5875); Central of Ga. Ry. v. Cowart & Son, 38 Ga. App. 426, 144 S.E. 213 (1928) (decided under former Civil Code 1910, § 5875); Sutton v. State Hwy. Dep't, 103 Ga. App. 29, 118 S.E.2d 285 (1961) (decided under former Code 1933, § 38-1708); Seaboard Coast Line R.R. v. Toole, 128 Ga. App. 24, 195 S.E.2d 282 (1973) (decided under former Code 1933, § 38-1708); Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22 (1974) (decided under former Code 1933, § 38-1708); Clark v. Peck, 134 Ga. App. 868, 216 S.E.2d 687 (1975) (decided under former Code 1933, § 38-1708); Gibbs v. Clay, 137 Ga. App. 381, 224 S.E.2d 46 (1976) (decided under former Code 1933, § 38-1708); Williams v. State, 246 Ga. App. 347, 540 S.E.2d 305 (2000) (decided under former O.C.G.A. § 24-9-66).

Expert witnesses. — Witness must be an expert, or must state a sufficient basis for testifying as to market value. Southern Cotton Oil Co. v. Overby, 136 Ga. 69, 70 S.E. 664 (1911) (decided under former Civil Code 1910, § 5875); Crump v. Knox, 18 Ga. App. 437, 89 S.E. 586 (1916) (decided under former Civil Code 1910, § 5875); Fowler v. National City Bank, 49 Ga. App. 435, 176 S.E. 113 (1934) (decided under former Code 1933, § 38-1709).

Expert's opinion as to what expert would pay for condemned land was probative of the land's fair market value and improperly excluded by the trial court. Jotin Realty Co. v. Department of Transp., 174 Ga. App. 809, 331 S.E.2d 605 (1985) (decided under former O.C.G.A. § 24-9-66).

Nonexpert witnesses. — There was no requirement that officer be an expert in order to express the officer's opinion as to amount of damages inflicted to the officer's vehicle by defendant, provided the officer had had an opportunity for forming a correct opinion. Mallory v. State, 164 Ga. App. 569, 298 S.E.2d 290 (1982) (decided under former O.C.G.A. § 24-9-66).

To give an opinion on value, the nonexpert witness must supply reasons by showing knowledge, experience, or familiarity as to value. City of Alma v. Morris, 180 Ga. App. 420, 349 S.E.2d 277 (1986) (decided under former O.C.G.A. § 24-9-66).

Because an opinion rendered by a debtor's guarantor lacked probative value as to the valuation of the debtor-dry cleaner's equipment, as the guarantor was not in the business of owning and operating a dry cleaning business, such opinion was inadmissible as it amounted to nothing more than an unsupported conclusion or guess; thus, the debtor and its guarantors failed to rebut the bank's prima facie showing that the sale was commercially reasonable, and the trial court properly granted summary judgment on this ground. AKA Mgmt. v. Branch Banking & Trust Co., 275 Ga. App. 615, 621 S.E.2d 576 (2005) (decided under former O.C.G.A. § 24-9-66).

Given that both parties to a property dispute involving a house testified as to the home's value, including the appraisals, probative and non-hearsay evidence as to the value existed to support the jury's damages award such that the trial court erred in concluding otherwise and awarding a new trial on this basis. Perry v. Perry, 285 Ga. App. 892, 648 S.E.2d 193 (2007) (decided under former O.C.G.A. § 24-9-66).

Owner of property is considered to be qualified to state owner's opinion as to value. Maddox v. State, 157 Ga. App. 696, 278 S.E.2d 480 (1981) (decided under former O.C.G.A. § 24-9-66); Dixon v. Williams, 177 Ga. App. 702, 340 S.E.2d 286 (1986) (decided under former O.C.G.A. § 24-9-66).

Property owner need not be an expert to state an opinion as to the value of the owner's property, provided the owner can establish that the owner has had an opportunity for forming a correct opinion. Iffland v. Lancaster, 176 Ga. App. 449, 336 S.E.2d 350 (1985) (decided under former O.C.G.A. § 24-9-66).

There was no error by the trial court in admitting property owner's opinion testi-

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mony as to the fair market value of the damaged property before the fire where the owner had adequate opportunity to form a correct opinion as to the value of the items lost and the values to which the owner testified were those prior to the fire. Georgia Power Co. v. Hinson, 179 Ga. App. 263, 346 S.E.2d 73 (1986) (decided under former O.C.G.A. § 24-9-66).

Trial court did not err in allowing the sellers to testify as to the fair market value of their property in a promissory estoppel action because the owner was competent to form a correct opinion of the property's fair market value based on the financial records put into evidence. Rental Equip. Group, LLC v. Maci, LLC, 263 Ga. App. 155, 587 S.E.2d 364 (2003) (decided under former O.C.G.A. § 24-9-66).

Trial court did not err in ordering the defendant to pay the victim restitution after the defendant pled guilty to arson in the first degree because the trial court was authorized to find that the preponderance of the evidence showed that the victim owned the house at the time of the fire, and evidence was presented to show the cost of repairs and its relation to the value of the house prior to the fire, in accordance with the law of damages to real property; the evidence of the background of the victim, a real estate investor who repaired houses personally, provided some evidence to show that the investor had knowledge, experience, or familiarity with the cost of repairs, the value of real estate, and the extent of the damages to the investor's property pursuant to former O.C.G.A. § 24-9-66. Mayfield v. State, 307 Ga. App. 630, 705 S.E.2d 717 (2011) (decided under former O.C.G.A. § 24-9-66).

Foundation for opinion evidence required. — Opinion evidence as to market value must be based upon a foundation that the witness has some experience or familiarity with, or knowledge other than mere general knowledge of, the value of the property or similar property, must have had an opportunity to form a correct opinion, and must give reasons for the value assessed. Southern Cotton Oil Co. v. Overby, 136 Ga. 69, 70 S.E. 664 (1911) (decided under former Civil Code 1910, § 5875); Central Ga. Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912) (decided under former Civil Code 1910, § 5875); Crump v. Knox, 18 Ga. App. 437, 89 S.E. 586 (1916) (decided under former Civil Code 1910, § 5875); Anderson v. Anderson, 27 Ga. App. 513, 108 S.E. 907, cert. denied, 27 Ga. App. 835 (1921) (decided under former Civil Code 1910, § 5875); Bitting v. State, 165 Ga. 55, 139 S.E. 877 (1927) (decided under former Civil Code 1910, § 5875); Central of Ga. Ry. v. Cowart & Son, 38 Ga. App. 426, 144 S.E. 213 (1928) (decided under former Civil Code 1910, § 5875); Speir v. Westmoreland, 40 Ga. App. 302, 149 S.E. 422 (1929) (decided under former Civil Code 1910, § 5875); Georgia Power Co. v. Carson, 96 Ga. App. 612, 167 S.E. 902 (1933) (decided under former Code 1933, § 38-1709); Herrmann & Henican v. De La Perrier, 47 Ga. App. 541, 171 S.E. 232 (1933), later appeal, 56 Ga. App. 749, 194 S.E. 42 (1937) (decided under former Code 1933, § 38-1709); Fowler v. National City Bank, 49 Ga. App. 435, 176 S.E. 113 (1934) (decided under former Code 1933, § 38-1709); Southern Ry. v. Thacker, 50 Ga. App. 706, 179 S.E. 225 (1935) (decided under former Code 1933, § 38-1709); Ferguson v. Bank of Dawson, 50 Ga. App. 604, 179 S.E. 236 (1935) (decided under former Code 1933, § 38-1709); United States ex rel. TVA v. Phillips, 50 F. Supp. 454 (N.D. Ga. 1943) (decided under former Code 1933, § 38-1709); Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119 (1953) (decided under former Code 1933, § 38-1709); Housing Auth. v. Spink, 91 Ga. App. 72, 85 S.E.2d 80 (1954) (decided under former Code 1933, § 38-1709); Georgia R.R. & Banking Co. v. Flynt, 93 Ga. App. 514, 92 S.E.2d 330 (1956) (decided under former Code 1933, § 38-1709); Hayes v. O'Shield Buick Co., 94 Ga. App. 177, 94 S.E.2d 44 (1956) (decided under former Code 1933, § 38-1709); Sutton v. State Hwy. Dep't, 103 Ga. App. 29, 118 S.E.2d 285 (1961) (decided under former Code 1933, § 38-1709); Mills v. Mangum, 111 Ga. App. 396, 141 S.E.2d 773 (1965) (decided under former Code 1933, § 38-1709);

Hoard v. Wiley, 113 Ga. App. 328, 147 S.E.2d 782 (1966) (decided under former Code 1933, § 38-1709); Johnson v. Rooks, 116 Ga. App. 394, 157 S.E.2d 527 (1967) (decided under former Code 1933, § 38-1709); Nail v. Hiers, 116 Ga. App. 522, 157 S.E.2d 771 (1967) (decided under former Code 1933, § 38-1709); Sisk v. Carney, 121 Ga. App. 560, 174 S.E.2d 456 (1970) (decided under former Code 1933, § 38-1709); Lary v. Gilmer, 125 Ga. App. 604, 188 S.E.2d 432 (1972) (decided under former Code 1933, § 38-1709); Schoolcraft v. DeKalb County, 126 Ga. App. 101, 189 S.E.2d 915 (1972) (decided under former Code 1933, § 38-1709); Nelson v. Cheek, 127 Ga. App. 31, 192 S.E.2d 504 (1972) (decided under former Code 1933, § 38-1709); Seaboard Coast Line R.R. v. Toole, 128 Ga. App. 24, 195 S.E.2d 282 (1973) (decided under former Code 1933, § 38-1709); Abbott v. State, 130 Ga. App. 891, 205 S.E.2d 14 (1974) (decided under former Code 1933, § 38-1709); Hiatt v. State, 133 Ga. App. 111, 210 S.E.2d 22 (1974) (decided under former Code 1933, § 38-1709); Clark v. Peck, 134 Ga. App. 868, 216 S.E.2d 687 (1975) (decided under former Code 1933, § 38-1709); DeKalb County v. Queen, 135 Ga. App. 307, 217 S.E.2d 624 (1975) (decided under former Code 1933, § 38-1709); Hagin v. Powers, 140 Ga. App. 300, 231 S.E.2d 780 (1976) (decided under former Code 1933, § 38-1709); Canal Ins. Co. v. P & J Truck Lines, 145 Ga. App. 545, 244 S.E.2d 81, overruled on other grounds sub nom., United Family Life Ins. Co. v. Shirley, 242 Ga. 235, 248 S.E.2d 635 (1978) (decided under former Code 1933, § 38-1709); Ricker v. Hopkins Chevrolet, Inc., 147 Ga. App. 358, 248 S.E.2d 720 (1978) (decided under former Code 1933, § 38-1709); Citizens & S. Nat'l Bank v. Williams, 147 Ga. App. 205, 249 S.E.2d 289 (1978) (decided under former Code 1933, § 38-1709); DOT v. Brand, 149 Ga. App. 547, 254 S.E.2d 873 (1979) (decided under former Code 1933, § 38-1709); Burch v. Lawrence, 150 Ga. App. 351, 258 S.E.2d 35 (1979) (decided under former Code 1933, § 38-1709); Cunningham v. Hodges, 150 Ga. App. 827, 258 S.E.2d 631 (1979) (decided under former Code 1933, § 38-1709); Toney v. Johns, 153 Ga. App. 880, 267 S.E.2d 298 (1980) (decided under former Code 1933, § 38-1709); Varnedoe v. Singleton, 154 Ga. App. 332, 268 S.E.2d 387 (1980) (decided under former Code 1933, § 38-1709); Orkin Exterminating Co. v. Thrift, 154 Ga. App. 545, 269 S.E.2d 53 (1980) (decided under former Code 1933, § 38-1709); Gunter v. State, 155 Ga. App. 176, 270 S.E.2d 224 (1980) (decided under former Code 1933, § 38-1709); Maddox v. State, 157 Ga. App. 696, 278 S.E.2d 480 (1981) (decided under former O.C.G.A. § 24-9-66); Apostle v. Prince, 158 Ga. App. 56, 279 S.E.2d 304 (1981) (decided under former O.C.G.A. § 24-9-66); Loethen v. State, 158 Ga. App. 469, 280 S.E.2d 878 (1981) (decided under former O.C.G.A. § 24-9-66).

Trial court did not err in refusing to allow the plaintiff to testify as to plaintiff's opinion of the value of an automobile destroyed in a collision since the plaintiff did not demonstrate any foundation of knowledge, experience, or familiarity on which an opinion of value could properly be based. White v. Miller, 194 Ga. App. 816, 392 S.E.2d 30 (1990) (decided under former O.C.G.A. § 24-9-66); GMAC v. Newton, 207 Ga. App. 700, 429 S.E.2d 120 (1993) (decided under former O.C.G.A. § 24-9-66).

Testimony that the witness is familiar with the value of the item in question is sufficient foundation. — It is no ground for objection if thereafter on cross-examination the witness testifies as to facts which tend to show a lack of knowledge about the facts to which the witness previously testified on direct. City of Alma v. Morris, 180 Ga. App. 420, 349 S.E.2d 277 (1986) (decided under former O.C.G.A. § 24-9-66).

In an action by homeowners for negligent construction of their house, since the homeowners demonstrated no basis for the homeowners opinion as to value except that the homeowners doubted the house could be sold and to them they had not received what they bargained for and thus the house had no value to them, and later homeowners admitted they were not familiar with building costs or procedures, there was no rational basis for their value opinions, and the opinions could furnish no basis for the jury's consideration of

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value. Hutto v. Shedd, 181 Ga. App. 654, 353 S.E.2d 596 (1987) (decided under former O.C.G.A. § 24-9-66).

Pursuant to former O.C.G.A. § 24-9-66, direct testimony as to market value is in the nature of opinion evidence, and one need not be an expert or dealer but may testify as to the value of property if one has had an opportunity for forming a correct opinion; a creditor's testimony at a confirmation proceeding about the creditor's experience with the property at issue in a foreclosure sale, how much the creditor had invested in the property, how much the creditor borrowed against the property, the property's condition at the time of the foreclosure sale, and the creditor's opinion that the creditor bid the fair market value for the property, along with the testimony of one of the buyers and the tax appraisal, was sufficient to show the fair market value of the property at the time of the sale. McCain v. Galloway, 267 Ga. App. 505, 600 S.E.2d 449 (2004) (decided under former O.C.G.A. § 24-9-66).

Testimony of shareholder. — Trial court did not err in refusing to allow a witness to testify as to the value of a riverboat after counsel argued that the witness was a shareholder in the company selling the vessel but no foundation was laid by counsel to elicit the witness's knowledge, experience, or familiarity with the value of the riverboat. North Ala. Enters., Inc. v. Cap'n Sam's Cruises, Inc., 181 Ga. App. 718, 353 S.E.2d 578 (1987) (decided under former O.C.G.A. § 24-9-66).

Prior jury verdict not admissible. — Trial court abused the court's discretion in ruling that the prior jury verdict is admissible evidence since to give an opinion on value the witness must supply reasons by showing knowledge, experience, or familiarity as to value and there was no procedure by which the parties could question the jury in the prior case about the reasons for its opinion of the property's earlier value and the prior jury could not relate its opinion to the later value of the property. Clayton County Bd. of Tax Assessors v. Lake Spivey Golf Club, Inc., 207 Ga. App. 693, 428 S.E.2d 687 (1993) (decided under former O.C.G.A. § 24-9-66).

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Automobile franchise. — Although franchisee was not an expert or dealer, as a person experienced in this field with the opportunity to form a correct opinion, the franchisee was authorized to state the franchisee's opinion of the value of the various equipment and inventory as well as the profit or loss incurred on the sales of certain automobiles. Moore v. American Suzuki Motor Corp., 203 Ga. App. 189, 416 S.E.2d 807 (1992) (decided under former O.C.G.A. § 24-9-66).

Bridge. — Trial court did not abuse the court's discretion in excluding, for insufficient foundation, a witness's opinion testimony concerning the cost to build a bridge over a waterway to cure trusts' lost usage after the condemnation of a ford over the waterway because the proffer the trusts made did not demonstrate pursuant to former O.C.G.A. § 24-9-66 a basis upon which the witness could have formed the witnesses own opinion on the cost to build the bridge apart from the single estimate the witness received; the trusts did not proffer that the witness obtained any other estimates concerning the cost to construct the bridge, spoke to anyone else about that cost, or possessed or sought to obtain any other information about that cost or about the accuracy of the estimate the witness received. Martha K. Wayt Trust v. City of Cumming, 306 Ga. App. 790, 702 S.E.2d 915 (2010) (decided under former O.C.G.A. § 24-9-66).

Confiscated drugs. — When a crime laboratory chemist testified as to the basis for the chemist's estimate involving confiscated drugs, it was not necessary that the chemist be qualified as an expert. Robinson v. State, 203 Ga. App. 759, 417 S.E.2d 404, cert. denied, 203 Ga. App. 907, 417 S.E.2d 404 (1992) (decided under former O.C.G.A. § 24-9-66).

Assessment of property. — See Hirsch v. Joint City County Bd. of Tax Assessors, 218 Ga. App. 881, 463 S.E.2d 703 (1995) (decided under former O.C.G.A. § 24-9-66); Hall County v. Merritt, 233 Ga. App. 526, 504 S.E.2d 754

(1998) (decided under former O.C.G.A. § 24-9-66).

In rendering expert opinions as to the market value of property subject to a condemnation proceeding, experts could properly consider hearsay statements made by a prior planning director for the local government to the effect that the government would work with the property's owner regarding rezoning the property. Unified Gov't v. Watson, 255 Ga. App. 1, 564 S.E.2d 453 (2002), aff'd, 276 Ga. 276, 577 S.E.2d 769 (2003) (decided under former O.C.G.A. § 24-9-66).

Defendant was properly sentenced for felony theft of aluminum tire rims based on lay testimony of the victim regarding their value because the victim had experience in buying and selling such rims, which gave the victim an opportunity to form a correct opinion as to the fair cash market value at the time and place of the theft. Perdue v. State, 300 Ga. App. 588, 685 S.E.2d 489 (2009) (decided under former O.C.G.A. § 24-9-66).

Houses. — See Clark v. Peck, 134 Ga. App. 868, 216 S.E.2d 687 (1975) (decided under former Code 1933, § 38-1709); DeKalb County v. Queen, 135 Ga. App. 307, 217 S.E.2d 624 (1975) (decided under former Code 1933, § 38-1709).

Land. — See Central Ga. Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912) (decided under former Civil Code 1910, § 5875); Birmingham Paper Co. v. Holder, 24 Ga. App. 630, 101 S.E. 692 (1919) (decided under former Civil Code 1910, § 5875); Georgia Power Co. v. Carson, 46 Ga. App. 612, 167 S.E. 902 (1933) (decided under former Code 1933, § 38-1709); McDuffie County v. Gunn, 50 Ga. App. 198, 177 S.E. 363 (1934) (decided under former Code 1933, § 38-1709); Housing Auth. v. Spink, 91 Ga. App. 72, 85 S.E.2d 80 (1954) (decided under former Code 1933, § 38-1709); Georgia R.R. & Banking Co. v. Flynt, 93 Ga. App. 514, 92 S.E.2d 330 (1956) (decided under former Code 1933, § 38-1709); Schoolcraft v. DeKalb County, 126 Ga. App. 101, 189 S.E.2d 915 (1972) (decided under former Code 1933, § 38-1709); DOT v. Brown, 155 Ga. App. 622, 271 S.E.2d 876 (1980) (decided under former Code 1933, § 38-1709).

Mobile homes. — See First Fed. Sav. & Loan Ass'n v. Jones, 173 Ga. App. 356, 326 S.E.2d 554 (1985) (decided under former O.C.G.A. § 24-9-66).

Motor vehicles. — See Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119 (1953) (decided under former Code 1933, § 38-1708); Nail v. Hiers, 116 Ga. App. 522, 157 S.E.2d 771 (1967) (decided under former Code 1933, § 38-1708); Ricker v. Hopkins Chevrolet, Inc., 147 Ga. App. 358, 248 S.E.2d 720 (1978) (decided under former Code 1933, § 38-1708); Burch v. Lawrence, 150 Ga. App. 351, 258 S.E.2d 35 (1979) (decided under former Code 1933, § 38-1708); Wheels & Brakes, Inc. v. Capital Ford Truck Sales, Inc., 167 Ga. App. 532, 307 S.E.2d 13 (1983) (decided under former O.C.G.A. § 24-9-66).

While the purchase price of a motor vehicle is relevant and admissible to establish the vehicle's value at the time of purchase, it is obviously not, standing alone, sufficient to establish the value of the vehicle at some later point in time. Similarly, the value of a motor vehicle cannot be established merely by adding to the vehicle's purchase price the cost of maintaining and repairing the vehicle. Builders Transp., Inc. v. Hall, 183 Ga. App. 812, 360 S.E.2d 60, cert. denied, 183 Ga. App. 905, 360 S.E.2d 60 (1987) (decided under former O.C.G.A. § 24-9-66).

When an affidavit as to the value of a truck contained no information regarding the affiant's knowledge, experience, or familiarity with the value of the vehicle, the affidavit lacked probative value as a nonexpert opinion. Dowdell v. Volvo Commer. Fin., LLC, 286 Ga. App. 659, 649 S.E.2d 750 (2007) (decided under former O.C.G.A. § 24-9-66).

Owner of property. — See Speir v. Westmoreland, 40 Ga. App. 302, 149 S.E. 422 (1929) (decided under former Civil Code 1910, § 5875); Georgia Power Co. v. Carson, 46 Ga. App. 612, 167 S.E. 902 (1933) (decided under former Code 1933, § 38-1709); Grant v. Dannals, 87 Ga. App. 389, 74 S.E.2d 119 (1953) (decided under former Code 1933, § 38-1709); Housing Auth. v. Spink, 91 Ga. App. 72, 85 S.E.2d 80 (1954) (decided under former Code 1933, § 38-1709); Georgia R.R. & Banking Co. v. Flynt, 93 Ga. App. 514, 92 S.E.2d

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2. Application in Specific Cases (Cont'd)

330 (1956) (decided under former Code 1933, § 38-1709); Isen & Co. v. Wise, 94 Ga. App. 220, 94 S.E.2d 98 (1956) (decided under former Code 1933, § 38-1709); Hoard v. Wiley, 113 Ga. App. 328, 147 S.E.2d 782 (1966) (decided under former Code 1933, § 38-1709); Edwards v. State, 116 Ga. App. 80, 156 S.E.2d 518 (1967) (decided under former Code 1933, § 38-1709); Johnson v. Rooks, 116 Ga. App. 394, 157 S.E.2d 527 (1967) (decided under former Code 1933, § 38-1709); Nelson v. Cheek, 127 Ga. App. 31, 192 S.E.2d 504 (1972) (decided under former Code 1933, § 38-1709); Clark v. Peck, 134 Ga. App. 868, 216 S.E.2d 687 (1975) (decided under former Code 1933, § 38-1709); Hagin v. Powers, 140 Ga. App. 300, 231 S.E.2d 780 (1976) (decided under former Code 1933, § 38-1709); Cunningham v. Hodges, 150 Ga. App. 827, 258 S.E.2d 631 (1979) (decided under former Code 1933, § 38-1709); Gunter v. State, 155 Ga. App. 176, 270 S.E.2d 224 (1980) (decided under former Code 1933, § 38-1709); DOT v. Brown, 155 Ga. App. 622, 271 S.E.2d 876 (1980) (decided under former Code 1933, § 38-1709).

Trial court did not err in concluding that the victim's testimony was sufficient to allow a felony theft charge to go to the jury because the victim testified as to the market value for each of the items stolen from him, and the total value exceeded $500; the victim established that the victim had an opportunity to form a correct opinion because the victim based the opinion as to the market value of the stolen tools on the age of the tools and his experience using and purchasing them. Sheppard v. State, 300 Ga. App. 631, 686 S.E.2d 295 (2009) (decided under former O.C.G.A. § 24-9-66).

Testimony from child of property owner. — Property owner's son's testimony in a condemnation proceeding as to the value of residential property was admissible, when the son testified to the son's comparable sales analysis and to the son's familiarity with the neighborhood. Appraiser could testify as to the possible rezoned value of the property, because the rezoning was sufficiently likely as to have an appreciable influence on the property's present market value, approximately $600. DOT v. Jordan, 300 Ga. App. 104, 684 S.E.2d 141 (2009), cert. denied, No. S10C0207, 2010 Ga. LEXIS 311 (Ga. 2010) (decided under former O.C.G.A. § 24-9-66).

Personal property. — See Hagin v. Powers, 140 Ga. App. 300, 231 S.E.2d 780 (1976) (decided under former Code 1933, § 24-9-66).

Purchase price. — See Speir v. Westmoreland, 40 Ga. App. 302, 149 S.E. 422 (1929) (decided under former Civil Code 1910, § 5875); Herrmann & Henican v. De La Perrier, 47 Ga. App. 541, 171 S.E. 232 (1933), later appeal, 56 Ga. App. 749, 194 S.E. 42 (1937) (decided under former Code 1933, § 38-1709); Mills v. Mangum, 111 Ga. App. 396, 141 S.E.2d 773 (1965) (decided under former Code 1933, § 38-1709); Hoard v. Wiley, 113 Ga. App. 328, 147 S.E.2d 782 (1966) (decided under former Code 1933, § 38-1709); Nail v. Hiers, 116 Ga. App. 522, 157 S.E.2d 771 (1967) (decided under former Code 1933, § 38-1709); Sisk v. Carney, 121 Ga. App. 560, 174 S.E.2d 456 (1970) (decided under former Code 1933, § 38-1709); Seaboard Coast Line R.R. v. Toole, 128 Ga. App. 24, 195 S.E.2d 282 (1973) (decided under former Code 1933, § 38-1709); Smith v. Fidelity Fed. Sav. & Loan Ass'n, 149 Ga. App. 730, 256 S.E.2d 43 (1979) (decided under former Code 1933, § 38-1709); Cunningham v. Hodges, 150 Ga. App. 827, 258 S.E.2d 631 (1979) (decided under former Code 1933, § 38-1709); General Fin. Corp. v. Henderson, 160 Ga. App. 242, 286 S.E.2d 454 (1981) (decided under former O.C.G.A. § 24-9-66).

Purchaser may testify as to termite damage. — In a suit arising out of hidden termite damage, the court erred by refusing to allow the plaintiff-purchaser to provide evidence of damage by giving plaintiff's own non-expert opinion testimony as to the diminished value of the property, based on plaintiff's familiarity with similar property in the area and plaintiff's close personal inspection of the damage in question. Vitello v. Stott, 222 Ga. App.

134, 473 S.E.2d 504 (1996) (decided under former O.C.G.A. § 24-9-66).

Rental value. — See Mayor of Gainesville v. Robertson, 25 Ga. App. 632, 103 S.E. 853 (1920) (decided under former Civil Code 1910, § 5875).

Salvage price. — See Isen & Co. v. Wise, 94 Ga. App. 220, 94 S.E.2d 98 (1956) (decided under former Code 1933, § 38-1709); Nail v. Hiers, 116 Ga. App. 522, 157 S.E.2d 771 (1967) (decided under former Code 1933, § 38-1709); Burch v. Lawrence, 150 Ga. App. 351, 258 S.E.2d 35 (1979) (decided under former Code 1933, § 38-1709).

Services. — See Western & Atl. R.R. v. Townsend, 36 Ga. App. 70, 135 S.E. 439 (1926), cert. denied, 36 Ga. App. 826 (1927) (decided under former Civil Code 1910, § 38-1709).

Similar sale. — See Herrmann & Henican v. De La Perrier, 47 Ga. App. 541, 171 S.E. 232 (1933), later appeal, 56 Ga. App. 749, 194 S.E. 42 (1937) (decided under former Code 1933, § 38-1709); Housing Auth. v. Spink, 91 Ga. App. 72, 85 S.E.2d 80 (1954) (decided under former Code 1933, § 38-1709).

Stock. — See Speir v. Westmoreland, 40 Ga. App. 302, 149 S.E. 422 (1929) (decided under former Civil Code 1910, § 5875); Herrmann & Henican v. De La Perrier, 47 Ga. App. 541, 171 S.E. 232 (1933), later appeal, 56 Ga. App. 749, 194 S.E. 42 (1937) (decided under former Code 1933, § 38-1709); Ferguson v. Bank of Dawson, 50 Ga. App. 604, 179 S.E. 236 (1935) (decided under former Code 1933, § 38-1709).

Value of dog. — Trial court did not err in assessing the value of a dog the defendant killed at $3,000 because evidence of the knowledge, experience, and familiarity of a witness with the value of labrador retrievers trained to hunt created a basis for the value stated. Futch v. State, 314 Ga. App. 294, 723 S.E.2d 714 (2012) (decided under former O.C.G.A. § 24-9-66).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 387 et seq.

C.J.S. — 32 C.J.S., Evidence, §§ 586 et seq., 608 et seq., 751 et seq., 768, 792.

Am. Jur. Proof of Facts. — Proof of Identification of Bite Marks, 75 POF3d 317.

ALR. — Effect of witness qualifying his testimony with "I think," "I believe," or the like, when expressing thereby indistinct observation or recollection, 4 ALR 979.

Newspapers and trade journals as evidence of market prices or quotations, 43 ALR 1192.

Admissibility of witness's conclusion as to care exercised in driving automobile, 66 ALR 1117.

Right of witness to give summary based on inspection of number of documents, 66 ALR 1206.

Testimony by witness as to emotions of fear or other mental state manifested by another, 69 ALR 1168.

Opinion evidence as to speed of automobile or motorcycle, 70 ALR 540; 94 ALR 1190.

Competency of testimony of nonexperts on question of sanity or insanity in criminal cases, 72 ALR 579.

Right of witness to state conclusion as to immoral purpose or intent of another, 73 ALR 868.

Opinion evidence as to condition of automobile or other motor vehicle, 77 ALR 559.

Right of witness to state his opinions or conclusion, based on examination of books and accounts, as to solvency or insolvency, 81 ALR 1431.

Opinion evidence directly as to the ultimate question of the amount of damage to property, 86 ALR 1449.

Opinion of court or counsel or other person learned in law as a factor in determining marketability of title, 90 ALR 609.

Right of witness to testify as a conclusion or as an ultimate fact to existence or nonexistence of agency or relationship of master and servant, 90 ALR 749.

Admissibility and effect of testimony of lay witness as to existence of a particular disease, or as to apparent physical condition of a person, on the issue of existence of particular disease, 93 ALR 482.

Lack of market value as a necessary condition of admissibility of evidence of actual or intrinsic value, 110 ALR 1375.

Right of witness to state his conclusion or opinion that confession was voluntary or involuntary, 114 ALR 974.

Opinion evidence as to distance within which automobile can be stopped, 135 ALR 1404.

Admissibility of opinion evidence as to cause of death, disease, or injury, 136 ALR 965; 66 ALR2d 1082.

Proper form of question to witness or of testimony of witness, as regards mental condition of person whose capacity to execute a will is in issue, 155 ALR 281.

Competency of witness to give expert or opinion testimony as to value of real property, 159 ALR 7.

Unaccepted offer for purchase or sale of real property as evidence of value, 7 ALR2d 781.

Admissibility on question of damages in action for libel or slander of testimony as to the impression or effect of the matter upon the minds of individuals, 12 ALR2d 1005.

Proof of prospective earning capacity of student or trainee, or of its loss, in action for personal injury or death, 15 ALR2d 418.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes, 16 ALR2d 1113.

Admissibility of opinion evidence as to whether vehicle involved in collision was standing still or moving, 33 ALR2d 1250.

Admissibility of opinion of nonexpert owner as to value of chattel, 37 ALR2d 967.

Admissibility of opinion evidence as to the cause of an accident or occurrence, 38 ALR2d 13.

Requisite foundation or predicate to permit nonexpert witness to give opinion, in a civil action, as to sanity, mental competency, or mental condition, 40 ALR2d 15.

Admissibility of opinion evidence of lay witnesses as to diseases and physical condition of animals, 49 ALR2d 932.

Admissibility, in homicide prosecution, of opinion evidence that death was or was not self-inflicted, 56 ALR2d 1447.

Statement of belief or opinion as perjury, 66 ALR2d 791.

Admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case, 66 ALR2d 1048.

Admissibility and probative effect of testimony that motor vehicle was going "fast" or the like, 92 ALR2d 1391.

Person performing services as competent to testify as to their value, 5 ALR3d 947.

Ability to see, hear, smell, or otherwise sense, as proper subject of opinion by lay witness, 10 ALR3d 258.

Admissibility of hearsay evidence as to comparable sales of other land as basis for expert's opinion as to land value, 12 ALR3d 1064.

Necessity of laying foundation for opinion of attesting witness as to mental condition of testator or testatrix, 17 ALR3d 503.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land on issue of value in eminent domain proceedings, 26 ALR3d 780.

Opinion testimony as to speed of motor vehicle based on skid marks and other facts, 29 ALR3d 248.

Competency of nonexpert's testimony, based on sound alone, as to speed of motor vehicle involved in accident, 33 ALR3d 1405.

Admissibility of nonexpert opinion testimony as to weather conditions, 56 ALR3d 575.

Admissibility of opinion evidence as to employability on issue of disability in health and accident insurance and workers' compensation cases, 89 ALR3d 783.

Sale price of real property as evidence in determining value for tax assessment purposes, 89 ALR3d 1126.

Unaccepted offer for purchase of real property as evidence of its value, 25 ALR4th 571.

Unaccepted offer to sell or buy comparable real property as evidence of value of property in issue, 25 ALR4th 615.

Unaccepted offer to sell or listing of real property as evidence of its value, 25 ALR4th 983.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludible as hearsay--state cases, 89 ALR4th 456.

Admissibility of expert or opinion evi-

dence of battered-woman syndrome on issue of self-defense, 58 ALR5th 749.

Admissibility of expert testimony as to proper techniques for interviewing children or evaluating techniques employed in particular case, 87 ALR5th 693.

Admissibility and sufficiency of bite mark evidence as basis for identification of accused, 1 ALR6th 657.

Admissibility of expert or opinion evidence — Supreme court cases, 177 ALR Fed. 77.

24-7-702. Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of federal law.

(a) Except as provided in Code Section 22-1-14 and in subsection (g) of this Code section, the provisions of this Code section shall apply in all civil proceedings. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses.

(b) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

(c) Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as deter-

mined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

(C) Except as provided in subparagraph (D) of this paragraph:

(i) Is a member of the same profession;

(ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or

(iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and

(D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

(d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16.

(e) An affiant shall meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.

(f) It is the intent of the legislature that, in all civil proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

(g) This Code section shall not be strictly applied in proceedings conducted pursuant to Chapter 9 of Title 34 or in administrative proceedings conducted pursuant to Chapter 13 of Title 50. (Code 1981, § 24-7-702, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Statute not applicable to valuation of condemned property, § 22-1-14. Competent expert testimony required in establishing payment standard or reimbursement criteria, § 51-1-52. Testimony by expert witnesses, Fed. R. Evid. 702.

Editor's notes. — Ga. L. 2005, p. 1, § 1, not codified by the General Assembly, provided, with respect to former O.C.G.A. § 24-9-67.1, the predecessor of O.C.G.A. §§ 24-7-702 and 24-7-703, that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Law reviews. — For annual 11th Circuit survey of evidence law, see 56 Mercer L. Rev. 1273 (2005). For article, "Georgia's New Expert Witness Rule: Daubert and More," see 11 Ga. St. B.J. 16 (2005). For survey article on tort law, see 60 Mercer L. Rev. 375 (2008). For annual survey of product liability law, see 58 Mercer L. Rev. 313 (2006). For survey article on product liability law, see 59 Mercer L. Rev. 331 (2007). For survey article on product liability law, see 60 Mercer L. Rev. 303 (2008). For annual survey on product liability, see 61 Mercer L. Rev. 267 (2009). For annual survey of law on product liability, see 62 Mercer L. Rev. 243 (2010). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005). For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006). For survey article on evidence law, see 59 Mercer L. Rev. 157 (2007). For annual survey on evidence, see 61 Mercer L. Rev. 135 (2009). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007). For survey article on trial practice and procedure, see 60 Mercer L. Rev. 397 (2008). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

For comment, "Georgia's Codification of Daubert: Narrowing the Admissibility of Novel Scientific Evidence in Georgia?," see 23 Ga. St. U.L. Rev. 481 (2006).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-67.1 are included in the annotations for this Code section.

Constitutionality. — Statement of intent in former O.C.G.A. § 24-9-67.1(f) (see now O.C.G.A. §§ 24-7-702, 24-7-703) was not a delegation of legislative power; and, the application of the evidentiary rules established by it, did not violate the constitutional prohibition against retroactive laws. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court erred in declaring former O.C.G.A. § 24-9-67.1(f) (see now O.C.G.A. §§ 24-7-702, 24-7-703) unconstitutional on the ground that the former statute violated the principle of separation of powers as the suggestion in the former statute that Georgia "may" consider the decisions of other courts on a subject did not invade the province of the judiciary because it was not couched in mandatory terms and merely stated a principle of law regularly employed by Georgia courts. Further, the permissive suggestion in former § 24-9-67.1(f), that the courts could consider federal interpretations of the cases on which federal rules and former § 24-9-67.1(f) were based contained no words of command and did not seek to enforce a particular construction of the former statute on the courts. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court properly found that former O.C.G.A. § 24-9-67.1(a) and (b)(1) (see now O.C.G.A. §§ 24-7-702, 24-7-703)were contradictory in that paragraph (b)(1) limited experts to relying on potentially admissible facts and data, whereas subsection (a) stated that facts and data relied upon need not be admissible. Since the two provisions could not be harmonized and, read together, they rendered the former statute unconstitutionally vague; however, the trial court was not required to strike the former statute in the statute's entirety. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603 (2008) (decided under former O.C.G.A. § 24-9-67.1).

In a personal injury suit wherein the trial court excluded the testimony of plaintiffs' two expert witnesses upon application of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court did not err in rejecting plaintiffs' equal protection challenge since plaintiffs could not establish the necessary element of an equal protection claim that plaintiffs were situated similarly to those being treated differently. For purposes of evidentiary standards, only those accused of the same offense are similarly situated in the criminal law arena, only those asserting or defending against the same cause of action are similarly situated in the civil law arena, and the parties to civil cases were not similarly situated to those engaged in criminal prosecutions. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Use of word "or" or "and" in former statute. — Legislature's use of the word "or" between former O.C.G.A. § 24-9-67.1(c)(2)(A) and (c)(2)(B) (see now O.C.G.A. §§ 24-7-702, 24-7-703), followed by the legislature's use of the word "and" between former § 24-9-67.1(c)(2)(B) and (c)(2)(C), indicated that a medical expert must show either active practice or teaching for at least three of the last five years, but that whichever of these may be the case, the expert must also be a member of the same profession as the person whose performance the expert was evaluating. For the purposes of former § 24-9-67.1, a pharmacist was not a member of the same profession as a medical doctor. Smith v. Harris, 294 Ga. App. 333, 670 S.E.2d 136 (2008), cert. denied, No. S09C0428, 2009 Ga. LEXIS 328 (Ga. 2009) (decided under former O.C.G.A. § 24-9-67.1).

Federal interpretation on application of Daubert standard. — Citing the Eleventh Circuit opinion of McDowell v. Brown, 392 F.3d 1283 (11th Cir. 2004), and applying the standards set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579 (1993), and subsequent

cases applying Daubert, the Court of Appeals held that the trial court properly applied the Daubert factors and did not abuse the court's discretion in admitting expert testimony under former O.C.G.A. § 24-9-67.1. Cotten v. Phillips, 280 Ga. App. 280, 633 S.E.2d 655 (2006), cert. denied, No. S06C1966, 2007 Ga. LEXIS 112 (Ga. 2007) (decided under former O.C.G.A. § 24-9-67.1).

Noting that "it is proper to consider and give weight to constructions placed on the federal rules by federal courts when applying or construing a statute based on those rules", and that since former O.C.G.A. § 24-9-67.1(b) "was based on Fed. R. Evid. Rule 702, which in its present form is based on the holdings in ... Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579 (1993), and to the many cases applying Daubert, including Kumho Tire Co. v. Carmichael, 119 SC 1167 (1999)", it was appropriate to apply the standards of Daubert in determining whether a witness is qualified to render an opinion as an expert. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Application of Daubert standard. — After a trial court found that an expert's testimony failed the first element of Daubert because the expert's theory was essentially untestable and had not been tested, the trial court properly exercised the court's discretion in weighing the fourth Daubert factor—whether the theory had attained general acceptance within the scientific community—less heavily than the other three Daubert factors. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011) (decided under former O.C.G.A. § 24-9-67.1).

As the trial court's finding that the plaintiff's expert was a "quintessential expert for hire" was supported by the evidence, it was within the trial court's discretion to apply the Daubert factors with greater rigor in determining the admissibility of the expert's opinion. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Trial court's denial of Daubert motion presumed correct. — Trial court's evidentiary ruling, denying a property owner's Daubert motion to exclude a bank's appraiser's expert testimony pursuant to former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. §§ 24-7-702, 24-7-703), was presumed correct since no transcript from the hearing thereon appeared in the record. Vill. at Lake Lanier, LLC v. State Bank & Trust Co., 314 Ga. App. 498, 724 S.E.2d 806 (2012) (decided under former O.C.G.A. § 24-9-67.1).

No error in excluding expert testimony. — Trial court did not err in excluding expert testimony of the value of a vehicle in the vehicle's defective condition on the date of sale because there was no evidence that the expert witness's method was relied upon more widely in the automotive field, nor of the method's known rate of error, nor whether it had been reviewed by qualified experts other than its creators. Moran v. Kia Motors Am., Inc., 276 Ga. App. 96, 622 S.E.2d 439 (2005) (decided under former O.C.G.A. § 24-9-67.1).

In an action filed pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51 et seq., the trial court did not abuse the court's discretion in excluding the testimony of an employee's treating physician as the doctor's conclusions were based on an incomplete medical history of the employee, without considering earlier lung-related illnesses, and while unaware of the employee's prior chemical exposure and treatment by other physicians. Shiver v. Ga. & Fla. Railnet, Inc., 287 Ga. App. 828, 652 S.E.2d 819 (2007), cert. denied, No. S08C0394, 2008 Ga. LEXIS 330 (Ga. 2008) (decided under former O.C.G.A. § 24-9-67.1).

In a patient's medical malpractice action, the testimony of an expert witness was properly excluded as the opinion was based on facts stated in a hypothetical question which were not proven by other witnesses or other competent evidence. Moreover, a motion in limine entered against the patient as to another expert witness's testimony was not addressed on appeal as the patient never called the expert to testify, and thus, the issue was abandoned. Hawkins v. OB-GYN Assocs., P.A., 290 Ga. App. 892, 660 S.E.2d 835 (2008), cert. denied, No. S08C1440, 2008

Ga. LEXIS 713 (Ga. 2008) (decided under former O.C.G.A. § 24-9-67.1).

In a wrongful interference with business relations and slander suit, a trial court properly excluded testimony of plaintiff's expert economist, which the plaintiff claimed would show plaintiff's financial injury as to plaintiff's tortious interference claim as the expert's reliance on the partial sales history of a single agent, along with a letter referencing annualized premiums from the sale of only certain life insurance policies and unsupported representations by another agent, did not provide an adequate basis for the expert's opinion. Am. Southern Ins. Group, Inc. v. Goldstein, 291 Ga. App. 1, 660 S.E.2d 810 (2008), cert. denied, No. S08C1555, 2008 Ga. LEXIS 680 (Ga. 2008) (decided under former O.C.G.A. § 24-9-67.1).

In a will contest, the trial court did not abuse the court's discretion in limiting testimony from the caveatrix's expert toxicologist as to whether a person's functioning level could be determined by that person's responses to general questions as the trial court found that the expert's opinion was based on generalized statistics which would have been of dubious help to the jury. Caswell v. Caswell, 285 Ga. 277, 675 S.E.2d 19 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a customer's personal injury action against a stylist and a hair salon alleging chemical burns, a motion in limine was properly granted under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) to exclude the customer's expert in chemistry because the expert's testing of hair products and the product's reaction to heat did not exactly replicate the conditions under which the incident occurred; the expert used a peroxide product that was not applied to the customer's hair and used a different type of heat source. Giannotti v. Beleza Hair Salon, Inc., 296 Ga. App. 636, 675 S.E.2d 544 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a customer's slip and fall case against a dry cleaner establishment, the trial court did not err by denying the customer's motion for a new trial and by excluding the testimony of one of the customer's expert witnesses. The expert was not qualified since the expert was retired and not a licensed physician and the testimony of that expert was cumulative of other expert testimony admitted at trial, therefore, any alleged error was harmless. Muskett v. Sketchley Cleaners, Inc., 297 Ga. App. 561, 677 S.E.2d 731 (2009), cert. denied, No. S09C1422, 2009 Ga. LEXIS 412 (Ga. 2009) (decided under former O.C.G.A. § 24-9-67.1).

Expert's testimony was properly excluded in a medical malpractice suit for corrective bladder surgery for perforations following a hysterectomy because the expert was board certified in geriatrics, and the expert had not been engaged in the active practice of gynecology or urology for three of the five years before the patient's operation. Hope v. Kranc, 304 Ga. App. 367, 696 S.E.2d 128 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not err in excluding the testimony of a nurse under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the nurse had not been practicing in the relevant area of nursing for three of the five years preceding a patient's accidental fall. At best, the nurse had worked full-time as a nurse for only 11 months, although the nurse had also cared for the nurse's husband and mother. Vaughan v. WellStar Health Sys., 304 Ga. App. 596, 696 S.E.2d 506 (2010) (decided under former O.C.G.A. § 24-9-67.1).

As vehicle occupants failed to satisfy the Daubert factors or any other reasonable criteria for purposes of measuring the reliability of their expert witness's conclusions with respect to a vehicle accident that occurred in a construction zone, a trial court did not abuse the court's discretion when the court excluded the witness's testimony under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703); the expert's conclusions were based solely on the expert's own assertions and were unsupported by either the Daubert factors or any other reasonable reliability criteria. HNTB Ga., Inc. v. Hamilton-King, 287 Ga. 641, 697 S.E.2d 770 (2010) (decided under former O.C.G.A. § 24-9-67.1).

It was within the trial court's discretion

to exclude an expert witness's testimony because a sister and a brother failed to satisfy the Daubert factors or any other reasonable criteria by which the trial court could measure the reliability of the expert's conclusions; the expert failed to cite any treatise or authority supporting the expert's opinion, and the sister and brother presented no evidence that the expert had any experience that would supply the foundation supporting the expert's conclusions. HNTB Ga., Inc. v. Hamilton-King, 287 Ga. 641, 697 S.E.2d 770 (2010) (decided under former O.C.G.A. § 24-9-67.1).

In a mother's medical malpractice action against a hospital, the trial court did not abuse the court's discretion by finding that the mother's witness was not admissible as an expert on whether any member of the hospital's nursing staff breached the standard of care pursuant to former O.C.G.A. § 24-9-67.1(c)(2)(D) (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the witness deposed that the witness did not train or practice as a nurse, did not train nurses, did not supervise nurses outside of normal nurse-physician interactions, and did not hold out to be an expert in nursing or in the standard of care of nurses. Pendley v. S. Reg'l Health Sys., 307 Ga. App. 82, 704 S.E.2d 198 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion in granting a motion in limine in a legal malpractice action to exclude a purported expert witness on the standard of care, under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), because the witness, although a member of the state bar, worked as a merchant for a family owned business and was not then engaged in any activities that constituted practicing law in Georgia under O.C.G.A. § 15-19-50. Further, the trial court's misguided analogy to a medical malpractice expert under former § 24-9-67.1(c)(2)(D) did not result in reversible error. Wilson v. McNeely, 307 Ga. App. 876, 705 S.E.2d 874 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Opinion of the plaintiff's expert, a pathologist, failed the first element of Daubert because the expert relied on the theory that any exposure to the asbestos in the defendant's product would contribute to the development of mesothelioma, yet the expert testified that the theory was essentially untestable and had not been tested. Thus, the expert's testimony was properly excluded under former O.C.G.A. § 24-9-67.1(b)(2) (see now O.C.G.A. §§ 24-7-702, 24-7-703) since it was not the product of reliable principles and methods. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion in refusing to permit a mother's expert on security practices to testify about the content of certain service call lists on which the expert had relied in forming the expert's opinions about the adequacy of security at the complex because the mother made no showing that the circumstances of the various incidents reflected on the lists were substantially similar to the murder of her son, such that those incidents would bear directly upon the question of foreseeability; the lists were confusing, and substantial explanation would have been required for the jury to understand the lists. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135 (2011), cert. denied, No. S12C0436, 2012 Ga. LEXIS 270 (Ga. 2012) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not err in determining that the affidavits of a driver's experts were inadequate under former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. §§ 24-7-702, 24-7-703) to defeat summary judgment in favor of a manufacturer in the driver's products liability action because the affidavits did not describe the facts or data upon which the experts' opinions were based, did not explain the principles or methods the experts used to reach the experts' conclusions about the tire, and did not provide support for a conclusion that the experts had applied those principles and methods reliably in the experts' inspections of the tire. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as an expert not satisfied. — Trial court did not err in refusing

to qualify the employees' witness as an expert because the witness's testimony provided no evidence, let alone expert testimony, that would preclude summary judgment in favor of the Georgia Department of Human Services, and under former O.C.G.A. § 24-9-67.1(d) (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court had discretion in determining whether expert testimony was necessary; any use of the witness as an expert in the case was wholly unnecessary because the areas of the expert's specialized knowledge were not issues beyond the ken of lay persons. Forrester v. Ga. Dep't of Human Servs., 308 Ga. App. 716, 708 S.E.2d 660 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Expert must be member of same profession. — Under former O.C.G.A. § 24-9-67.1(c) (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court erred in allowing a pharmacist to testify about a physician's negligence. A medical expert had to show either active practice or teaching for three of the last five years, and also had to be a member of the same profession as the person whose performance the expert was evaluating. Smith v. Harris, 294 Ga. App. 333, 670 S.E.2d 136 (2008), cert. denied, No. S09C0428, 2009 Ga. LEXIS 328 (Ga. 2009) (decided under former O.C.G.A. § 24-9-67.1).

Federal interpretation of expert testimony in state medical malpractice claims brought in federal court. — Citing the Eleventh Circuit holding in McDowell v. Brown, 392 F.3d 1283 (11th Cir. 2004) that, when evaluating expert testimony in Georgia state medical malpractice claims brought in federal court pursuant to supplemental jurisdiction, the matter is substantive and subject to state law, the federal district court held that former O.C.G.A. § 24-9-67.1 was applicable to the medical malpractice action, and relied upon the factors specified in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579 (1993) for determining admissibility of expert testimony under Fed. R. Evid. 702 in construing former § 24-9-67.1. Dukes v. Georgia, 428 F. Supp. 2d 1298 (N.D. Ga. 2006), aff'd, 212 Fed. Appx. 916 (11th Cir. 2006) (decided under former O.C.G.A. § 24-9-67.1).

Nurse's affidavit insufficient in case alleging physical therapist's negligence. — Trial court erred in ruling that a registered nurse could provide an expert affidavit regarding a physical therapist's care, given that O.C.G.A. § 9-11-9.1(g) categorized nurses and physical therapists as practicing separate professions, and because an expert was required to meet the conditions of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) in order to provide a § 9-11-9.1 affidavit. Ball v. Jones, 301 Ga. App. 340, 687 S.E.2d 625 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Affidavit of chiropractor not admissible against physical therapist. — Trial court erred by finding that the opinion of the patient's expert satisfied O.C.G.A. §§ 9-11-9.1 and former 24-9-67.1(c) (see now O.C.G.A. § 24-7-702), because despite the expert testimony that, as allowed by the expert's chiropractic license, the expert had practiced physical therapy for a number of years, chiropractic medicine and physical therapy were not the same professions. Bacon County Hosp. & Health Sys. v. Whitley, 319 Ga. App. 545, 737 S.E.2d 328 (2013) (decided under former O.C.G.A. § 24-9-67.1).

Evidence of expert's personal practices admitted. — In a medical malpractice case, evidence of an expert's personal practices, unless excludable on other grounds, is admissible both as substantive evidence and to impeach the expert's opinion as to the applicable standard of care. To the extent Johnson v. Riverdale Anesthesia Assocs., 563 S.E.2d 431 (Ga. 2002), held otherwise, it is overruled. Condra v. Atlanta Orthopaedic Group, P.C., 285 Ga. 667, 681 S.E.2d 152 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Opinion of a witness qualified as expert may be given on facts proved by other witnesses. DOT v. Baldwin, 292 Ga. App. 816, 665 S.E.2d 898 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Striking surveyor's affidavits held proper. — In a suit between two landowners to enforce the terms of an easement, the trial court did not abuse the court's discretion in excluding two affida-

vits from a surveyor in determining land elevation as no testimony was offered regarding any knowledge, skill, experience, training, or education the witness possessed in that capacity, and no evidence was presented as to the principles and methods the witness employed including whether the methods were reliable. McGuire Holdings, LLLP v. TSQ Partners, LLC, 290 Ga. App. 595, 660 S.E.2d 397 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Applicability. — Because former O.C.G.A. § 24-9-67.1(a) (see now O.C.G.A. §§ 24-7-702, 24-7-703), which governed expert witness testimony in civil actions, did not apply to probation revocation hearings, the trial court's ruling to permit the expert's testimony regarding the presence of marijuana in a joint seized from the probationer was not erroneous as the state was not required to comply with Daubert to prove the expert's qualifications. Carlson v. State, 280 Ga. App. 595, 634 S.E.2d 410 (2006), cert. denied, No. S06C2099, 2007 Ga. LEXIS 215 (Ga. 2007) (decided under former O.C.G.A. § 24-9-67.1).

Former O.C.G.A. § 24-9-67.1(c) (see now O.C.G.A. §§ 24-7-702, 24-7-703) was a procedural, not substantive statute because the former statute did not change the standard of care to be applied in a medical malpractice action or the measure of a plaintiff's recovery; thus, the requirements of the statute were properly applied retroactively in a medical malpractice action in which a patient suffered injuries prior to the effective date of the former statute but filed suit after former § 24-9-67.1(c) became effective. Nathans v. Diamond, 282 Ga. 804, 654 S.E.2d 121 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Construction with other law. — Upon a proper appeal from a final order, while neither former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) nor O.C.G.A. § 9-11-16 required that a complaint be dismissed or stricken for failing to comply with the terms of those statutes, unlike the Anti-SLAPP statute, codified at O.C.G.A. § 9-11-11.1, because the trial court did not enter a final judgment within the meaning of O.C.G.A. § 9-11-68(b)(1), attorney fees were properly denied; moreover, as to the claim that dismissing and refiling in another court constituted "improper judge shopping," obtaining a different judge was simply the result of the action, not necessarily the reason for doing so. McKesson Corp. v. Green, 286 Ga. App. 110, 648 S.E.2d 457 (2007), cert. denied, No. S07C1602, 2007 Ga. LEXIS 656 (Ga. 2007) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action, when a doctor was the only expert witness submitted by the suing couple, and the couple did not challenge the trial court's exclusion of another doctor's testimony, their argument that said doctor's testimony should have been admitted as a rebuttal witness was unpersuasive. Thomas v. Peachtree Orthopaedic Clinic, P.C., 290 Ga. App. 869, 660 S.E.2d 758 (2008), cert. denied, No. S08C1373, 2008 Ga. LEXIS 915 (Ga. 2008) (decided under former O.C.G.A. § 24-9-67.1).

Timeliness of motion in limine — In a customer's personal injury action against a stylist and a hair salon alleging chemical burns, while a motion in limine to exclude the customer's expert in chemistry was not timely under former O.C.G.A. § 24-9-67.1(d) (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court properly considered the motion and granted the motion as the customer did not make the expert available for deposition until just one week prior to trial. Giannotti v. Beleza Hair Salon, Inc., 296 Ga. App. 636, 675 S.E.2d 544 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Subject matter improper for expert testimony. — In a negligence action, the trial court erred by allowing the investigating police officer to give expert testimony about the color of the traffic light as the color of the light was a question that average jurors could have answered for themselves, and because the color of the traffic light was the determining factor for assessing negligence, the officer's expert opinion on this issue likely influenced the jury's verdict; thus, based on such error, a new trial was ordered. Purcell v. Kelley, 286 Ga. App. 117, 648 S.E.2d 454 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Federal interpretation on practice area of defendant and expert's qualifications related thereto. — Following the federal practice on the issue of admissibility of expert testimony under Fed. R. Evid. 702 as developed in Daubert v. Merrell Dow Pharmaceuticals, 509 U. S. 579, 113 S. Ct. 2786, 125 L.E.2d 469 (1993), and its progeny, the Court of Appeals concluded that the language "area of practice or specialty in which the opinion is to be given" in former O.C.G.A. § 24-9-67.1(c)(2), is dictated not by the apparent expertise of the treating physician, but rather by the allegations of the complaint concerning the plaintiff's injury; the statute contemplates that "the expert may very well have a different area of practice than the defendant doctor", and it is thus the expert's qualifications, and not the defendant doctor's area of practice, that control the admissibility of the expert's testimony. Abramson v. Williams, 281 Ga. App. 617, 636 S.E.2d 765 (2006), cert. denied, No. S07C0226, 2007 Ga. LEXIS 91 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Healthcare expert not qualified. — In a medical malpractice and negligence action by an arrestee against a county, jail medical personnel, a medical lab, and lab personnel, these defendants successfully moved to exclude the testimony of an expert in correctional health on the basis of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the expert was not qualified to testify as to any matter outside correctional health care—specifically, the standard of care in the fields of internal medicine, infectious disease, or laboratory procedures with regard to the arrestee's state law claims; furthermore, the expert's testimony was neither relevant nor reliable under the Daubert analysis, and therefore, it was excluded pursuant to Fed. R. Evid. 702. Dukes v. Georgia, 428 F. Supp. 2d 1298 (N.D. Ga. 2006), aff'd, 212 Fed. Appx. 916 (11th Cir. 2006) (decided under former O.C.G.A. § 24-9-67.1).

Expert retained by the plaintiffs in a medical malpractice action, which was based on the failure to adequately inform a patient of the potential risks and complications connected with a sleep apnea procedure, was not qualified to testify under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the expert had not performed the procedure in question on other patients nor did the expert aver that the expert had obtained informed consents for similar procedures. Nathans v. Diamond, 282 Ga. 804, 654 S.E.2d 121 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion by dismissing the parents' medical malpractice action because the court correctly found that the purported expert offered by the parents failed to make even one diagnosis of a vascular ring within five years of the date at issue, and had not taught others for at least three of the last five years to diagnose a vascular ring. Spacht v. Troyer, 288 Ga. App. 898, 655 S.E.2d 656 (2007), cert. denied, 129 S. Ct. 726, 172 L.Ed.2d 726 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court properly refused to admit the testimony of a patient's expert in a case involving a claim of an unnecessary surgical procedure because the expert, who described the physician's medical practice as a "family practice", had no surgical training or expertise. Long v. Natarajan, 291 Ga. App. 814, 662 S.E.2d 876 (2008) (decided under former O.C.G.A. § 24-9-67.1).

In a malpractice and wrongful death case filed against a surgeon and an anesthesiologist, as the expert retained by the decedent's spouse did not teach or practice in the area of post-surgical airway management with sufficient frequency to establish the appropriate level of knowledge to meet the criteria of former O.C.G.A. § 24-9-67.1(c)(2) (see now O.C.G.A. §§ 24-7-702, 24-7-703), and lacked training in anesthesiology, the expert's opinion was properly excluded. Dawson v. Leder, 294 Ga. App. 717, 669 S.E.2d 720 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not err in determining that an anesthesiologist did not meet the expert-witness qualification requirements set forth in former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the anesthesiologist did not meet the licensing requirement for expert wit-

nesses, former § 24-9-67.1(c)(1). Although the anesthesiologist's amended affidavit in support of a medical malpractice complaint indicated that the anesthesiologist held a medical license from Pennsylvania on the date of the alleged negligent act, there was no evidence that the anesthesiologist was practicing in that state, and instead, the anesthesiologist's testimony indicated that the anesthesiologist was practicing medicine in Australia; in order to comply with the licensing requirement of former § 24-7-67.1(c)(1), an expert in a professional malpractice action must be licensed and practicing (or teaching) in one of the states of the United States at the time the alleged negligent act occurred. Craigo v. Azizi, 301 Ga. App. 181, 687 S.E.2d 198 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Active practice. — Trial court abused the court's discretion to the extent the court determined that an anesthesiologist did not meet the "active practice" requirements of former O.C.G.A. § 24-9-67.1(c)(2)(A) (see now O.C.G.A. §§ 24-7-702, 24-7-703) because once the anesthesiologist received a medical degree and embarked upon a residency in anesthesiology, the anesthesiologist was engaged in the "active practice of such area of specialty" within the meaning of former § 24-9-67.1(c)(2)(A); years spent as a resident physician can count as years of "active practice" for purposes of former § 24-9-67.1(c)(2)(A). Craigo v. Azizi, 301 Ga. App. 181, 687 S.E.2d 198 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Physician's affidavit. — Fact that a medical expert was not licensed as a medical doctor when the expert executed an expert affidavit to accompany a medical malpractice complaint, pursuant to O.C.G.A. § 9-11-9.1, did not affect the validity of the affidavit or require dismissal of the complaint as licensure was not a required element of such an affidavit under that statutory section or under case law; further, former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), assuming it was applicable to the circumstances, only required that the expert was licensed at the time of the medical negligence, which was the case for the instant expert. Tenet Healthcare Corp. v. Gilbert, 277 Ga. App. 895, 627 S.E.2d 821 (2006) (decided under former O.C.G.A. § 24-9-67.1).

In a professional malpractice case brought by a married couple, an expert's original affidavit was insufficient under O.C.G.A. §§ 9-11-9.1 and former 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), which applied retroactively. Although the expert avowed therein that the expert had been licensed to practice medicine since 1974, the affidavit contained nothing concerning the expert's recent or continuing experience as an orthopedist. Cogland v. Hosp. Auth., 290 Ga. App. 73, 658 S.E.2d 769 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Doctor's affidavit complied with former O.C.G.A. § 24-9-67.1(c) (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the plain language of the former statute did not require a license during three of the last five years of practice, but experience in the area of the alleged malpractice and a license at the time of the alleged malpractice. Emory Adventist, Inc. v. Hunter, 301 Ga. App. 215, 687 S.E.2d 267 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Dismissal of medical malpractice suit based on affidavit. — Trial court erred in granting a hospital's motion to dismiss a survivor's wrongful death action based on O.C.G.A. § 9-11-9.1(e) because a nurse's affidavit that allegedly failed to comply with former O.C.G.A. § 24-9-67.1(c)(2) and (e) (see now O.C.G.A. §§ 24-7-702, 24-7-703), because the trial court did not consider the survivor's other affidavit submitted: an unchallenged affidavit from a medical doctor. Piscitelli v. Hosp. Auth. of Valdosta & Lowndes County, 302 Ga. App. 746, 691 S.E.2d 615 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Treating physician's testimony sufficient. — In a Federal Employers' Liability Act action, testimony of an employee's treating physician was not insufficient under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because after diagnosing the employee with hepatitis related to chemical exposure, the physician reviewed reports of, inter alia, a toxicologist that the chemical in a leaking train car was hydrogen sulfide and opined

as to causation; the physician's opinion was not merely based on the temporal proximity of the chemical exposure to the onset of the employee's symptoms. CSX Transp., Inc. v. McDowell, 294 Ga. App. 871, 670 S.E.2d 543 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Qualification of nurses as expert witnesses. — Registered nurses and licensed practical nurses who cared for a decedent after the decedent's diagnosis with Alzheimer's disease did not lack qualifications to testify as experts about the decedent's capacity to execute a deed because the law did not require that only physicians be allowed to give testimony regarding a medical issue, but permitted others with certain training and experience to testify on issues within the scope of their expertise, and a licensed practical nurse or registered nurse was qualified to testify as an expert witness within the areas of the nurse's expertise; as to any failure to qualify the witnesses as experts, the question of whether a person possessed the qualifications of an expert witness rested entirely in the sound discretion of the trial court. Smith v. Smith, 281 Ga. 380, 637 S.E.2d 662 (2006) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action, given the relevant past experience of the patient's expert as a nurse, and the expert's familiarity with the degree and skills required of nurses and other medical staff in giving intermuscular injections, the expert was sufficiently qualified to render an expert opinion in the case. Allen v. Family Med. Ctr., P.C., 287 Ga. App. 522, 652 S.E.2d 173 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Complaint alleged that a nurse committed malpractice by not accurately triaging a patient. As the patient's expert nurse had ongoing practical experience in patient triage, and years of practical and teaching experience in supervising patient care, the expert's affidavit filed under O.C.G.A. § 9-11-9.1 was legally sufficient even though the expert had not performed emergency room triage. Houston v. Phoebe Putney Mem. Hosp., Inc., 295 Ga. App. 674, 673 S.E.2d 54 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action brought by a patient against a hospital and an employee of the hospital, the patient's expert nurse was held to be indisputably qualified under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) based on the nurse actively and regularly practicing as a licensed nurse on a full-time basis in supervising and directly performing nursing services and being a faculty member at two educational institutions accredited in the teaching of the nursing profession. Lee v. Phoebe Putney Mem. Hosp., Inc., 297 Ga. App. 692, 678 S.E.2d 340 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a case involving a patient who fell at the doctor's office while a nurse was weighing the patient, a trial court abused the court's discretion in concluding that a nursing expert was not qualified to testify under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703). The proper area of specialty was not weighing patients, in which the nurse expert had little experience, but managing patient safety while moving or directing patients, in which the nurse expert had sufficient experience at a surgical clinic. Anderson v. Mt. Mgmt. Servs., 306 Ga. App. 412, 702 S.E.2d 462 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Medical malpractice expert testimony sufficient to avoid directed verdict. — Patient who was allergic to latex alleged a hospital's negligent use of a latex catheter caused her to develop interstitial cystitis (IC). Though the patient's medical expert admitted that the causes of IC were unknown, and that no research linked IC to latex allergies, the expert's testimony that allergic reactions could trigger IC, and did so in the patient's case, was sufficient evidence of medical causation to justify denying the hospital's motion for judgment notwithstanding the verdict. EHCA Dunwoody, LLC v. Daniel, 277 Ga. App. 783, 627 S.E.2d 830 (2006) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action, the trial court properly denied a neurosurgeon's motion to dismiss the action, on grounds that the affidavit required under former O.C.G.A. § 24-9-67.1

(see now O.C.G.A. §§ 24-7-702, 24-7-703) was from an orthopedist and not a fellow neurosurgeon, as the statutory area of practice in which the opinion was to be given was dictated not by the apparent expertise of the treating physician, but rather by the allegations of the complaint concerning the plaintiff's injury. Abramson v. Williams, 281 Ga. App. 617, 636 S.E.2d 765 (2006), cert. denied, No. S07C0226, 2007 Ga. LEXIS 91 (2007) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action involving alleged nerve damage to a child during delivery, a trial court properly directed a verdict in favor of the doctor upon determining that the suing parent failed to provide causation evidence as the parent's expert failed to rule in a certain possibility as to the cause of the injury at issue and, instead, assumed a cause of injury, which was unsupported by the evidence. Hawkins v. OB-GYN Assocs., P.A., 290 Ga. App. 892, 660 S.E.2d 835 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Police officer as expert. — In a negligence case, assuming that admission of a police officer's affidavit opining as to the cause of an accident was error under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), the error was harmless in light of other evidence showing that the proximate cause of the accident was the driver's own negligence, including the driver's statements to treating physicians that the driver was reaching for the driver's cell phone when the driver ran off the road and a statement to the insurance adjustor that the driver was distracted. Kecskes v. City of Mt. Zion, 300 Ga. App. 348, 685 S.E.2d 329 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Expert's conclusion could not serve as basis for summary judgment. — Expert's testimony as to the cause of an auto accident was speculative and could not support summary judgment as the credibility of the expert and the weight to be given to the opinion were matters to be addressed by the jury; moreover, if the expert's opinion was based upon inadequate knowledge, this fact did not mandate the exclusion of the opinion but, rather, presented a jury question as to the weight which should be assigned to the opinion. Layfield v. DOT, 280 Ga. 848, 632 S.E.2d 135 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Opinion testimony properly admitted. — In a premises liability case involving an elevator that stopped above landing level, the trial court properly allowed the plaintiffs' expert to give opinion testimony that the elevator maintenance provider did not follow industry standards in maintaining the elevator; the expert based the opinion on the expert's personal knowledge of the elevator industry, the expert's review of the elevator maintenance records, and the deposition testimony of the provider's mechanics, Brady v. Elevator Specialists, Inc., 287 Ga. App. 304, 653 S.E.2d 59 (2007) (decided under former O.C.G.A. § 24-9-67.1).

In a patient's suit against a doctor, the doctor was qualified to testify as to the doctor's opinion on the standard of care and causation in the case; although the doctor was not board certified in any field of medicine and had not instructed in the area of emergency medicine, the doctor met the competency standard set forth in former O.C.G.A. § 24-9-67.1(c)(2)(A) (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the doctor was licensed to practice medicine for 26 years, the doctor practiced as an emergency room physician for 19 years, and the doctor was regularly engaged in the practice of emergency medicine during five of the five years preceding the doctor's treatment of the patient. Cruickshank v. Elbert County, No. 3:06-CV-101(CDL), 2008 U.S. Dist. LEXIS 40221 (M.D. Ga. May 19, 2008) (decided under former O.C.G.A. § 24-9-67.1).

Objections to expert opinions not timely filed. — In a tenant's action against the leasing agent of the tenant's apartment complex alleging that the tenant was injured by soot emitted from the apartment's heating system, the trial court properly refused to exclude expert opinions on behalf of the tenant on the ground that the opinions were inadmissible under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703); although the agent had notice that the tenant intended to rely on the experts' opinions, it did not assert its claim until the last business day before the trial and

therefore failed to seek a timely ruling no later than the final pretrial conference contemplated under O.C.G.A. § 9-11-16 and as required by former § 24-9-67.1(d). Ambling Mgmt. Co. v. Purdy, 283 Ga. App. 21, 640 S.E.2d 620 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Expert testimony was properly allowed in a medical negligence action because the suing patient failed to timely challenge the expert evidence via former O.C.G.A. § 24-9-67.1(d) (see now O.C.G.A. §§ 24-7-702, 24-7-703), by way of a pretrial hearing; moreover, even assuming that the untimeliness of the patient's request for a hearing did not waive the particular grounds asserted in a motion to strike brought at the close of evidence, the patient nevertheless waived all remaining objections to the expert testimony by failing to object contemporaneously. Airasian v. Shaak, 289 Ga. App. 540, 657 S.E.2d 600 (2008) (decided under former O.C.G.A. § 24-9-67.1).

In a negligence suit involving the death of an individual in an automobile collision, a trial court erred by declaring that application of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), with regard to a hitch manufacturer seeking to exclude plaintiff's expert witness, would have been unconstitutional as the motion to exclude the expert was filed several months after the final pretrial conference had already taken place and, thus, the time period within which the trial court was required to hold a hearing and rule on the motion had already passed. However, application of the former statute would not have changed the trial court's ultimate, and correct, conclusion that the hitch manufacturer's motion to exclude the expert was without merit based on the time period for ruling on the motion having already passed. Ford Motor Co. v. Gibson, 283 Ga. 398, 659 S.E.2d 346 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Speculative opinion testimony by expert improperly admitted. — In a premises liability case involving an elevator that stopped above landing level, the trial court should have excluded the opinion of an expert that if the elevator maintenance provider had followed a more aggressive maintenance schedule for the elevator, the condition in the elevator that led to its mis-leveling would almost certainly have been discovered or prevented before a passenger was injured; the expert had showed no basis for the opinion. Brady v. Elevator Specialists, Inc., 287 Ga. App. 304, 653 S.E.2d 59 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Capacity to execute a deed. — Even if registered nurses and licensed practical nurses who cared for a decedent after the decedent's diagnosis with Alzheimer's disease lacked qualifications to testify as experts about the decedent's capacity to execute a deed, a trial court did not err in permitting the nurses to testify because even a lay witness could give evidence on the question of capacity as long as the witness gave sufficient facts to form the basis of the witness's opinion; the witnesses offered detailed testimony about the decedent's inability to recognize the decedent's sibling or sign the decedent's own name, the decedent's chronic disorientation, the decedent's need for constant redirection and reorientation, and other factual observations the nurses made about the decedent's mental state and the decedent's apparent lack of capacity. Smith v. Smith, 281 Ga. 380, 637 S.E.2d 662 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Striking valuation testimony proper. — Trial court did not manifestly abuse the court's discretion by striking certain testimony of the condemnee's expert witness regarding valuation on the ground that the testimony was without sufficient foundation since the testimony was based on an assumption of the value as if the subject property had already been subdivided, which it had not; in making its ruling, the trial court properly discerned that, even though a different use of the property was shown to have been reasonably probable, a jury cannot evaluate the property as though the new use were an accomplished fact. Woodland Partners Ltd. P'ship v. DOT, 286 Ga. App. 546, 650 S.E.2d 277 (2007), cert. denied, No. S07C1767, 2007 Ga. LEXIS 698 (Ga. 2007) (decided under former O.C.G.A. § 24-9-67.1).

Probative value. — To the extent that an affidavit as to the value of a truck was

offered as an expert opinion, the affidavit lacked probative value as there was no evidence that the valuation method the affiant used was reliable. Dowdell v. Volvo Commer. Fin., LLC, 286 Ga. App. 659, 649 S.E.2d 750 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Limited qualification as expert. — In a suit against a permittee by the Environmental Protection Division of the Georgia Department of Natural Resources (EPD), the permittee objected to testimony of an EPD employee on the ground that the employee was not qualified as an engineer under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703). The trial court, however, qualified the witness and permitted the employee to testify as an expert in biologic and anaerobic processes, and did not abuse the court's discretion in doing so. Agri-Cycle LLC v. Couch, 284 Ga. 90, 663 S.E.2d 175 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Expert found not qualified to render opinion. — In a personal injury case when a driver alleged that a loose tie rod caused the driver to lose control of the steering, neither of the driver's experts was qualified to render an opinion as to the cause of the accident; the first expert did not have adequate knowledge or experience with the mechanical aspects of a vehicle to determine if mechanical failure caused the vehicle to lose control and also had no experience in evaluating design defects, and the second expert, an experienced mechanic and a police officer, had no experience in the area of accident reconstruction or in evaluating the circumstances surrounding catastrophic mechanical failure. Smith v. Liberty Chrysler-Plymouth-Dodge, Inc., 285 Ga. App. 606, 647 S.E.2d 315 (2007), cert. denied, No. S07C1526, 2007 Ga. LEXIS 861 (Ga. 2007); cert. denied, 552 U.S. 1317, 128 S. Ct. 1883, 170 L. Ed. 2d 757 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion in applying former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), and excluding the testimony of two experts in plaintiffs' personal injury suit because neither witness's testimony was shown to be the product of reliable principles and methods. One expert's testimony on the issue of causation lacked scientific support, and the other expert's testimony on the issue of labeling used standards having no specific relevance to consumer use of products, and the opinion was based solely on data obtained from the Internet and from plaintiffs' attorneys. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603 (2008) (decided under former O.C.G.A. § 24-9-67.1).

When a couple who filed a medical malpractice case did not show that their experts had actual professional knowledge and experience through active practice or by teaching during at least three of the last five years, the trial court properly held under O.C.G.A. §§ 9-11-9.1 and former 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) that the experts were not qualified to give an opinion and dismissed the case. Akers v. Elsey, 294 Ga. App. 359, 670 S.E.2d 142 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Expert allowed to testify. — In a personal injury and loss of consortium action, the trial court did not err by allowing a business to call a witness who had not been identified as an expert as: (1) the proper remedy for the erroneous admission of evidence was to request a continuance or a mistrial, neither of which the injured invitee did; (2) the invitee did not dispute that the invitee received, before trial, the substance of the witness's expected testimony, along with a curriculum vitae, but only argued that the business failed to amend the interrogatory answers; and (3) the invitee failed to object either when the business called the witness to testify, or when the business tendered the witness as an expert. Magill v. Edd Kirby Chevrolet, Inc., 277 Ga. App. 619, 627 S.E.2d 207 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Lender's appraiser's opinion as to foreclosed property's true market value at the time of foreclosure was properly admitted under former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. §§ 24-7-702, 24-7-703). The lender's expert's appraisal was based upon extensive facts and careful analysis taking into account the potential for fu-

ture recovery of a down real estate market by the discounted flow method, which the borrower conceded was reliable. Blue Marlin Dev., LLC v. Branch Banking & Trust Co., 302 Ga. App. 120, 690 S.E.2d 252 (2010) (decided under former O.C.G.A. § 24-9-67.1).

There was no abuse of discretion in allowing a witness to testify as an expert on steel and polymer vaults or soil conditions in an action seeking a permanent injunction against a cemetery group because the cemetery group failed to show that the testimony was not the product of reliable principles and methods. Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co., 307 Ga. App. 206, 704 S.E.2d 858 (2010) (decided under former O.C.G.A. § 24-9-67.1).

In a visitation dispute, it was not an abuse of discretion to allow the subject children's therapist to testify as an expert in child psychology because any dispute as to the witness's qualifications was properly explored on cross-examination and went to the weight of the witness's testimony, rather than the admissibility of that testimony. Gottschalk v. Gottschalk, 311 Ga. App. 304, 715 S.E.2d 715 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Trial court's evidentiary ruling, denying a property owner's Daubert motion for a hearing to determine the competence of a bank's appraiser pursuant to former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. §§ 24-7-702, 24-7-703), was not an abuse of discretion because disputes as to the expert's credientials went to the weight and credibility of the testimony, but not to the admissibility. Vill. at Lake Lanier, LLC v. State Bank & Trust Co., 314 Ga. App. 498, 724 S.E.2d 806 (2012) (decided under former O.C.G.A. § 24-9-67.1).

Surgeon allowed to testify. — Under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), a vascular surgeon was qualified to give an opinion in a medical malpractice case against an orthopedic surgeon because the vascular surgeon did not allege that the doctor was negligent in the performance of a patient's knee replacement surgery, only in the failure to assess the vascular issues involved, particularly in light of the patient's medical history. Cotten v. Phillips, 280 Ga. App. 280, 633 S.E.2d 655 (2006), cert. denied, No. S06C1966, 2007 Ga. LEXIS 112 (Ga. 2007) (decided under former O.C.G.A. § 24-9-67.1).

Caseworker allowed to testify. — In a termination of parental rights proceeding, pretermitting whether a case worker was qualified to give an expert opinion about the adverse effects of long-term foster care on the mother's twin children, because the mother failed to show prejudice in light of the other evidence supporting the termination of parental rights, the juvenile court did not err in allowing the case worker's testimony. In the Interest of T.J., 281 Ga. App. 673, 637 S.E.2d 75 (2006) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice case, because the trial court was authorized to conclude that the patient's expert witnesses applied reliable principles and methods to the facts of the case, and that the experts were offering opinions in the area of practice or specialty of pediatric medicine, it did not abuse the court's discretion in qualifying those experts under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703). Canas v. Al-Jabi, 282 Ga. App. 764, 639 S.E.2d 494 (2006), cert. denied, 2007 Ga. LEXIS 197 (Ga. 2007); reversed on other grounds, Kaminer v. Canas, 282 Ga. 830, 653 S.E.2d 691 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Expert with different speciality than defendant doctor. — Trial court properly denied a doctor's motion to exclude testimony from the patient's expert witness, despite the fact that the expert had a different specialty than the doctor, as such was allowed under the plain language of former O.C.G.A. § 24-9-67.1(c) (see now O.C.G.A. §§ 24-7-702, 24-7-703), and the expert's testimony addressed the doctor's alleged misdiagnosis of the patient's condition, which was the ultimate issue in the case. Mays v. Ellis, 283 Ga. App. 195, 641 S.E.2d 201 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Medical expert proper. — Trial court did not abuse the court's discretion in denying a hospital board's motion to ex-

clude the testimony of the plaintiff's medical expert in a medical malpractice suit because under the plaintiff's complaint the ultimate issues to be decided were whether the hospital staff and the board's urologists committed malpractice by failing to timely evaluate the plaintiff's injury, not whether the board's urologists negligently performed the exploratory surgery or that the urologists negligently removed the plaintiff's testicle contrary to urological standards of care; the area of practice or specialty in which the opinion was to have been given in the case was an area of practice in which the plaintiff's medical expert possessed the requisite knowledge and experience under former O.C.G.A. § 24-9-67.1(c)(2) (see now O.C.G.A. §§ 24-7-702, 24-7-703). MCG Health, Inc. v. Barton, 285 Ga. App. 577, 647 S.E.2d 81 (2007), cert. denied, 2007 Ga. LEXIS 821 (Ga. 2007) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion in denying a motion in limine filed by a doctor and the board of regents of a medical college to exclude expert testimony because the trial court correctly determined that the expert's opinion was based on sufficient facts and data in order to be admissible at trial; the expert deposed that the expert's opinion of the cause of the patient's epidural hematoma was derived from applying the expert's medical knowledge and the expert's experience with previous cases to the patient's medical records and deposition testimony regarding the incident given by the doctor and the patient. Bd. of Regents of the Univ. Sys. v. Casey, 300 Ga. App. 850, 686 S.E.2d 807 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Elevator inspector as expert. — In a premises liability case involving an elevator that stopped above landing level, a person who had worked for 31 years for an elevator company, with responsibilities including maintenance, repair, and upgrading of existing elevators for customers, and who was certified as a qualified elevator inspector, was properly accepted as an expert. Brady v. Elevator Specialists, Inc., 287 Ga. App. 304, 653 S.E.2d 59 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as board certified doctor. — During a malpractice case alleging that a patient's doctor failed to timely examine and treat the patient after the patient broke a hip at a long-term care facility, the trial court did not abuse the court's discretion in finding that the patient's expert witness (who, like the doctor, was board certified in internal medicine) was qualified under former O.C.G.A. § 24-9-67.1(c)(2) (see now O.C.G.A. §§ 24-7-702, 24-7-703). The witness saw about six patients per week, including patients who resided in long-term-care facilities; the fact that the witness had not ordered an x-ray or CT-scan or admitted anyone to the hospital in the past five years did not disqualify the witness as an expert. Carter v. Smith, 294 Ga. App. 590, 669 S.E.2d 425 (2008), cert. denied, No. S09C0463, 2009 Ga. LEXIS 194 (Ga. 2009) (decided under former O.C.G.A. § 24-9-67.1).

Qualification of engineering expert. — Given an expert witness's qualifications, including the expert's advanced degrees in civil engineering and public administration, professional engineer's license, certification as a professional traffic operations engineer, fifteen years experience working at the DOT, and eight years experience at the local government level, and the expert's testimony based on personal knowledge of the DOT's manuals and inspection policies, a trial court did not err in allowing the witness to give an opinion of whether the DOT had complied with its storm inspection policy. Ga. DOT v. Miller, 300 Ga. App. 857, 686 S.E.2d 455 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a property owner's action for trespass and nuisance, the trial court did not abuse the court's discretion by allowing the owner's expert witness to testify because the expert (1) relied on sufficient facts and data; (2) was a civil engineer with a doctorate in engineering science and mechanics; and (3) had consulted and testified as an expert in numerous water intrusion/infiltration and related cases; although the expert deposed that the expert's opinion was a theory that was impossible to prove since the expert could not repeat the owner's initial water leak, the expert had

factual information showing that the owner had not had an excessive rainwater problem before a sprinkler vault leak and that chlorinated water flowed to the owner's property in large volumes and could have done so for months, and the expert had factual information that the owner experienced excessive flooding during rains thereafter. Bailey v. Annistown Rd. Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. 2010) (decided under former O.C.G.A. § 24-9-67.1).

Federal interpretation on party bearing burden of establishing reliability of expert's opinion. — The Georgia Court of Appeals held that the trial court properly utilized federal authority, including Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579 (1993), as permitted by former O.C.G.A. § 24-9-67.1(f), when determining whether an expert's testimony met the requirements of former § 24-9-67.1(b); such authority imbues trial courts with 'substantial discretion in deciding how to test an expert's reliability.' Citing Mason v. Home Depot U.S.A., Inc., 283 Ga. 271 (Ga. 2008), and McClain v. Metabolife Intl., 401 F.3d 1233 (11th Cir. 2005), the court noted that former O.C.G.A. § 24-9-67.1(b) is based upon Rule 702 of the Federal Rules of Evidence, which places the burden of establishing the reliability of the expert's opinion on the proponent. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Trial court should rule on admissibility before ruling on summary judgment. — Because the opinions of a homeowner's experts, if admissible, would present a jury question on the issue of an exterminator's breach of contract and the extent of the homeowner's damages, a trial court erred in failing to decide the admissibility of these opinions under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) before granting summary judgment to the exterminator. An v. Active Pest Control South, Inc., 313 Ga. App. 110, 720 S.E.2d 222 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Summary judgment entered in favor of a sanitation company was vacated as to a citizen's claim that the company negligently damaged a platform, created a tripping hazard, and caused the citizen's injuries because the trial court had to rule on the admissibility of the citizen's expert witness before the court of appeals could consider whether the company bent the landing and caused a tripping hazard; the company moved to exclude the expert's testimony under former O.C.G.A. § 24-9-67.1, but the trial court never ruled on admissibility. Burroughs v. Mitchell County, 313 Ga. App. 8, 720 S.E.2d 335 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Expert's opinions were improperly found not to be reliable under former O.C.G.A. § 24-9-67.1(b)(2) and (b)(3) (see now O.C.G.A. §§ 24-7-702, 24-7-703) in a negligence action on the basis that the opinions were products of the engineer's exercise of engineering judgment and thus inadmissible because the expert was not required to point to a specific provision in the Manual of Uniform Traffic Control Devices that required the exact safety measures the expert proposed, the expert could rely on the expert's 48 years as a licensed professional engineer, and the expert was also not required to validate the expert's opinion by showing a series of similar accidents that could constitute test results. Hamilton-King v. HNTB Ga., Inc., 296 Ga. App. 864, 676 S.E.2d 287 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Jury instructions. — In a medical malpractice case when evidence of an expert's personal practices is admitted, the trial court must give jury instructions that clearly define the legal meaning of standard of care; enunciate the principle that a mere difference in views between physicians does not by itself prove malpractice; and clarify concepts such as burden of proof and credibility of witnesses. In addition, the party whose expert has been cross-examined has the ability to elicit explanations for why the expert's practices differ from what that expert attested to as the standard of care. Condra v. Atlanta Orthopaedic Group, P.C., 285 Ga. 667, 681 S.E.2d 152 (2009) (decided under former O.C.G.A. § 24-9-67.1).

RESEARCH REFERENCES

Am. Jur. Trials. — Defense Use of Economist, 31 Am. Jur. Trials 287.

ALR. — Medical negligence in extraction of tooth, established through expert testimony, 18 ALR6th 325.

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 18 ALR6th 613.

Admissibility of expert testimony by nurses, 24 ALR6th 549.

Qualification as expert to testify as to findings or results of scientific test concerning DNA matching, 38 ALR6th 439.

Admissibility of computer forensic testimony, 40 ALR6th 355.

Admissibility of evidence taken from vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "black boxes", 40 ALR6th 595.

Admissibility of biomedical engineer testimony, 43 ALR6th 327.

Necessity and admissibility of expert testimony to establish malpractice or breach of professional standard of care by architect, 47 ALR6th 303.

24-7-703. Bases of expert opinion testimony.

The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Such facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. (Code 1981, § 24-7-703, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Bases of an expert's opinion testimony, Fed. R. Evid. 703.

Law reviews. — For article, "Georgia's New Expert Witness Rule: Daubert and More," see 11 Ga. St. B.J. 16 (2005).

For comment, "Georgia's Codification of Daubert: Narrowing the Admissibility of Novel Scientific Evidence in Georgia?," see 23 Ga. St. U.L. Rev. 481 (2006).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under subsection (a) of former O.C.G.A. § 24-9-67.1 are included in the annotations for this Code section.

Constitutionality. — Trial court properly found that former O.C.G.A. § 24-9-67.1(a) and (b)(1) (see now O.C.G.A. §§ 24-7-702, 24-7-703) were contradictory in that paragraph (b)(1) limited experts to relying on potentially admissible facts and data, whereas subsection (a) stated that facts and data relied upon need not be admissible. Since the two provisions could not be harmonized and, read together, they rendered the former statute unconstitutionally vague; however, the trial court was not required to strike the former statute in the statute's entirety. Mason v. Home Depot U.S.A.,

Inc., 283 Ga. 271, 658 S.E.2d 603 (2008) (decided under former O.C.G.A. § 24-9-67.1).

In a personal injury suit wherein the trial court excluded the testimony of plaintiffs' two expert witnesses upon application of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court did not err in rejecting plaintiffs' equal protection challenge since plaintiffs could not establish the necessary element of an equal protection claim that plaintiffs were situated similarly to those being treated differently. For purposes of evidentiary standards, only those accused of the same offense are similarly situated in the criminal law arena, only those asserting or defending against the same cause of action are similarly situated in the civil law arena, and the parties to civil cases are not similarly situated to those engaged in criminal prosecutions. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Application of Daubert standard. — After a trial court found that an expert's testimony failed the first element of Daubert because the expert's theory was essentially untestable and had not been tested, the trial court properly exercised the court's discretion in weighing the fourth Daubert factor—whether the theory had attained general acceptance within the scientific community—less heavily than the other three Daubert factors. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011) (decided under former O.C.G.A. § 24-9-67.1).

As the trial court's finding that the plaintiff's expert was a "quintessential expert for hire" was supported by the evidence, it was within the trial court's discretion to apply the Daubert factors with greater rigor in determining the admissibility of the expert's opinion. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Trial court's denial of Daubert motion presumed correct. — Trial court's evidentiary ruling, denying a property owner's Daubert motion to exclude a bank's appraiser's expert testimony pursuant to former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. §§ 24-7-702, 24-7-703), was presumed correct since no transcript from the hearing thereon appeared in the record. Vill. at Lake Lanier, LLC v. State Bank & Trust Co., 314 Ga. App. 498, 724 S.E.2d 806 (2012) (decided under former O.C.G.A. § 24-9-67.1).

No error in excluding expert testimony. — Trial court did not err in excluding expert testimony of the value of a vehicle in the vehicle's defective condition on the date of sale because there was no evidence that the expert witness's method was relied upon more widely in the automotive field, nor of the method's known rate of error, nor whether it had been reviewed by qualified experts other than its creators. Moran v. Kia Motors Am., Inc., 276 Ga. App. 96, 622 S.E.2d 439 (2005) (decided under former O.C.G.A. § 24-9-67.1).

In an action filed pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51 et seq., the trial court did not abuse the court's discretion in excluding the testimony of an employee's treating physician as the doctor's conclusions were based on an incomplete medical history of the employee, without considering earlier lung-related illnesses, and while unaware of the employee's prior chemical exposure and treatment by other physicians. Shiver v. Ga. & Fla. Railnet, Inc., 287 Ga. App. 828, 652 S.E.2d 819 (2007), cert. denied, No. S08C0394, 2008 Ga. LEXIS 330 (Ga. 2008) (decided under former O.C.G.A. § 24-9-67.1).

In a patient's medical malpractice action, the testimony of an expert witness was properly excluded as the opinion was based on facts stated in a hypothetical question which were not proven by other witnesses or other competent evidence. Moreover, a motion in limine entered against the patient as to another expert witness's testimony was not addressed on appeal as the patient never called the expert to testify, and thus, the issue was abandoned. Hawkins v. OB-GYN Assocs., P.A., 290 Ga. App. 892, 660 S.E.2d 835 (2008), cert. denied, No. S08C1440, 2008 Ga. LEXIS 713 (Ga. 2008) (decided under former O.C.G.A. § 24-9-67.1).

In a wrongful interference with business relations and slander suit, a trial

court properly excluded testimony of plaintiff's expert economist, which the plaintiff claimed would show plaintiff's financial injury as to plaintiff's tortious interference claim as the expert's reliance on the partial sales history of a single agent, along with a letter referencing annualized premiums from the sale of only certain life insurance policies and unsupported representations by another agent, did not provide an adequate basis for the expert's opinion. Am. Southern Ins. Group, Inc. v. Goldstein, 291 Ga. App. 1, 660 S.E.2d 810 (2008), cert. denied, No. S08C1555, 2008 Ga. LEXIS 680 (Ga. 2008) (decided under former O.C.G.A. § 24-9-67.1).

In a will contest, the trial court did not abuse the court's discretion in limiting testimony from the caveatrix's expert toxicologist as to whether a person's functioning level could be determined by that person's responses to general questions as the trial court found that the expert's opinion was based on generalized statistics which would have been of dubious help to the jury. Caswell v. Caswell, 285 Ga. 277, 675 S.E.2d 19 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a customer's personal injury action against a stylist and a hair salon alleging chemical burns, a motion in limine was properly granted under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) to exclude the customer's expert in chemistry because the expert's testing of hair products and the product's reaction to heat did not exactly replicate the conditions under which the incident occurred; the expert used a peroxide product that was not applied to the customer's hair and used a different type of heat source. Giannotti v. Beleza Hair Salon, Inc., 296 Ga. App. 636, 675 S.E.2d 544 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a customer's slip and fall case against a dry cleaner establishment, the trial court did not err by denying the customer's motion for a new trial and by excluding the testimony of one of the customer's expert witnesses. The expert was not qualified since the expert was retired and not a licensed physician and the testimony of that expert was cumulative of other expert testimony admitted at trial, therefore, any alleged error was harmless. Muskett v. Sketchley Cleaners, Inc., 297 Ga. App. 561, 677 S.E.2d 731 (2009), cert. denied, No. S09C1422, 2009 Ga. LEXIS 412 (Ga. 2009) (decided under former O.C.G.A. § 24-9-67.1).

Expert's testimony was properly excluded in a medical malpractice suit for corrective bladder surgery for perforations following a hysterectomy because the expert was board certified in geriatrics, and the expert had not been engaged in the active practice of gynecology or urology for three of the five years before the patient's operation. Hope v. Kranc, 304 Ga. App. 367, 696 S.E.2d 128 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not err in excluding the testimony of a nurse under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the nurse had not been practicing in the relevant area of nursing for three of the five years preceding a patient's accidental fall. At best, the nurse had worked full-time as a nurse for only 11 months, although the nurse had also cared for the nurse's husband and mother. Vaughan v. WellStar Health Sys., 304 Ga. App. 596, 696 S.E.2d 506 (2010) (decided under former O.C.G.A. § 24-9-67.1).

As vehicle occupants failed to satisfy the Daubert factors or any other reasonable criteria for purposes of measuring the reliability of their expert witness's conclusions with respect to a vehicle accident that occurred in a construction zone, a trial court did not abuse the court's discretion when the court excluded the witness's testimony under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703); the expert's conclusions were based solely on the expert's own assertions and were unsupported by either the Daubert factors or any other reasonable reliability criteria. HNTB Ga., Inc. v. Hamilton-King, 287 Ga. 641, 697 S.E.2d 770 (2010) (decided under former O.C.G.A. § 24-9-67.1).

It was within the trial court's discretion to exclude an expert witness's testimony because a sister and a brother failed to satisfy the Daubert factors or any other reasonable criteria by which the trial

court could measure the reliability of the expert's conclusions; the expert failed to cite any treatise or authority supporting the expert's opinion, and the sister and brother presented no evidence that the expert had any experience that would supply the foundation supporting the expert's conclusions. HNTB Ga., Inc. v. Hamilton-King, 287 Ga. 641, 697 S.E.2d 770 (2010) (decided under former O.C.G.A. § 24-9-67.1).

In a mother's medical malpractice action against a hospital, the trial court did not abuse the court's discretion by finding that the mother's witness was not admissible as an expert on whether any member of the hospital's nursing staff breached the standard of care pursuant to former O.C.G.A. § 24-9-67.1(c)(2)(D) (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the witness deposed that the witness did not train or practice as a nurse, did not train nurses, did not supervise nurses outside of normal nurse-physician interactions, and did not hold out to be an expert in nursing or in the standard of care of nurses. Pendley v. S. Reg'l Health Sys., 307 Ga. App. 82, 704 S.E.2d 198 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Opinion of the plaintiff's expert, a pathologist, failed the first element of Daubert because the expert relied on the theory that any exposure to the asbestos in the defendant's product would contribute to the development of mesothelioma, yet the expert testified that the theory was essentially untestable and had not been tested. Thus, the expert's testimony was properly excluded under former O.C.G.A. § 24-9-67.1(b)(2) (see now O.C.G.A. §§ 24-7-702, 24-7-703) since it was not the product of reliable principles and methods. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion in refusing to permit a mother's expert on security practices to testify about the content of certain service call lists on which the expert had relied in forming the expert's opinions about the adequacy of security at the complex because the mother made no showing that the circumstances of the various incidents reflected on the lists were substantially similar to the murder of her son, such that those incidents would bear directly upon the question of foreseeability; the lists were confusing, and substantial explanation would have been required for the jury to understand the lists. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135 (2011), cert. denied, No. S12C0436, 2012 Ga. LEXIS 270 (Ga. 2012) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as an expert not satisfied. — Trial court did not err in refusing to qualify the employees' witness as an expert because the witness's testimony provided no evidence, let alone expert testimony, that would preclude summary judgment in favor of the Georgia Department of Human Services, and under former O.C.G.A. § 24-9-67.1(d) (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court had discretion in determining whether expert testimony was necessary; any use of the witness as an expert in the case was wholly unnecessary because the areas of the expert's specialized knowledge were not issues beyond the ken of lay persons. Forrester v. Ga. Dep't of Human Servs., 308 Ga. App. 716, 708 S.E.2d 660 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Expert must be member of same profession. — Under former O.C.G.A. § 24-9-67.1(c) (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court erred in allowing a pharmacist to testify about a physician's negligence. A medical expert had to show either active practice or teaching for three of the last five years, and also had to be a member of the same profession as the person whose performance the expert was evaluating. Smith v. Harris, 294 Ga. App. 333, 670 S.E.2d 136 (2008), cert. denied, No. S09C0428, 2009 Ga. LEXIS 328 (Ga. 2009) (decided under former O.C.G.A. § 24-9-67.1).

Nurse's affidavit insufficient in case alleging physical therapist's negligence. — Trial court erred in ruling that a registered nurse could provide an expert affidavit regarding a physical therapist's care, given that O.C.G.A. § 9-11-9.1(g) categorized nurses and physical therapists as practicing separate professions,

and because an expert was required to meet the conditions of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) in order to provide a § 9-11-9.1 affidavit. Ball v. Jones, 301 Ga. App. 340, 687 S.E.2d 625 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Evidence of expert's personal practices admitted. — In a medical malpractice case, evidence of an expert's personal practices, unless excludable on other grounds, is admissible both as substantive evidence and to impeach the expert's opinion as to the applicable standard of care. To the extent Johnson v. Riverdale Anesthesia Assocs., 563 S.E.2d 431 (Ga. 2002), held otherwise, it is overruled. Condra v. Atlanta Orthopaedic Group, P.C., 285 Ga. 667, 681 S.E.2d 152 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Opinion of a witness qualified as expert may be given on facts proved by other witnesses. DOT v. Baldwin, 292 Ga. App. 816, 665 S.E.2d 898 (2008) (decided under former O.C.G.A. § 24-9-67.1).

No error in excluding experts' affidavits. — Trial court did not err by denying a defendant's request to admit testimony regarding the contents of affidavits used, in part, by the defendant's expert witnesses as the basis for the experts' opinions regarding the defendant's mental status as, in applying former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court first found that the facts contained in the disputed affidavits were otherwise inadmissible hearsay, as the affidavits rested on the veracity and competency of persons not in court and did not come within any statutorily-recognized hearsay exception. The trial court then balanced the probative value of the affidavits against the prejudicial effect, noting that the affidavits were originally submitted in the defendant's habeas proceeding, contained identical language thereby casting suspicion on the affidavits' trustworthiness, contained conclusory statements and irrelevant and prejudicial information related to the defendant's alleged alcohol and drug use and the crime of murder for which the defendant was convicted; and, therefore, the affidavits had little probative information and were cumulative of other evidence. Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747; reh'g denied, 554 U.S. 930, 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Striking surveyor's affidavits held proper. — In a suit between two landowners to enforce the terms of an easement, the trial court did not abuse the court's discretion in excluding two affidavits from a surveyor in determining land elevation as no testimony was offered regarding any knowledge, skill, experience, training, or education the witness possessed in that capacity, and no evidence was presented as to the principles and methods the witness employed including whether the methods were reliable. McGuire Holdings, LLLP v. TSQ Partners, LLC, 290 Ga. App. 595, 660 S.E.2d 397 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Applicability. — Because former O.C.G.A. § 24-9-67.1(a) (see now O.C.G.A. §§ 24-7-702, 24-7-703), which governed expert witness testimony in civil actions, did not apply to probation revocation hearings, the trial court's ruling to permit the expert's testimony regarding the presence of marijuana in a joint seized from the probationer was not erroneous as the state was not required to comply with Daubert to prove the expert's qualifications. Carlson v. State, 280 Ga. App. 595, 634 S.E.2d 410 (2006), cert. denied, No. S06C2099, 2007 Ga. LEXIS 215 (Ga. 2007) (decided under former O.C.G.A. § 24-9-67.1).

Construction with other law. — Upon a proper appeal from a final order, while neither former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) nor O.C.G.A. § 9-11-16 required that a complaint be dismissed or stricken for failing to comply with the terms of those statutes, unlike the Anti-SLAPP statute, codified at O.C.G.A. § 9-11-11.1, because the trial court did not enter a final judgment within the meaning of O.C.G.A. § 9-11-68(b)(1), attorney fees were properly denied; moreover, as to the claim that dismissing and refiling in another court constitutes "improper judge shopping," ob-

taining a different judge was simply the result of the action, not necessarily the reason for doing so. McKesson Corp. v. Green, 286 Ga. App. 110, 648 S.E.2d 457 (2007), cert. denied, No. S07C1602, 2007 Ga. LEXIS 656 (Ga. 2007) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action, when a doctor was the only expert witness submitted by the suing couple, and the couple did not challenge the trial court's exclusion of another doctor's testimony, their argument that said doctor's testimony should have been admitted as a rebuttal witness was unpersuasive. Thomas v. Peachtree Orthopaedic Clinic, P.C., 290 Ga. App. 869, 660 S.E.2d 758 (2008), cert. denied, No. S08C1373, 2008 Ga. LEXIS 915 (Ga. 2008) (decided under former O.C.G.A. § 24-9-67.1).

Subject matter improper for expert testimony. — As the undisputed evidence showed that the mitochondrial DNA (mtDNA) analysis was based on sound scientific theory and produced reliable results when proper procedures were followed, and the "direct sequencing" method employed in the prosecution of the defendant for murder was the only technique accepted and used by those who conducted forensic mtDNA testing, as the technique produced reliable results upon which any practitioner could draw conclusions, the trial court did not err in allowing that evidence. Vaughn v. State, 282 Ga. 99, 646 S.E.2d 212 (2007) (decided under former O.C.G.A. § 24-9-67.1).

In a negligence action, the trial court erred by allowing the investigating police officer to give expert testimony about the color of the traffic light as the color of the light was a question that average jurors could have answered for themselves, and because the color of the traffic light was the determining factor for assessing negligence, the officer's expert opinion on this issue likely influenced the jury's verdict; thus, based on such error, a new trial was ordered. Purcell v. Kelley, 286 Ga. App. 117, 648 S.E.2d 454 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Healthcare expert not qualified. — In a medical malpractice and negligence action by an arrestee against a county, jail medical personnel, a medical lab, and lab personnel, these defendants successfully moved to exclude the testimony of an expert in correctional health on the basis of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the expert was not qualified to testify as to any matter outside correctional health care—specifically, the standard of care in the fields of internal medicine, infectious disease, or laboratory procedures with regard to the arrestee's state law claims; furthermore, the expert's testimony was neither relevant nor reliable under the Daubert analysis, and therefore, it was excluded pursuant to Fed. R. Evid. 702. Dukes v. Georgia, 428 F. Supp. 2d 1298 (N.D. Ga. 2006), aff'd, 212 Fed. Appx. 916 (11th Cir. 2006) (decided under former O.C.G.A. § 24-9-67.1).

Expert retained by the plaintiffs in a medical malpractice action, which was based on the failure to adequately inform a patient of the potential risks and complications connected with a sleep apnea procedure, was not qualified to testify under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because the expert had not performed the procedure in question on other patients nor did the expert aver that the expert had obtained informed consents for similar procedures. Nathans v. Diamond, 282 Ga. 804, 654 S.E.2d 121 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion by dismissing the parents' medical malpractice action because the court correctly found that the purported expert offered by the parents failed to make even one diagnosis of a vascular ring within five years of the date at issue, and had not taught others for at least three of the last five years to diagnose a vascular ring. Spacht v. Troyer, 288 Ga. App. 898, 655 S.E.2d 656 (2007), cert. denied, 129 S. Ct. 726, 172 L.Ed.2d 726 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court properly refused to admit the testimony of a patient's expert in a case involving a claim of an unnecessary surgical procedure because the expert, who described the physician's medical practice as a "family practice", had no surgical training or expertise. Long v. Natarajan, 291 Ga. App. 814, 662 S.E.2d

876 (2008) (decided under former O.C.G.A. § 24-9-67.1).

In a malpractice and wrongful death case filed against a surgeon and an anesthesiologist, as the expert retained by the decedent's spouse did not teach or practice in the area of post-surgical airway management with sufficient frequency to establish the appropriate level of knowledge to meet the criteria of former O.C.G.A. § 24-9-67.1(c)(2) (see now O.C.G.A. §§ 24-7-702, 24-7-703), and lacked training in anesthesiology, the expert's opinion was properly excluded. Dawson v. Leder, 294 Ga. App. 717, 669 S.E.2d 720 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Treating physician's testimony sufficient. — In a Federal Employers' Liability Act action, testimony of an employee's treating physician was not insufficient under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) because after diagnosing the employee with hepatitis related to chemical exposure, the physician reviewed reports of, inter alia, a toxicologist that the chemical in a leaking train car was hydrogen sulfide and opined as to causation; the physician's opinion was not merely based on the temporal proximity of the chemical exposure to the onset of the employee's symptoms. CSX Transp., Inc. v. McDowell, 294 Ga. App. 871, 670 S.E.2d 543 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Qualification of nurses as expert witnesses. — Registered nurses and licensed practical nurses who cared for a decedent after the decedent's diagnosis with Alzheimer's disease did not lack qualifications to testify as experts about the decedent's capacity to execute a deed because the law did not require that only physicians be allowed to give testimony regarding a medical issue, but permitted others with certain training and experience to testify on issues within the scope of their expertise, and a licensed practical nurse or registered nurse was qualified to testify as an expert witness within the areas of the nurse's expertise; as to any failure to qualify the witnesses as experts, the question of whether a person possessed the qualifications of an expert witness rested entirely in the sound discretion of the trial court. Smith v. Smith, 281 Ga. 380, 637 S.E.2d 662 (2006) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action, given the relevant past experience of the patient's expert as a nurse, and the expert's familiarity with the degree and skills required of nurses and other medical staff in giving intermuscular injections, the expert was sufficiently qualified to render an expert opinion in the case. Allen v. Family Med. Ctr., P.C., 287 Ga. App. 522, 652 S.E.2d 173 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Complaint alleged that a nurse committed malpractice by not accurately triaging a patient. As the patient's expert nurse had ongoing practical experience in patient triage, and years of practical and teaching experience in supervising patient care, the expert's affidavit filed under O.C.G.A. § 9-11-9.1 was legally sufficient even though the expert had not performed emergency room triage. Houston v. Phoebe Putney Mem. Hosp., Inc., 295 Ga. App. 674, 673 S.E.2d 54 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action brought by a patient against a hospital and an employee of the hospital, the patient's expert nurse was held to be indisputably qualified under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) based on the nurse actively and regularly practicing as a licensed nurse on a full-time basis in supervising and directly performing nursing services and being a faculty member at two educational institutions accredited in the teaching of the nursing profession. Lee v. Phoebe Putney Mem. Hosp., Inc., 297 Ga. App. 692, 678 S.E.2d 340 (2009) (decided under former O.C.G.A. § 24-9-67.1).

In a case involving a patient who fell at the doctor's office while a nurse was weighing the patient, a trial court abused the court's discretion in concluding that a nursing expert was not qualified to testify under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703). The proper area of specialty was not weighing patients, in which the nurse expert had little experience, but managing patient

safety while moving or directing patients, in which the nurse expert had sufficient experience at a surgical clinic. Anderson v. Mt. Mgmt. Servs., 306 Ga. App. 412, 702 S.E.2d 462 (2010) (decided under former O.C.G.A. § 24-9-67.1).

Medical malpractice expert testimony sufficient to avoid directed verdict. — Patient who was allergic to latex alleged a hospital's negligent use of a latex catheter caused her to develop interstitial cystitis (IC). Though the patient's medical expert admitted that the causes of IC were unknown, and that no research linked IC to latex allergies, the expert's testimony that allergic reactions could trigger IC, and did so in the patient's case, was sufficient evidence of medical causation to justify denying the hospital's motion for judgment notwithstanding the verdict. EHCA Dunwoody, LLC v. Daniel, 277 Ga. App. 783, 627 S.E.2d 830 (2006) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action, the trial court properly denied a neurosurgeon's motion to dismiss the action, on grounds that the affidavit required under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) was from an orthopedist and not a fellow neurosurgeon, as the statutory area of practice in which the opinion was to be given was dictated not by the apparent expertise of the treating physician, but rather by the allegations of the complaint concerning the plaintiff's injury. Abramson v. Williams, 281 Ga. App. 617, 636 S.E.2d 765 (2006), cert. denied, No. S07C0226, 2007 Ga. LEXIS 91 (2007) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice action involving alleged nerve damage to a child during delivery, a trial court properly directed a verdict in favor of the doctor upon determining that the suing parent failed to provide causation evidence as the parent's expert failed to rule in a certain possibility as to the cause of the injury at issue and, instead, assumed a cause of injury, which was unsupported by the evidence. Hawkins v. OB-GYN Assocs., P.A., 290 Ga. App. 892, 660 S.E.2d 835 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Police officer as expert. — In a negligence case, assuming that admission of a police officer's affidavit opining as to the cause of an accident was error under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), the error was harmless in light of other evidence showing that the proximate cause of the accident was the driver's own negligence, including the driver's statements to treating physicians that the driver was reaching for the driver's cell phone when the driver ran off the road and a statement to the insurance adjustor that the driver was distracted. Kecskes v. City of Mt. Zion, 300 Ga. App. 348, 685 S.E.2d 329 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Expert's conclusion could not serve as basis for summary judgment. — Expert's testimony as to the cause of an auto accident was speculative and could not support summary judgment as the credibility of the expert and the weight to be given to the opinion were matters to be addressed by the jury; moreover, if the expert's opinion was based upon inadequate knowledge, this fact did not mandate the exclusion of the opinion but, rather, presented a jury question as to the weight which should be assigned to the opinion. Layfield v. DOT, 280 Ga. 848, 632 S.E.2d 135 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Opinion testimony properly admitted. — In a premises liability case involving an elevator that stopped above landing level, the trial court properly allowed the plaintiffs' expert to give opinion testimony that the elevator maintenance provider did not follow industry standards in maintaining the elevator; the expert based the opinion on the expert's personal knowledge of the elevator industry, the expert's review of the elevator maintenance records, and the deposition testimony of the provider's mechanics. Brady v. Elevator Specialists, Inc., 287 Ga. App. 304, 653 S.E.2d 59 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Objections to expert opinions not timely filed. — In a negligence suit involving the death of an individual in an automobile collision, a trial court erred by declaring that application of former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), with regard to a hitch manufacturer seeking to exclude

plaintiff's expert witness, would have been unconstitutional as the motion to exclude the expert was filed several months after the final pretrial conference had already taken place and, thus, the time period within which the trial court was required to hold a hearing and rule on the motion had already passed. However, application of the former statute would not have changed the trial court's ultimate, and correct, conclusion that the hitch manufacturer's motion to exclude the expert was without merit based on the time period for ruling on the motion having already passed. Ford Motor Co. v. Gibson, 283 Ga. 398, 659 S.E.2d 346 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Speculative opinion testimony by expert improperly admitted. — In a premises liability case involving an elevator that stopped above landing level, the trial court should have excluded the opinion of an expert that if the elevator maintenance provider had followed a more aggressive maintenance schedule for the elevator, the condition in the elevator that led to its mis-leveling would almost certainly have been discovered or prevented before a passenger was injured; the expert had showed no basis for the opinion. Brady v. Elevator Specialists, Inc., 287 Ga. App. 304, 653 S.E.2d 59 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Capacity to execute a deed. — Even if registered nurses and licensed practical nurses who cared for a decedent after the decedent's diagnosis with Alzheimer's disease lacked qualifications to testify as experts about the decedent's capacity to execute a deed, a trial court did not err in permitting the nurses to testify because even a lay witness could give evidence on the question of capacity as long as the witness gave sufficient facts to form the basis of the witness's opinion; the witnesses offered detailed testimony about the decedent's inability to recognize the decedent's sibling or sign the decedent's own name, the decedent's chronic disorientation, the decedent's need for constant redirection and reorientation, and other factual observations the nurses made about the decedent's mental state and the decedent's apparent lack of capacity. Smith v. Smith, 281 Ga. 380, 637 S.E.2d 662 (2006) (decided under former O.C.G.A. § 24-9-67.1).

Striking valuation testimony proper. — Trial court did not manifestly abuse the court's discretion by striking certain testimony of the condemnee's expert witness regarding valuation on the ground that the testimony was without sufficient foundation since the testimony was based on an assumption of the value as if the subject property had already been subdivided, which it had not; in making its ruling, the trial court properly discerned that, even though a different use of the property was shown to have been reasonably probable, a jury cannot evaluate the property as though the new use were an accomplished fact. Woodland Partners Ltd. P'ship v. DOT, 286 Ga. App. 546, 650 S.E.2d 277 (2007), cert. denied, No. S07C1767, 2007 Ga. LEXIS 698 (Ga. 2007) (decided under former O.C.G.A. § 24-9-67.1).

Probative value. — To the extent that an affidavit as to the value of a truck was offered as an expert opinion, the affidavit lacked probative value as there was no evidence that the valuation method the affiant used was reliable. Dowdell v. Volvo Commer. Fin., LLC, 286 Ga. App. 659, 649 S.E.2d 750 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Limited qualification as expert. — In a suit against a permittee by the Environmental Protection Division of the Georgia Department of Natural Resources (EPD), the permittee objected to testimony of an EPD employee on the ground that the employee was not qualified as an engineer under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703). The trial court, however, qualified the witness and permitted the employee to testify as an expert in biologic and anaerobic processes, and did not abuse the court's discretion in doing so. Agri-Cycle LLC v. Couch, 284 Ga. 90, 663 S.E.2d 175 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Expert found not qualified to render opinion. — In a personal injury case when a driver alleged that a loose tie rod caused the driver to lose control of the steering, neither of the driver's experts

was qualified to render an opinion as to the cause of the accident; the first expert did not have adequate knowledge or experience with the mechanical aspects of a vehicle to determine if mechanical failure caused the vehicle to lose control and also had no experience in evaluating design defects, and the second expert, an experienced mechanic and a police officer, had no experience in the area of accident reconstruction or in evaluating the circumstances surrounding catastrophic mechanical failure. Smith v. Liberty Chrysler-Plymouth-Dodge, Inc., 285 Ga. App. 606, 647 S.E.2d 315 (2007), cert. denied, No. S07C1526, 2007 Ga. LEXIS 861 (Ga. 2007); cert. denied, 552 U.S. 1317, 128 S. Ct. 1883, 170 L. Ed. 2d 757 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion in applying former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), and excluding the testimony of two experts in plaintiffs' personal injury suit because neither witness's testimony was shown to be the product of reliable principles and methods. One expert's testimony on the issue of causation lacked scientific support, and the other expert's testimony on the issue of labeling used standards having no specific relevance to consumer use of products, and the opinion was based solely on data obtained from the Internet and from plaintiffs' attorneys. Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603 (2008) (decided under former O.C.G.A. § 24-9-67.1).

When a couple who filed a medical malpractice case did not show that their experts had actual professional knowledge and experience through active practice or by teaching during at least three of the last five years, the trial court properly held under O.C.G.A. §§ 9-11-9.1 and former 24-9-67.1 that the experts were not qualified to give an opinion and dismissed the case. Akers v. Elsey, 294 Ga. App. 359, 670 S.E.2d 142 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Expert allowed to testify. — In a personal injury and loss of consortium action, the trial court did not err by allowing a business to call a witness who had not been identified as an expert as: (1) the proper remedy for the erroneous admission of evidence was to request a continuance or a mistrial, neither of which the injured invitee did; (2) the invitee did not dispute that the invitee received, before trial, the substance of the witness's expected testimony, along with a curriculum vitae, but only argued that the business failed to amend the interrogatory answers; and (3) the invitee failed to object either when the business called the witness to testify, or when the business tendered the witness as an expert. Magill v. Edd Kirby Chevrolet, Inc., 277 Ga. App. 619, 627 S.E.2d 207 (2006) (decided under former O.C.G.A. § 24-9-67.1).

There was no abuse of discretion in allowing a witness to testify as an expert on steel and polymer vaults or soil conditions in an action seeking a permanent injunction against a cemetery group because the cemetery group failed to show that the testimony was not the product of reliable principles and methods. Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co., 307 Ga. App. 206, 704 S.E.2d 858 (2010) (decided under former O.C.G.A. § 24-9-67.1).

In a visitation dispute, it was not an abuse of discretion to allow the subject children's therapist to testify as an expert in child psychology because any dispute as to the witness's qualifications was properly explored on cross-examination and went to the weight of the witness's testimony, rather than the admissibility of that testimony. Gottschalk v. Gottschalk, 311 Ga. App. 304, 715 S.E.2d 715 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Surgeon allowed to testify. — Under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), a vascular surgeon was qualified to give an opinion in a medical malpractice case against an orthopedic surgeon because the vascular surgeon did not allege that the doctor was negligent in the performance of a patient's knee replacement surgery, only in the failure to assess the vascular issues involved, particularly in light of the patient's medical history. Cotten v. Phillips, 280 Ga. App. 280, 633 S.E.2d 655 (2006), cert. denied, No. S06C1966, 2007 Ga.

LEXIS 112 (Ga. 2007) (decided under former O.C.G.A. § 24-9-67.1).

Caseworker allowed to testify. — In a termination of parental rights proceeding, pretermitting whether a case worker was qualified to give an expert opinion about the adverse effects of long-term foster care on the mother's twin children, because the mother failed to show prejudice in light of the other evidence supporting the termination of parental rights, the juvenile court did not err in allowing the case worker's testimony. In the Interest of T.J., 281 Ga. App. 673, 637 S.E.2d 75 (2006) (decided under former O.C.G.A. § 24-9-67.1).

In a medical malpractice case, because the trial court was authorized to conclude that the patient's expert witnesses applied reliable principles and methods to the facts of the case, and that they were offering opinions in the area of practice or specialty of pediatric medicine, it did not abuse the court's discretion in qualifying those experts under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703). Canas v. Al-Jabi, 282 Ga. App. 764, 639 S.E.2d 494 (2006), cert. denied, 2007 Ga. LEXIS 197 (Ga. 2007); reversed on other grounds, Kaminer v. Canas, 282 Ga. 830, 653 S.E.2d 691 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Expert on DNA testing. — No error resulted by admitting expert testimony on the issue of DNA testing and because the defendant did not contend that the expert's testimony failed to meet the Harper standard, no basis for reversal on this ground existed. Carruth v. State, 286 Ga. App. 431, 649 S.E.2d 557 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Elevator inspector as expert. — In a premises liability case involving an elevator that stopped above landing level, a person who had worked for 31 years for an elevator company, with responsibilities including maintenance, repair, and upgrading of existing elevators for customers, and who was certified as a qualified elevator inspector, was properly accepted as an expert. Brady v. Elevator Specialists, Inc., 287 Ga. App. 304, 653 S.E.2d 59 (2007) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as medical expert. — Trial court did not abuse the court's discretion in denying a motion in limine filed by a doctor and the board of regents of a medical college to exclude expert testimony because the trial court correctly determined that the expert's opinion was based on sufficient facts and data in order to be admissible at trial; the expert deposed that the expert's opinion of the cause of the patient's epidural hematoma was derived from applying the expert's medical knowledge and the expert's experience with previous cases to the patient's medical records and deposition testimony regarding the incident given by the doctor and the patient. Bd. of Regents of the Univ. Sys. v. Casey, 300 Ga. App. 850, 686 S.E.2d 807 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion in denying a motion in limine filed by a doctor and the board of regents of a medical college to exclude expert testimony because the expert reviewed the medical records of the patient's case as well as the deposition testimony of the doctor and the patient before using a differential diagnosis to explain the expert's theory of the cause of the patient's epidural hematoma; the trial court denied the motion in limine based on the expert's use of differential diagnosis because, the expert explained, based on prior experiences and medical knowledge as applied to the medical records, time-line, and testimony given in the case, why the expert believed that the patient's interaction with the doctor caused the epidural hematoma either to form or to worsen to the point that it caused the damage suffered by the patient. Bd. of Regents of the Univ. Sys. v. Casey, 300 Ga. App. 850, 686 S.E.2d 807 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as DOT expert. — Given an expert witness's qualifications, including his advanced degrees in civil engineering and public administration, professional engineer's license, certification as a professional traffic operations engineer, fifteen years experience working at the DOT, and eight years experience at the local government level, and the expert's testimony based on personal knowl-

edge of the DOT's manuals and inspection policies, a trial court did not err in allowing the witness to give an opinion of whether the DOT had complied with its storm inspection policy. Ga. DOT v. Miller, 300 Ga. App. 857, 686 S.E.2d 455 (2009) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as water intrusion/infiltration expert. — In a property owner's action for trespass and nuisance, the trial court did not abuse the court's discretion by allowing the owner's expert witness to testify because the expert (1) relied on sufficient facts and data; (2) was a civil engineer with a doctorate in engineering science and mechanics; and (3) had consulted and testified as an expert in numerous water intrusion/infiltration and related cases; although the expert deposed that the expert's opinion was a theory that was impossible to prove since the expert could not repeat the owner's initial water leak, the expert had factual information showing that the owner had not had an excessive rainwater problem before a sprinkler vault leak and that chlorinated water flowed to the owner's property in large volumes and could have done so for months, and the expert had factual information that the owner experienced excessive flooding during rains thereafter. Bailey v. Annistown Rd. Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. 2010) (decided under former O.C.G.A. § 24-9-67.1).

Trial court should rule on admissibility before ruling on summary judgment. — Because the opinions of a homeowner's experts, if admissible, would present a jury question on the issue of an exterminator's breach of contract and the extent of the homeowner's damages, a trial court erred in failing to decide the admissibility of these opinions under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703) before granting summary judgment to the exterminator. An v. Active Pest Control South, Inc., 313 Ga. App. 110, 720 S.E.2d 222 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Summary judgment entered in favor of a sanitation company was vacated as to a citizen's claim that the company negligently damaged a platform, created a tripping hazard, and caused the citizen's injuries because the trial court had to rule on the admissibility of the citizen's expert witness before the court of appeals could consider whether the company bent the landing and caused a tripping hazard; the company moved to exclude the expert's testimony under former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), but the trial court never ruled on admissibility. Burroughs v. Mitchell County, 313 Ga. App. 8, 720 S.E.2d 335 (2011) (decided under former O.C.G.A. § 24-9-67.1).

Jury instructions. — In a medical malpractice case when evidence of an expert's personal practices is admitted, the trial court must give jury instructions that clearly define the legal meaning of standard of care; enunciate the principle that a mere difference in views between physicians does not by itself prove malpractice; and clarify concepts such as burden of proof and credibility of witnesses. In addition, the party whose expert has been cross-examined has the ability to elicit explanations for why the expert's practices differ from what that expert attested to as the standard of care. Condra v. Atlanta Orthopaedic Group, P.C., 285 Ga. 667, 681 S.E.2d 152 (2009) (decided under former O.C.G.A. § 24-9-67.1).

RESEARCH REFERENCES

Am. Jur. Trials. — Defense Use of Economist, 31 Am. Jur. Trials 287.

ALR. — Medical negligence in extraction of tooth, established through expert testimony, 18 ALR6th 325.

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 18 ALR6th 613.

Admissibility of expert testimony by nurses, 24 ALR6th 549.

Qualification as expert to testify as to findings or results of scientific test concerning DNA matching, 38 ALR6th 439.

Admissibility of computer forensic testimony, 40 ALR6th 355.

Admissibility of evidence taken from vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "black boxes", 40 ALR6th 595.

Admissibility of biomedical engineer testimony, 43 ALR6th 327.

Necessity and admissibility of expert testimony to establish malpractice or breach of professional standard of care by architect, 47 ALR6th 303.

24-7-704. Ultimate issue opinion.

(a) Except as provided in subsection (b) of this Code section, testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of an accused in a criminal proceeding shall state an opinion or inference as to whether the accused did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone. (Code 1981, § 24-7-704, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Opinion on an ultimate issue, Fed. R. Evid. 704.

24-7-705. Disclosure of facts or data underlying expert opinion.

An expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. An expert may in any event be required to disclose the underlying facts or data on cross-examination. (Code 1981, § 24-7-705, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Disclosing the facts or data underlying an expert's opinion, Fed. R. Evid. 705.

24-7-706. Court appointed experts.

Except as provided in Chapter 7 of Title 9 or Code Section 17-7-130.1, 17-10-66, 29-4-11, 29-5-11, 31-14-3, 31-20-3, 44-6-166.1, 44-6-184, or 44-6-187, the following procedures shall govern the appointment, compensation, and presentation of testimony of court appointed experts:

(1) The court on its own motion or on the motion of any party may enter an order to show cause why any expert witness should not be

appointed and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. Each appointed expert witness shall be informed of his or her duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. Each appointed expert witness shall advise the parties of his or her findings, if any. Except as provided in Article 3 of Chapter 12 or Article 6 of Chapter 13 of this title, such witness's deposition may be taken by any party. Such witness may be called to testify by the court or any party. Each expert witness shall be subject to cross-examination by each party, including a party calling the witness;

(2) Appointed expert witnesses shall be entitled to reasonable compensation in whatever sum the court allows. The compensation fixed shall be payable from funds which may be provided by law in criminal proceedings and civil proceedings involving just compensation for the taking of property. In other civil proceedings, the compensation shall be paid by the parties in such proportion and at such time as the court directs and thereafter charged in like manner as other costs;

(3) In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness; and

(4) Nothing in this Code section shall limit a party in calling expert witnesses of the party's own selection. (Code 1981, § 24-7-706, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 97, § 3/HB 744.)

Cross references. — Court appointed expert witnesses, Fed. R. Evid. 706.

The 2012 amendment, effective January 1, 2013, substituted "44-6-166.1, 44-6-184, or 44-6-187," for "or 44-6-166.1," near the middle of the introductory paragraph.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2011, "and proceedings" was deleted following "civil proceedings" in the second sentence of paragraph (2).

Editor's notes. — Ga. L. 2012, p. 97, § 1/HB 744, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Uniform Partition of Heirs Property Act.'"

24-7-707. Expert opinion testimony in criminal proceedings.

In criminal proceedings, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses. (Code 1981, § 24-7-707, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Discovery of facts known and opinions held by expert witnesses, § 9-11-26(b)(4). Admissibility of medical tests and blood tests in proceedings to determine paternity, § 19-7-46. DNA sampling, collection, and analysis, § 35-3-160.

Law reviews. — For article analyzing Georgia business entries provisions, see 4 Mercer L. Rev. 313 (1953). For article, "The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony," see 39 Mercer L. Rev. 545 (1988). For article, "Georgia's New Expert Witness Rule: Daubert and More," see 11 Ga. St. B.J. 16 (2005). For annual 11th Circuit survey of evidence law, see 56 Mercer L. Rev. 1273 (2005). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005).

For note on the chiropractor as an expert witness, see 15 Mercer L. Rev. 431 (1964). For note on admissibility of expert psychological testimony in Georgia, see 4 Ga. St. U.L. Rev. 117 (1988). For note, "Exiting Twilight Zone: Changes in the Standard for Admissibility of Scientific Evidence in Georgia," see 10 Ga. St. U.L. Rev. 401 (1994). For note, "Kumho Tire Co. v. Carmichael: Daubert's Gatekeeping Method Expanded To Apply To All Expert Testimony," see 51 Mercer L. Rev. 1325 (2000).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3792, former Code 1873, § 3868, former Code 1882, § 3868, former Civil Code 1895, § 5287, former Penal Code 1895, § 1022, former Civil Code 1910, § 5876, former Penal Code 1910, § 1048, former Code 1933, § 38-1710, and former O.C.G.A. § 24-9-67 are included in the annotations for this Code section.

Status of witness as lay or expert goes not to admissibility, but credibility. McLelland v. State, 203 Ga. App. 93, 416 S.E.2d 340, cert. denied, 203 Ga. App. 907, 416 S.E.2d 340 (1992) (decided under former O.C.G.A. § 24-9-67).

Expert witness defined. — An expert witness is one who through education, training, or experience has peculiar knowledge concerning some matter of science or skill to which the expert's testimony relates. Tifton Brick & Block Co. v. Meadow, 92 Ga. App. 328, 88 S.E.2d 569 (1955) (decided under former Code 1933, § 38-1710).

Construction. — As the undisputed evidence showed that the mitochondrial DNA (mtDNA) analysis was based on sound scientific theory and produced reliable results when proper procedures were followed, and the "direct sequencing" method employed in the prosecution of the defendant for murder was the only technique accepted and used by those who conducted forensic mtDNA testing, as the technique produced reliable results upon

General Consideration (Cont'd)

which any practitioner could draw conclusions, the trial court did not err in allowing that evidence. Further, former O.C.G.A. § 24-9-67, and neither Daubert nor former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702 and 24-7-703) controlled the admission of evidence in criminal proceedings. Vaughn v. State, 282 Ga. 99, 646 S.E.2d 212 (2007) (decided under former O.C.G.A. § 24-9-67).

Applicable only in criminal cases. — Trial court was not required to consider a driver's expert affidavits under former O.C.G.A. § 24-9-67 in a products liability action because by the former statute's terms, the former statute applied to criminal cases, not civil cases. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011) (decided under former O.C.G.A. § 24-9-67).

Qualifications of expert witness are addressed to sound discretion of court. Atlantic Coast Line R.R. v. Sweat, 183 F.2d 27 (5th Cir. 1950) (decided under former Code 1933, § 38-1710).

Expert opinion must be helpful or necessary. — Expert opinion, like lay opinion, is received only in instances when the opinion is helpful or necessary. Jones v. State, 232 Ga. 762, 208 S.E.2d 850 (1974) (decided under former Code 1933, § 38-1710).

Expert opinion is admissible on any matter of scientific or technical knowledge. Southern Ry. v. Wessinger, 32 Ga. App. 551, 124 S.E. 100, cert. denied, 32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5876).

When based on facts supported by other witnesses and weight thereof is jury question. — Expert witnesses' opinions, on questions of science, skill, trade, or like questions, shall always be admissible provided the opinions are based on facts supported by other witnesses and the weight thereof is a question for the jury, to deal with as the jury sees fit, giving credence to the opinion or not. Atlantic Coast Line R.R. v. Sweat, 183 F.2d 27 (5th Cir. 1950) (decided under former Code 1933, § 38-1710).

When an expert testified that the expert's opinion was based upon the plaintiff's deposition testimony, the investigating officer's report, diagrams of the accident scene drafted by the plaintiff, photographs of the plaintiff's vehicle, and information regarding the speed of the plaintiff's truck from its governor, it was a jury question as to the weight which should be assigned the opinion, and not a question of admissibility. J.B. Hunt Transp., Inc. v. Brown, 236 Ga. App. 634, 512 S.E.2d 34 (1999) (decided under former O.C.G.A. § 24-9-67).

Expert's credibility is a jury question. — Defendant's argument that the evidence was insufficient to support the defendant's conviction for possession by ingestion of methamphetamine because the testimony of the defendant's expert witness, a forensic toxicologist with a private clinical reference laboratory, called into question the validity of the state crime lab report, was rejected because the determination of the credibility of defendant's expert and the effect of the expert's testimony on the validity of the state crime lab report were for the jury. Poston v. State, 274 Ga. App. 117, 617 S.E.2d 150 (2005) (decided under former O.C.G.A. § 24-9-67).

Opinion proper when on matter within scope of expertise. — Expert can express an opinion on a matter when the matter inquired about lies within the domain of the profession or calling which the expert pursues. Southern Ry. v. Cabe, 109 Ga. App. 432, 136 S.E.2d 438 (1964) (decided under former Code 1933, § 38-1710).

Opinions on matters outside scope of expertise. — Opinion of any witness, not on any question of science, skill, trade, or like questions is inadmissible when all the facts are capable of being clearly detailed so that the jury may form correct conclusions therefrom. Whatley v. Henry, 65 Ga. App. 668, 16 S.E.2d 214 (1941) (decided under former Code 1933, § 38-1710).

While expert witnesses may give their opinions as to facts, principles, and rules involved in the science in which the witnesses are learned, the witnesses are not, as to questions lying out of the domain of the science, art, or trade in which the witnesses are experts, exempt from the

restriction of the former statute, which required witnesses to state facts and not opinions. Southern Ry. v. Cabe, 109 Ga. App. 432, 136 S.E.2d 438 (1964) (decided under former Code 1933, § 38-1710).

Establishing variance from standard of care in legal malpractice cases. — Plaintiff may not establish variance from standard of care in medical or legal malpractice cases without expert opinion testimony from which the jury could determine malpractice. This latter requirement is properly a prerequisite for the submission of a case to the jury. Savannah Valley Prod. Credit Ass'n v. Cheek, 248 Ga. 745, 285 S.E.2d 689 (1982) (decided under former O.C.G.A. § 24-9-67).

Matter within scope of lay knowledge or experience. — Expert testimony is usually excluded when the question is whether the subject matter is within the scope of the ordinary layman's knowledge and experience. Jones v. State, 232 Ga. 762, 208 S.E.2d 850 (1974) (decided under former Code 1933, § 38-1710).

Expert opinion testimony on issues to be decided by the jury, even the ultimate issue, is admissible when the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; that is, the conclusion is beyond the ken of the average layman. Smith v. State, 247 Ga. 612, 277 S.E.2d 678 (1981) (decided under former Code 1933, § 38-1710).

Expert may not testify as to the expert's opinion as to the existence vel non of a fact (in this case, whether a child had been abused sexually) unless the inference to be drawn from facts in evidence is beyond the ken of the jurors—that is, unless the jurors, for want of specialized knowledge, skill, or experience, are incapable of drawing—from facts in evidence—such an inference for themselves. Allison v. State, 256 Ga. 851, 353 S.E.2d 805 (1987) (decided under former O.C.G.A. § 24-9-67).

Advocate for the victims of sexual assault at a rape crisis center did not testify as to a rape trauma syndrome; rather, the advocate properly testified that there was no typical or common behavior among rape victims and that alleged victims of sexual assault might delay reporting such crimes. Stevenson v. State, 272 Ga. App. 335, 612 S.E.2d 521 (2005) (decided under former O.C.G.A. § 24-9-67).

Whether a seat belt engaged properly or an air bag deployed are not matters of science and issues requiring the expert testimony of an engineer or a metallurgist, but are matters of skill and experience. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651 (2005) (decided under former O.C.G.A. § 24-9-67).

Whether someone suffers greater injuries in a car wreck when a seat belt does not work to restrain the person and the air bag does not inflate between the person and the steering wheel, windshield, and mirror are not matters of science and issues requiring the expert testimony of trauma physician or engineer, but are matters of skill and experience. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651 (2005) (decided under former O.C.G.A. § 24-9-67).

Mixture of law and fact. — It is only when the drawing of the inference requires a mixture of law and fact that the question is not a proper one for opinion evidence. Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345 (1980) (decided under former Code 1933, § 38-1710); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349 (1980) (decided under former Code 1933, § 38-1710).

Opinion of ultimate fact. — Expert opinions are advisory and are not binding upon a fact-finding tribunal when such opinions are as broad in scope as the question of fact at issue, such as the cause of death or disability. American Mut. Liab. Ins. Co. v. King, 88 Ga. App. 176, 76 S.E.2d 81 (1953) (decided under former Code 1933, § 38-1710).

As a general rule, an expert witness is not allowed to express on the stand an opinion of ultimate fact or the very fact to be decided by the jury because to do so would invade the province of the jury. Jones v. State, 232 Ga. 762, 208 S.E.2d 850 (1974) (decided under former Code 1933, § 38-1710); Mitchell v. State, 154 Ga. App. 399, 268 S.E.2d 360 (1980) (decided under former Code 1933, § 38-1710).

An expert witness may testify as to the

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witness's opinion on the ultimate issue in the case without invading the province of the jury so long as the subject is an appropriate one for opinion evidence. King v. Browning, 246 Ga. 46, 268 S.E.2d 653 (1980) (decided under former Code 1933, § 38-1710); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349 (1980) (decided under former Code 1933, § 38-1710).

If witness is asked witness's opinion as to a fact and not as to a mixed question of law and fact, the witness should be allowed to testify even though the witness's opinion is as to the ultimate issue for the jury. Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349 (1980) (decided under former Code 1933, § 38-1710).

If the cause and manner of an injury is the ultimate issue of fact to be determined by the jury, an expert may nevertheless give the expert's factual opinion but not the expert's legal conclusion on this issue for the benefit of the jury in their fact finding. Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349 (1980) (decided under former Code 1933, § 38-1710).

Expert may state the expert's opinion upon an ultimate fact, provided that all other requirements for admission of expert opinion were met. Baker v. State, 161 Ga. App. 670, 288 S.E.2d 280 (1982) (decided under former O.C.G.A. § 24-9-67).

Legal conclusions. — Expert cannot act as a member of the jury; nor, while on the stand, can the expert transcend the functions of a witness and, under the guise of giving testimony, state a legal conclusion. Travelers Ins. Co. v. Thornton, 119 Ga. 455, 46 S.E. 678 (1904) (decided under former Civil Code 1895, § 5287); Herndon v. State, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935) (decided under former Code 1933, § 38-1710); Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345 (1980) (decided under former Code 1933, § 38-1710); Mitchell v. State, 154 Ga. App. 399, 268 S.E.2d 360, cert. denied, 449 U.S. 1011, 101 S. Ct. 567, 66 L. Ed. 2d 469 (1980) (decided under former Code 1933, § 38-1710).

Whether a question calls for a legal conclusion or principally a fact which incidentally involves a legal word or phrase is within the sound discretion of the trial court. Gage v. Tiffin Motor Homes, Inc., 153 Ga. App. 704, 266 S.E.2d 345 (1980) (decided under former Code 1933, § 38-1710).

Although it is permissible for the expert to give the expert's opinion to facts in issue or even the ultimate issue where such question is a proper one for opinion evidence, the expert is not permitted to state a legal conclusion as to the ultimate matter in issue. Nichols v. State, 177 Ga. App. 689, 340 S.E.2d 654 (1986) (decided under former O.C.G.A. § 24-9-67).

Testimony on calculation of damages. — When plaintiffs presented expert testimony on the calculation of damages, even though the trier of fact found that the defendant was not responsible for all the damages, the plaintiff showed with reasonable certainty the total amount of damages and the degree to which those damages were attributable to defendant, and the award was affirmed. Metropolitan Atlanta Rapid Transit Authority v. Green Int'l, Inc., 235 Ga. App. 419, 509 S.E.2d 674 (1998) (decided under former O.C.G.A. § 24-9-67).

Opinions of an expert alone are insufficient grounds on which to grant summary judgment. Lake v. Hamilton Bank, 137 Ga. App. 600, 224 S.E.2d 522 (1976) (decided under former Code 1933, § 38-1710).

Experiments. — Expert testimony can be based on experiments if the expert gives details of the experiment. Frank v. State, 141 Ga. 243, 80 S.E. 1016 (1914) (decided under former Penal Code 1910, § 1048).

Construction with § 24-9-65. — Former Code 1933, § 38-1710 dealt with expert testimony concerning science, skill, trade, or like questions, in which matters experts may give their opinion based on facts as proved by other witnesses, but former Code 1933, § 38-1708 (see now O.C.G.A. § 24-7-701) dealt with opinions of lay witnesses. Mills v. State, 71 Ga. App. 353, 30 S.E.2d 824 (1944) (decided

under former Code 1933, § 38-1710).

Appellate standard for admission. — When testimony of an expert accident reconstructionist was admitted by the trial court as expert opinion, the Court of Appeals erred by judging its admissibility pursuant to the standard appropriate for lay witnesses. Johnson v. Knebel, 267 Ga. 853, 485 S.E.2d 451 (1997) (decided under former O.C.G.A. § 24-9-67).

Appellate court is not bound by Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786, 125 LE2d 469 (1993) and has consistently refused to apply the Daubert standard; further, as Daubert involves the application of Fed. R. Evid. 702, which has not been adopted in Georgia, Daubert has not been adopted in Georgia either. Dailey v. State, 271 Ga. App. 492, 610 S.E.2d 126 (2005) (decided under former O.C.G.A. § 24-9-67).

Past use of expert by other party. — Plaintiff's questions regarding the prior employment of plaintiff's expert by defense counsel, asked in an attempt to rehabilitate or bolster the expert's credibility, were not admissible. Vaughn v. Protective Ins. Co., 243 Ga. App. 79, 532 S.E.2d 159 (2000) (decided under former O.C.G.A. § 24-9-67).

Exclusion of expert witness testimony on cross-racial eyewitness identification not reversible error. — Trial court did not abuse the court's discretion or violate the defendant's Sixth and Fourteenth amendment rights by excluding expert testimony about cross-racial eyewitness identification; based on eyewitness testimony and the defendant's confession, the jury could have resolved the issue of whether the victims recognized the defendant without the assistance of an expert witness. Crawford v. State, 283 Ga. App. 645, 642 S.E.2d 335 (2007) (decided under former O.C.G.A. § 24-9-67).

Limiting questioning of expert. — Trial court did not err in limiting appellate counsel's questioning of an expert witness at the hearing on the defendant's motion for new trial because there was sufficient evidence before the trial court to show what the expert's testimony would have been had defense counsel called the expert as a witness; appellate counsel called the witness and questioned the witness about the techniques used to question young children and the reliability of a young child's testimony, and the trial court decided to limit the testimony only when appellate counsel began asking specific questions about one of the interviews. Vaughn v. State, 307 Ga. App. 754, 706 S.E.2d 137 (2011) (decided under former O.C.G.A. § 24-9-67).

Subject matter improper for expert testimony. — As the undisputed evidence showed that the mitochondrial DNA (mtDNA) analysis was based on sound scientific theory and produced reliable results when proper procedures were followed, and the "direct sequencing" method employed in the prosecution of the defendant for murder was the only technique accepted and used by those who conducted forensic mtDNA testing, as the technique produced reliable results upon which any practitioner could draw conclusions, the trial court did not err in allowing that evidence. Vaughn v. State, 282 Ga. 99, 646 S.E.2d 212 (2007) (decided under former O.C.G.A. § 24-9-67).

Expert on DNA testing. — No error resulted by admitting expert testimony on the issue of DNA testing and because the defendant did not contend that the expert's testimony failed to meet the Harper standard, no basis for reversal on this ground existed. Carruth v. State, 286 Ga. App. 431, 649 S.E.2d 557 (2007) (decided under former O.C.G.A. § 24-9-67).

No error in excluding experts' affidavits. — Trial court did not err by denying a defendant's request to admit testimony regarding the contents of affidavits used, in part, by the defendant's expert witnesses as the basis for the experts' opinions regarding the defendant's mental status as, in applying former O.C.G.A. § 24-9-67.1 (see now O.C.G.A. §§ 24-7-702, 24-7-703), the trial court first found that the facts contained in the disputed affidavits were otherwise inadmissible hearsay, as the affidavits rested on the veracity and competency of persons not in court and did not come within any statutorily-recognized hearsay exception. The trial court then balanced the probative value of the affidavits against the

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prejudicial effect, noting that the affidavits were originally submitted in the defendant's habeas proceeding, contained identical language thereby casting suspicion on the affidavits' trustworthiness, contained conclusory statements and irrelevant and prejudicial information related to the defendant's alleged alcohol and drug use and the crime of murder for which the defendant was convicted; and, therefore, the affidavits had little probative information and were cumulative of other evidence. Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747; reh'g denied, 554 U.S. 930, 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008) (decided under former O.C.G.A. § 24-9-67.1).

Procedural Considerations

Giving testimony based on lab report not yet admitted into evidence. — Expert medical witness could not give an opinion on the cause of death based on lab report which had not yet been admitted into evidence, but error in allowing such opinion was cured when the lab report was later introduced into evidence. Vaughn v. State, 249 Ga. 803, 294 S.E.2d 504 (1982) (decided under former O.C.G.A. § 24-9-67).

Trial court did not err in refusing to permit the testimony of two of the manufacturer's expert witnesses in an asbestos exposure case as to the asbestos fiber counts on its packing material that had been determined by an outside laboratory, even though such opinions may be given on the facts as proved by other witnesses, because the experts were not entitled to give an opinion based upon the outside laboratory's report which was prepared by other people and which was not in evidence. John Crane, Inc. v. Jones, 262 Ga. App. 531, 586 S.E.2d 26 (2003) (decided under former O.C.G.A. § 24-9-67).

Introduction of fingerprint magnifications not necessary when expert testified as to expert's comparisons. — Expert in field of fingerprint identification was qualified to state opinion based on expert's analysis and comparison that fingerprints found at scene of the crime were those of appellant; and in presenting this expert testimony, it was not necessary for state to introduce magnification of prints to demonstrate at trial the points of similarity. W.B.S. v. State, 163 Ga. App. 471, 294 S.E.2d 705 (1982) (decided under former O.C.G.A. § 24-9-67).

When witness is tendered as an expert. — Witness who was not tendered as an expert until near the end of the witness's testimony and after cross-examination qualified as an expert at the inception of the witness's testimony and could properly render an expert opinion. In re C.W.D., 232 Ga. App. 200, 501 S.E.2d 232 (1998) (decided under former O.C.G.A. § 24-9-67).

Qualification as Expert

Court determines expert's qualifications. — Qualification of a witness as an expert is addressed to the sound discretion of the court. Clary v. State, 8 Ga. App. 92, 68 S.E. 615 (1910) (decided under former Penal Code 1910, § 1048); Hines v. Hendricks, 25 Ga. App. 682, 104 S.E. 520 (1920) (decided under former Penal Code 1910, § 1048); Western & Atl. R.R. v. Fowler, 77 Ga. App. 206, 47 S.E.2d 874 (1948) (decided under former Code 1933, § 38-1710); McDowell v. State, 78 Ga. App. 116, 50 S.E.2d 633 (1948) (decided under former Code 1933, § 38-1710); Carroll v. Hayes, 98 Ga. App. 450, 105 S.E.2d 755 (1958) (decided under former Code 1933, § 38-1710); Pinkerton & Laws Co. v. Robert & Co. Assocs., 129 Ga. App. 881, 201 S.E.2d 654 (1973) (decided under former Code 1933, § 38-1710); Johnson v. State, 130 Ga. App. 704, 204 S.E.2d 302 (1974) (decided under former Code 1933, § 38-1710); Barrow v. State, 235 Ga. 635, 221 S.E.2d 416 (1975) (decided under former Code 1933, § 38-1710); McCoy v. State, 237 Ga. 118, 227 S.E.2d 18 (1976) (decided under former Code 1933, § 38-1710); Redd v. State, 240 Ga. 753, 243 S.E.2d 16 (1978) (decided under former Code 1933, § 38-1710); Kelly v. Floor Bazaar, Inc., 153 Ga. App. 163, 264 S.E.2d 697 (1980) (decided under former Code 1933, § 38-1710); Wilkie v. State, 153 Ga. App. 609, 266 S.E.2d 289 (1980) (decided under former Code 1933, § 38-1710); Haygood v. State, 154 Ga. App. 633, 269

S.E.2d 480 (1980) (decided under former Code 1933, § 38-1710); Rose Mill Homes, Inc. v. Michel, 155 Ga. App. 808, 273 S.E.2d 211 (1980) (decided under former Code 1933, § 38-1710); Hicks v. State, 157 Ga. App. 69, 276 S.E.2d 129 (1981) (decided under former Code 1933, § 38-1710); Hicks v. State, 196 Ga. App. 311, 396 S.E.2d 60 (1990) (decided under former O.C.G.A. § 24-9-67).

For definitions of expert, see Macon Ry. & Light Co. v. Mason, 123 Ga. 773, 51 S.E. 569 (1905) (decided under former Civil Code 1895, § 5287). See also Doster v. Brown, 25 Ga. 24, 71 Am. Dec. 153 (1858) (decided under former law); White v. Clements, 39 Ga. 232 (1869) (decided under former law); Hines v. Hendricks, 25 Ga. App. 682, 104 S.E. 520 (1920) (decided under former Civil Code 1910, § 5876).

An expert is one who practices a business or profession requiring the person to have technical knowledge in that field. Smith v. State, 127 Ga. 56, 56 S.E. 116 (1906) (decided under former Penal Code 1895, § 1022); Glover v. State, 129 Ga. 717, 59 S.E. 816 (1907) (decided under former Penal Code 1895, § 1022).

Expert testimony must relate to scientific or technical knowledge. McLain v. State, 71 Ga. 279 (1883) (decided under former Code 1882, § 3868); McClendon v. State, 7 Ga. App. 784, 68 S.E. 331 (1910) (decided under former Penal Code 1895, § 1022); Spence v. State, 20 Ga. App. 61, 92 S.E. 555, cert. denied, 20 Ga. App. 832 (1917) (decided under former Penal Code 1910, § 1048).

Basic requirements for expert. — Generally, nothing more is required to qualify an expert than that one has been educated in a particular trade or profession. Southern Ry. v. Cabe, 109 Ga. App. 432, 136 S.E.2d 438 (1964) (decided under former Code 1933, § 38-1710); Bowden v. State, 239 Ga. 821, 238 S.E.2d 905 (1977), cert. denied, 435 U.S. 937, 98 S. Ct. 1513, 55 L. Ed. 2d 533 (1978) (decided under former Code 1933, § 38-1710); Brown v. State, 245 Ga. 588, 266 S.E.2d 198 (1980) (decided under former Code 1933, § 38-1710); Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275 (1981) (decided under former Code 1933, § 38-1710); Morris v. State, 159 Ga. App. 600, 284 S.E.2d 103 (1981) (decided under former Code 1933, § 38-1710); Inta-Roto, Inc. v. Guest, 160 Ga. App. 75, 286 S.E.2d 61 (1981) (decided under former Code 1933, § 38-1710).

An expert witness need only be competent as an expert in the witness's own field, and the witness need not have legal expertise. Watkins v. State, 259 Ga. 648, 386 S.E.2d 132 (1989) (decided under former O.C.G.A. § 24-9-67).

Formal training is not a prerequisite for expert status. Brown v. State, 245 Ga. 588, 266 S.E.2d 198 (1980) (decided under former Code 1933, § 38-1710).

Special knowledge necessary to be an expert may be derived from experience as well as study. Southern Ry. v. Cabe, 109 Ga. App. 432, 136 S.E.2d 438 (1964) (decided under former Code 1933, § 38-1710); Martin v. Newton, 129 Ga. App. 735, 201 S.E.2d 31 (1973) (decided under former Code 1933, § 38-1710); Bowden v. State, 239 Ga. 821, 238 S.E.2d 905 (1977), cert. denied, 435 U.S. 937, 98 S. Ct. 1513, 55 L. Ed. 2d 533 (1978) (decided under former Code 1933, § 38-1710); Brown v. State, 245 Ga. 588, 266 S.E.2d 198 (1980) (decided under former Code 1933, § 38-1710); Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275 (1981) (decided under former Code 1933, § 38-1710); Morris v. State, 159 Ga. App. 600, 284 S.E.2d 103 (1981) (decided under former Code 1933, § 38-1710); Inta-Roto, Inc. v. Guest, 160 Ga. App. 75, 286 S.E.2d 61 (1981) (decided under former Code 1933, § 38-1710).

Failure to object constitutes waiver. — In rate increase request hearings, when the power company failed to object to an expert witness's qualifications either before or during the witness's testimony, any objection it might have had was waived. Georgia Power Co. v. Georgia Pub. Serv. Comm'n, 196 Ga. App. 572, 396 S.E.2d 562 (1990) (decided under former O.C.G.A. § 24-9-67).

Expert can express an opinion on a matter which lies within the domain of the profession or calling which the witness pursues. Martin v. Newton, 129 Ga. App. 735, 201 S.E.2d 31 (1973) (decided under former Code 1933, § 38-1710).

Application of knowledge to specific problem not necessary. — When

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one has been formally educated in a particular trade or profession, additional experience by application of that knowledge to a specific problem is not necessary in order to sustain one as an expert. Inta-Roto, Inc. v. Guest, 160 Ga. App. 75, 286 S.E.2d 61 (1981) (decided under former Code 1933, § 38-1710).

Qualification as expert satisfied. — Toxicologist and pharmacologist, who was not a medical doctor, was competent to give an opinion in a medical malpractice action that a drug prescribed by defendants caused plaintiff's miscarriage since the testimony was not offered to address the applicable standard of care but to show causation. Sinkfield v. Shi-Han Oh, 229 Ga. App. 883, 495 S.E.2d 94 (1998) (decided under former O.C.G.A. § 24-9-67).

Medical examiner's testimony was not without proper foundation as the examiner was qualified, tendered, and admitted as an expert and, therefore, the examiner was permitted to give opinion testimony based on observations during the autopsy, as well as on facts provided by other witnesses; the examiner testified that the opinion as to the manner of death was based on the appearance of the wound, the path and course of the bullet, the presence of a laceration to the head of the victim, and the absence of a gun at the scene. Smith v. State, 276 Ga. 97, 575 S.E.2d 450 (2003) (decided under former O.C.G.A. § 24-9-67).

Defendant alleged that the witness was not qualified as a handwriting expert because the witness failed the test to become a member of the American Board of Forensic Document Examiners and was only a trainee member of the American Society of Forensic Document Examiners; although this is true, the witness testified to becoming a member of the Southeastern Association of Forensic Document Examiners after completing two years of training, that the witness had been performing handwriting analysis on a daily basis for the Georgia Crime Lab for the last eight years, that the witness had examined thousands of documents, and that the witness had been qualified as an expert witness in criminal cases tried in a Georgia superior court approximately eighteen times; thus, there was no abuse of discretion by the trial court in qualifying the witness as an expert in forensic document examination. Poole v. State, 270 Ga. App. 432, 606 S.E.2d 878 (2004) (decided under former O.C.G.A. § 24-9-67).

Advocate for the victims of sexual assault at a rape crisis center was properly qualified as an expert as the advocate had been through 50 hours of sexual assault training and had two years of experience, in which the advocate had counseled over 100 purported victims of sexual assault; further, the advocate had published one article that was presented at a seminar. Stevenson v. State, 272 Ga. App. 335, 612 S.E.2d 521 (2005) (decided under former O.C.G.A. § 24-9-67).

Certification of an expert was not an abuse of discretion as the witness had over 20 years of experience in the field of domestic violence and an educational background in psychology. Miller v. State, 273 Ga. App. 761, 615 S.E.2d 843 (2005) (decided under former O.C.G.A. § 24-9-67).

Employee of the Department of Family and Children Services was properly allowed to testify that a victim's condition and behavior was consistent with Shaken Baby Syndrome based on the employee's extensive experience and training with respect to fatal child abuse and Shaken Baby Syndrome; the fact that the employee did not hold a medical degree went only to the weight of the employee's testimony, and the employee's evidence was cumulative of that given by physicians. Waits v. State, 282 Ga. 1, 644 S.E.2d 127 (2007) (decided under former O.C.G.A. § 24-9-67).

Trial court did not abuse the court's discretion by qualifying a licensed professional counselor and qualified psychometrist as an expert in the administration of intelligence tests after hearing testimony regarding the counselor's relevant education and experience based on the fact that the counselor did not independently perform the Wechsler Adult Intelligence Scales-Third Edition test (WAIS-III) on the defendant and merely assisted in the test's administration, nor

did the trial court err in admitting the sufficiently relevant and reliable evidence regarding the WAIS-III test administered since the counselor's supervisor did not have to be physically present in the room with the defendant during the counselor's testing session in order to supervise the counselor. Further, the defendant failed to show that the tests results were unreliable after the counselor's unrebutted testimony regarding the manner in which the testing was conducted. Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747; reh'g denied, 554 U.S. 930, 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008) (decided under former O.C.G.A. § 24-9-67).

An investigator testified that the investigator had been employed in law enforcement since 1988; that the investigator had received 240 hours of narcotics training; that the investigator had attended a regional drug training academy specializing in the recognition of clandestine methamphetamine labs; that the investigator had attended informant management classes, undercover drug classes, and drug identification classes; that the investigator had previously investigated cases involving possession of narcotics with the intent to distribute and manufacturing of the same, including methamphetamine; and, among other things, that the investigator used confidential informants to assess new trends in the world of illegal narcotics. Based on this training and experience, there was no abuse of discretion by the trial court in qualifying the investigator as an expert in the street level narcotics trade, the characteristics of a methamphetamine lab, and the identification of a substance as possible methamphetamine. Boone v. State, 293 Ga. App. 654, 667 S.E.2d 880 (2008) (decided under former O.C.G.A. § 24-9-67).

In a prosecution for driving under the influence, testimony of the forensic toxicologist who tested the defendant's blood was properly admitted as expert testimony as the witness had a permit from the Georgia Bureau of Investigation to perform chemical analyses of blood specimens received from the police, and the defendant subsequently had the opportunity to cross-examine the witness about the witness's credentials and testimony. Fowler v. State, 294 Ga. App. 864, 670 S.E.2d 448 (2008), cert. denied, No. S09C0529, 2009 Ga. LEXIS 204 (Ga. 2009) (decided under former O.C.G.A. § 24-9-67).

Evidence was sufficient for a rational trier of fact to find the defendant guilty of aggravated sodomy of one victim and rape and aggravated sodomy of a second victim because the jury was authorized to conclude, based on a nurse's testimony and the medical evidence, that penetration occurred; the nurse was properly tendered and accepted as an expert in the subject of sexual assault examinations, and the nurse testified that the first victim's external injuries established the potential for penetration. Blash v. State, 304 Ga. App. 542, 697 S.E.2d 265 (2010) (decided under former O.C.G.A. § 24-9-67).

Juvenile court did not abuse the court's discretion in determining that an officer possessed the requisite skill and experience to testify as an expert because the officer was experienced, had investigated thousands of crimes, was trained in crime scene observation, and had handled other cases involving shoe-print matching. In the Interest of J.D., 305 Ga. App. 519, 699 S.E.2d 827 (2010) (decided under former O.C.G.A. § 24-9-67).

Trial court did not abuse the court's discretion in qualifying a witness as an expert in the valuation of transportation equipment because the witness testified that the witness had been in the repossession business 22 years, with another 6 or 8 years dealing specifically with equipment repossession, that the witness was qualified to estimate the value and condition of transportation equipment, and that the witness had been qualified as an expert 15-20 times in other court proceedings. Rushing v. State, 305 Ga. App. 629, 700 S.E.2d 620 (2010) (decided under former O.C.G.A. § 24-9-67).

Appointment of Expert by Court

Appointment discretionary with court. — Granting or denial of a motion for appointment of expert witnesses lies within the sound discretion of the trial court. Whitaker v. State, 246 Ga. 163, 269

Appointment of Expert by Court (Cont'd)

S.E.2d 436 (1980) (decided under former Code 1933, § 38-1710).

Appointment of expert witnesses lies within the sound discretion of the trial court and, absent a showing of an abuse of that discretion, the Court of Appeals will not interfere. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982) (decided under former Code 1933, § 38-1710); Dennis v. State, 158 Ga. App. 142, 279 S.E.2d 275 (1981) (decided under former Code 1933, § 38-1710); Morris v. State, 159 Ga. App. 600, 284 S.E.2d 103 (1981) (decided under former Code 1933, § 38-1710).

Trial court's comments on witness's status held prejudicial. — Trial court's comments, adding the influence of the court's personal opinion on the expert status of a witness and identifying the witness in common with the court as a state-paid employee, were prejudicial comments on the evidence during a competency trial. Jones v. State, 189 Ga. App. 232, 375 S.E.2d 648 (1988) (decided under former O.C.G.A. § 24-9-67).

Basis for Opinion

1. In General

Facts that can form basis for opinion. — Expert opinions can be based upon facts which the expert has testified to, or heard others testify to, or which have been hypothetically stated to the expert. Choice v. State, 31 Ga. 424 (1860) (decided under former law); Taylor v. State, 83 Ga. 647, 10 S.E. 442 (1889) (decided under former Code 1882, § 3868).

An expert witness may give an opinion based upon the witness's own examination of a person, upon the witness's observation of that person, or upon any state of facts, supported by some evidence in the case, which the witness assumes as true. Mutual Benefit Health & Accident Ass'n v. Hickman, 100 Ga. App. 348, 111 S.E.2d 380 (1959) (decided under former Code 1933, § 38-1710).

Opinion of an expert on any question relating to the expert's profession, trade, or business is always admissible, when given in response to a hypothetical question based upon the testimony of witnesses other than the expert, or if the expert has personally observed the facts, and gives the expert's opinion based upon the expert's own observation. Bullington v. Chandler, 110 Ga. App. 803, 140 S.E.2d 59 (1964) (decided under former Code 1933, § 38-1710).

An expert may give an opinion based on facts which the expert personally observes, and when an expert personally observes data collected by another, the expert's opinion is not objectionable merely because it is based, in part, on the other's findings. Millar Elevator Serv. Co. v. O'Shields, 222 Ga. App. 456, 475 S.E.2d 188 (1996) (decided under former O.C.G.A. § 24-9-67).

Expert witness's opinion predicated on facts raised by others. — An expert witness's opinion may be predicated upon facts placed in evidence by the testimony of other witnesses or by any other legal means. Mutual Benefit Health & Accident Ass'n v. Hickman, 100 Ga. App. 348, 111 S.E.2d 380 (1959) (decided under former Code 1933, § 38-1710); National Trailer Convoy, Inc. v. Sutton, 136 Ga. App. 760, 222 S.E.2d 98 (1975) (decided under former Code 1933, § 38-1710).

Opinions must be based on established facts. — Expert opinions are admissible if based upon a state of facts which the evidence on behalf of either party tends to establish; but the jury should know upon what facts the opinion is founded, for its pertinence depends upon whether the jury finds the facts on which the opinion rests. Moore v. State, 221 Ga. 636, 146 S.E.2d 895 (1966) (decided under former Code 1933, § 38-1710).

Matter not in evidence. — An expert witness was properly precluded from expressing an opinion based on a letter containing an inadmissible summary of matter not in evidence and not within the expert's own knowledge. Loper v. Drury, 211 Ga. App. 478, 440 S.E.2d 32 (1994) (decided under former O.C.G.A. § 24-9-67).

Witness's opinion must be witness's own; the witness cannot act as a mere

conduit for the opinion of others. Thus, the opinion is incompetent if the witness has no general knowledge of the witness's own. Central of Ga. Ry. v. Brower, 106 Ga. App. 340, 127 S.E.2d 33, rev'd on other grounds, 218 Ga. 525, 128 S.E.2d 926 (1962) (decided under former Code 1933, § 38-1710); Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653 (1981) (decided under former Code 1933, § 38-1710).

Personal observation of fact by expert. — Opinion of experts, on matters within their area of expertise, is admissible especially when the expert has personally observed the facts and gives the expert's opinion based upon the expert's own observations. Erwin v. Gold Kist, Inc., 146 Ga. App. 372, 246 S.E.2d 404 (1978) (decided under former Code 1933, § 38-1710).

Expert testimony as to illegal drug distribution trade is admissible. — Trial court did not err by allowing a district attorney's investigator to give the investigator's "guess" that a document found in appellant's possession and introduced in evidence "was 'the way people who are involved in the distribution of drugs keep records of who owes them money,'" because the testimony of the investigator involved a question of "trade," particularly concerning the procedure used in the illegal drug distribution trade in keeping records of accounts due and owing. O'Donnell v. State, 200 Ga. App. 829, 409 S.E.2d 579, cert. denied, 200 Ga. App. 896, 409 S.E.2d 579 (1991) (decided under former O.C.G.A. § 24-9-67).

Expert testimony by an undercover officer about how street drug dealers operated in three person units consisting of a seller, drug handler, and money handler, and why they did so, was admissible as not "beyond the ken" of the average juror and applicable to the facts of the case. Vaughan v. State, 251 Ga. App. 221, 553 S.E.2d 335 (2001) (decided under former O.C.G.A. § 24-9-67).

With respect to a particular scientific procedure or technique, the trial court makes a determination whether the procedure or technique in question has reached a scientific stage of verifiable certainty, based upon evidence, expert testimony, treatises, or the rationale of cases in other jurisdictions. Orkin Exterminating Co. v. McIntosh, 215 Ga. App. 587, 452 S.E.2d 159 (1994) (decided under former O.C.G.A. § 24-9-67).

Expert need not have gone to scene. — When an expert bases the expert's opinion on facts within the bounds of evidence, the testimony is admissible notwithstanding the fact that the expert never went to the scene at all and based the expert's opinion on an examination of photographs. Jones v. Ray, 159 Ga. App. 734, 285 S.E.2d 42 (1981) (decided under former Code 1933, § 38-1710).

Opinion based on findings of another. — When an expert personally observes data collected by another, the expert's opinion is not objectionable merely because it is based, in part, upon the other's findings. Cochran v. State, 151 Ga. App. 478, 260 S.E.2d 391 (1979) (decided under former Code 1933, § 38-1710).

Condemnor's expert properly testified as to the necessity of a transmission line even though the condemnor's opinion was based, in part, on another's findings; further, the expert conducted the condemnor's own study after the case was initially remanded and testified on remand that the transmission line was needed by 2007 to provide safe and reliable electric service to customers in North Georgia. Mosteller Mill, Ltd. v. Ga. Power Co., 271 Ga. App. 287, 609 S.E.2d 211 (2005) (decided under former O.C.G.A. § 24-9-67).

Expert opinion may not be given on another's opinion. — Expert may give an opinion upon the facts testified to by other witnesses, but not upon their opinions. Walker v. Fields, 28 Ga. 237 (1859) (decided under former law); Taylor v. Warren, 175 Ga. 800, 166 S.E. 225 (1932) (decided under former Civil Code 1910, § 5876); McCauley v. Boston Old Colony Ins. Co., 149 Ga. App. 706, 256 S.E.2d 19 (1979) (decided under former Code 1933, § 38-1710).

Expert opinion cannot be based on out-of-court representations by another. Flanagan v. State, 106 Ga. 109, 32 S.E. 80, 71 Am. St. R. 242 (1898) (decided under former Penal Code 1895, § 1022).

Opinion based on hearsay. — When an expert witness's opinion is based on

Basis for Opinion (Cont'd)
1. In General (Cont'd)

hearsay it is not error for the court to allow an expert to relate facts of which the expert has no direct personal knowledge, especially if the court gives the proper limiting instruction. White v. Georgia Power Co., 237 Ga. 341, 227 S.E.2d 385 (1976) (decided under former Code 1933, § 38-1710).

It is axiomatic that an expert, in utilizing the expert's expertise, may base the expert's opinion as to value upon hearsay. Hoover & Morris Dev. Co. v. FDIC, 149 Ga. App. 855, 256 S.E.2d 140 (1979) (decided under former Code 1933, § 38-1710).

When an expert's testimony is based on hearsay, the lack of personal knowledge on the part of the expert does not mandate the exclusion of the opinion but, rather, presents a jury question as to the weight which should be assigned the opinion. King v. Browning, 246 Ga. 46, 268 S.E.2d 653 (1980) (decided under former Code 1933, § 38-1710); Cheek v. Wainwright, 246 Ga. 171, 269 S.E.2d 443 (1980) (decided under former Code 1933, § 38-1710); Jones v. Ray, 159 Ga. App. 734, 285 S.E.2d 42 (1981) (decided under former Code 1933, § 38-1710).

An expert's opinion may be based in part upon hearsay, and when it is based thereon it goes to the weight and credibility of the testimony, not its admissibility. Avant Trucking Co. v. Stallion, 159 Ga. App. 198, 283 S.E.2d 7 (1981) (decided under former Code 1933, § 38-1710).

Provided an expert witness is properly qualified in the field in which the expert offers testimony, and the facts relied upon are within the bounds of the evidence, whether there is sufficient knowledge upon which to base an opinion or whether it is based upon hearsay goes to the weight and credibility of the testimony, not its admissibility. Orkin Exterminating Co. v. McIntosh, 215 Ga. App. 587, 452 S.E.2d 159 (1994) (decided under former O.C.G.A. § 24-9-67).

In an action against a utility and power company for damages arising from electromagnetic radiation, the trial court committed reversible error in admitting testimony of experts regarding a perceived consensus of opinion in the scientific community that magnetic fields from power lines are not a cause of cancer. Jordan v. Georgia Power Co., 219 Ga. App. 690, 466 S.E.2d 601 (1995) (decided under former O.C.G.A. § 24-9-67).

Forensic pediatrician who examined a battered infant was properly allowed to testify about seizures noted in the baby's medical records, and about a radiologist's report that confirmed suspicions about the extent of an injury, because the pediatrician's opinion was not based solely on those records, but also on an examination of the baby. Nichols v. State, 278 Ga. App. 46, 628 S.E.2d 131 (2006) (decided under former O.C.G.A. § 24-9-67).

Investigating police officer basing opinion on hearsay statements. — Police officer who investigates an accident cannot base the officer's opinion as to manner in which accident occurred upon hearsay statements which the officer receives during the officer's investigation unless they are a part of the res gestae. Avant Trucking Co. v. Stallion, 159 Ga. App. 198, 283 S.E.2d 7 (1981) (decided under former Code 1933, § 38-1710).

Book learning. — Expert testimony was admissible even though based on book learning rather than knowledge gained from actual experience. Boswell v. State, 114 Ga. 40, 39 S.E. 897 (1901) (decided under former Penal Code 1895, § 1022); Miller v. Travelers Ins. Co., 111 Ga. App. 245, 141 S.E.2d 223 (1965) (decided under former Code 1933, § 38-1710).

Opinion based on education and experience was not speculative. — Testimony of a firearms expert, that the expert would not expect to find gunshot residue from the murder weapon, a semi-automatic pistol, was not speculative, was grounded on the expert's education and experience, and was admissible under former O.C.G.A. § 24-9-67. Tavera v. State, 279 Ga. 803, 621 S.E.2d 422 (2005) (decided under former O.C.G.A. § 24-9-67).

Restatement of textbook opinion inadmissible. — While an expert witness may support the expert's opinion by reference to books, statistical sources, and other learned sources, the witness's testimony is inadmissible when it is merely a

restatement of a textbook opinion rather than an independent expression of the witness's own expert opinion. DOT v. Brand, 149 Ga. App. 547, 254 S.E.2d 873 (1979), overruled on other grounds, Metropolitan Atlanta Rapid Transit Auth., 250 Ga. 538, 299 S.E.2d 876 (1983) (decided under former O.C.G.A. § 24-9-67).

Medical records. — Opinion testimony based merely upon records and case history furnished the witness by other doctors and not a part of the evidence in the case was objectionable, but the error in the admission of the doctor's opinion was harmless, since during the four-day trial of the case, an enormous amount of testimony was adduced concerning the recent medical history of the decedent, the testimony included findings of diagnostic tests made during the decedent's final days, a pathologic opinion as to the cause of death could not have been made without reference to the decedent's records, and other opinion evidence based upon the records was admitted in evidence without objection. Andrews v. Major, 180 Ga. App. 393, 349 S.E.2d 225 (1986) (decided under former O.C.G.A. § 24-9-67).

Specific article in medical journal. — It was not necessary for a doctor to have qualified as authoritative the specific article referred to in a medical journal in defense of a medical malpractice case, since the doctor did not limit the doctor's assessment of the journal's authority to the selective scope of the article. Pound v. Medney, 176 Ga. App. 756, 337 S.E.2d 772 (1985) (decided under former O.C.G.A. § 24-9-67).

Jury instructions. — Charge to the jury, that opinions of experts to be of any value, must be based upon facts believed, or proven to be true, was not an improper charge, nor did it have the effect of expressing an opinion on the evidence or tending to discredit the testimony of the expert witnesses in the case. Allen v. Allen, 71 Ga. App. 272, 30 S.E.2d 665 (1944) (decided under former Code 1933, § 38-1710).

2. Need to State Basis

Expert and nonexpert compared. — Expert may give the expert's opinion without stating the reasons therefor, but one who was not an expert may give an opinion only when accompanied with the reasons. Wallace v. State, 204 Ga. 676, 51 S.E.2d 395 (1949) (decided under former Code 1933, § 38-1710).

Explanation unnecessary. — Opinion testimony by witnesses who qualified as expert real estate appraisers, as to the value of the condemnees' land and as to the damages which the witnesses had suffered on account of the taking, is admissible without the necessity for the witnesses to state the facts upon which the witnesses based their opinions. Housing Auth. v. Millwood, 138 Ga. App. 610, 226 S.E.2d 766 (1976) (decided under former Code 1933, § 38-1710).

An expert may give the expert's opinion without stating the foundation therefor and without a hypothetical question based upon other evidence if the expert's opinion is based upon facts which the expert knows and has observed, or based upon facts in the record at the time the expert states the expert's opinion, or based partly on first-hand knowledge and partly on the facts or record. Thrift-Mart, Inc. v. Commercial Union Assurance Cos., 154 Ga. App. 344, 268 S.E.2d 397 (1980) (decided under former Code 1933, § 38-1710).

Explanation permitted. — While it is not necessary that an expert witness state the facts upon which the expert bases the expert's opinion, it is error to refuse to permit the expert to do so for the purpose of showing the basis of the opinion. It matters not whether the facts are sought from the witness while on direct or on cross-examination. State Hwy. Dep't v. Howard, 119 Ga. App. 298, 167 S.E.2d 177 (1969) (decided under former Code 1933, § 38-1710); Martin v. State, 151 Ga. App. 9, 258 S.E.2d 711 (1979) (decided under former Code 1933, § 38-1710).

Explanation necessary. — When an expert testifies to a conclusion based on information furnished by others, then all the information utilized by that expert in forming an opinion should be presented to the jury to enable the jury to evaluate the expert's testimony. Stewart v. State, 246 Ga. 70, 268 S.E.2d 906 (1980) (decided under former Code 1933, § 38-1710).

Error to refuse to permit witness to state basis. — While it is not necessary

Basis for Opinion (Cont'd)
2. Need to State Basis (Cont'd)

that an expert witness state the facts upon which the expert bases the expert's opinion, it is error to refuse to permit the expert to do so for the purpose of showing the basis of the opinion. Jordan v. Department of Transp., 178 Ga. App. 133, 342 S.E.2d 482 (1986) (decided under former O.C.G.A. § 24-9-67).

Basis for opinion outside scope of expertise. — An opinion of a witness is inadmissible when the information upon which the opinion is based is not given. This is true, even though the witness is an expert on some subject, when the opinion testimony related to a subject on which the witness is not qualified as an expert. Central of Ga. Ry. v. Brower, 106 Ga. App. 340, 127 S.E.2d 33, rev'd on other grounds, 218 Ga. 525, 128 S.E.2d 926 (1962) (decided under former Code 1933, § 38-1710).

Explanation enhances weight of opinion. — When the facts upon which an expert bases the expert's opinion are stated the opinion is entitled to greater weight. State Hwy. Dep't v. Howard, 119 Ga. App. 298, 167 S.E.2d 177 (1969) (decided under former Code 1933, § 38-1710).

Hypothetical Questions

Admissibility of opinion. — Opinion of an expert on any question relating to the expert's profession, trade, or business is always admissible, when given in response to a hypothetical question based upon the testimony of witnesses other than the expert, or where the expert has personally observed the facts and given the expert's opinion based on the expert's own opinion. Yates v. State, 127 Ga. 813, 56 S.E. 1017, 9 Ann. Cas. 620 (1907) (decided under former Civil Code 1895, § 5287); Cranshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 S.E. 222 (1907) (decided under former Civil Code 1895, § 5287); Fincher v. Davis, 27 Ga. App. 494, 108 S.E. 905 (1921) (decided under former Civil Code 1910, § 5876); Taylor v. Warren, 175 Ga. 800, 166 S.E. 225 (1932) (decided under former Civil Code 1910, § 5876); Wallace v. State, 204 Ga. 676, 51 S.E.2d 395 (1949) (decided under former Code 1933, § 38-1710).

Trial court did not err by allowing an expert to respond to the state's hypothetical question during redirect examination because the hypothetical was supported by the evidence; the expert was asked to consider a scenario based on the defendant's version of the facts and photographs of a crib in order to determine whether the victim's injury was consistent with the defendant's story. Elrod v. State, 316 Ga. App. 491, 729 S.E.2d 593 (2012) (decided under former O.C.G.A. § 24-9-67).

It is not necessary that question be propounded hypothetically when an expert testifies to the expert's opinion based upon facts which the expert has observed. Jones v. Ray, 159 Ga. App. 734, 285 S.E.2d 42 (1981) (decided under former Code 1933, § 38-1710).

When hypothetical question is appropriate. — Proper mode of examining a physician or expert, when the physician or expert is not testifying from one's own knowledge, is to ask the physician or expert hypothetical questions. Kimball v. State, 63 Ga. App. 183, 10 S.E.2d 240 (1940) (decided under former Code 1933, § 38-1710).

When an expert is asked to give an opinion on facts not coming within the expert's own knowledge, the question should be hypothetical. Evans v. DeKalb County Hosp. Auth., 154 Ga. App. 17, 267 S.E.2d 319 (1980) (decided under former Code 1933, § 38-1710).

Factual basis for hypothetical question. — When the testimony is based upon a hypothetical question, the facts assumed to be true should be such as the evidence on behalf of either party tends to establish. Flanagan v. State, 106 Ga. 109, 32 S.E. 80, 71 Am. St. R. 242 (1898) (decided under former Civil Code 1895, § 5287); Yarbrough v. Yarbrough, 202 Ga. 391, 43 S.E.2d 329 (1947) (decided under former Code 1933, § 38-1710); Ellis v. Southern Ry., 89 Ga. App. 407, 79 S.E.2d 541 (1953) (decided under former Code 1933, § 38-1710); Garrett v. State, 153 Ga. App. 366, 265 S.E.2d 304 (1980) (decided under former Code 1933, § 38-1710).

Opinion of an expert witness may be given in response to a hypothetical question based upon facts placed in evidence by the testimony of other witnesses or by competent evidence of any nature. Altamaha Convalescent Ctr., Inc. v. Godwin, 137 Ga. App. 394, 224 S.E.2d 76 (1976) (decided under former Code 1933, § 38-1710); DuBois v. Ray, 177 Ga. App. 349, 339 S.E.2d 605 (1985) (decided under former O.C.G.A. § 24-9-67); Horton v. Eaton, 215 Ga. App. 803, 452 S.E.2d 541 (1994), overruled on other grounds, Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009) (decided under former O.C.G.A. § 24-9-67); Rowe v. State, 266 Ga. 136, 464 S.E.2d 811 (1996) (decided under former O.C.G.A. § 24-9-67).

When reliance is made upon circumstantial evidence alone for proof of one of the essential facts assumed in the framing of a hypothetical question, the trier of fact may consider the answer to the question only if it has first determined that the assumed fact has been satisfactorily established. Bowers v. State, 153 Ga. App. 894, 267 S.E.2d 309 (1980) (decided under former Code 1933, § 38-1710).

Reliance can be made upon circumstantial evidence to establish a basis for framing a hypothetical question; the question of whether the circumstances were sufficiently proven to establish the fact contained in the hypothetical question is an issue for the trier of fact. Stoneridge Properties, Inc. v. Kuper, 178 Ga. App. 409, 343 S.E.2d 424 (1986) (decided under former O.C.G.A. § 24-9-67).

That the testimony was circumstantial would not affect the viability of a hypothetical. Whether there was insufficient knowledge upon which the expert could render the expert's opinion goes not to the admissibility of that opinion, but to the credibility of the witness. Apac-Georgia, Inc. v. Padgett, 193 Ga. App. 706, 388 S.E.2d 900 (1989) (decided under former O.C.G.A. § 24-9-67).

Method of asking question. — Attorney would be limited in framing the hypothetical question to the expert witness by the same parameters which would limit own testimony. Altamaha Convalescent Ctr., Inc. v. Godwin, 137 Ga. App. 394, 224 S.E.2d 76 (1976) (decided under former Code 1933, § 38-1710).

Weight of testimony in response to hypothetical question. — Opinion testimony of an expert can be based upon hypothetical questions and though the jury is allowed to receive the testimony of experts the jury is not bound by such testimony; such testimony is not conclusive or controlling and is submitted for whatever the jury considers it to be worth. Woods v. Andersen, 145 Ga. App. 492, 243 S.E.2d 748 (1978) (decided under former Code 1933, § 38-1710).

Weight of Opinion Evidence

Expert testimony is weighed and judged like any other; its weight and value is determined by the jury considering its nature and the layman's knowledge thereof. Buckhanon v. State, 151 Ga. 827, 108 S.E. 209 (1921) (decided under former Penal Code 1910, § 1048). See also Mitchell v. State, 6 Ga. App. 554, 65 S.E. 326 (1909) (decided under former Penal Code 1895, § 1022).

Trier of fact not bound by expert testimony. — While competent expert testimony is entitled to great weight, the testimony is not so authoritative that either court, jury, or commission is bound to be governed by that testimony, since the testimony is advisory merely and intended to assist the court, jury, or commission in coming to a correct conclusion. B.F. Goodrich Co. v. Arnold, 88 Ga. App. 64, 76 S.E.2d 20 (1953) (decided under former Code 1933, § 38-1710). See also Thomas v. United States Cas. Co., 218 Ga. 493, 128 S.E.2d 749 (1962) (decided under former Code 1933, § 38-1710); Miller v. Travelers Ins. Co., 111 Ga. App. 245, 141 S.E.2d 223 (1965) (decided under former Code 1933, § 38-1710); Hughes v. Newell, 152 Ga. App. 618, 263 S.E.2d 505 (1979) (decided under former Code 1933, § 38-1710); Moses v. State, 245 Ga. 180, 263 S.E.2d 916 (1980), cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60 (1980), overruled on other grounds, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993) (decided under former Code 1933, § 38-1710).

While direct and positive testimony cannot arbitrarily be rejected by a jury or other trier of facts, this rule does not apply to the opinion evidence of physicians or

Weight of Opinion Evidence (Cont'd)

other experts. Accordingly, it was a question for the board's determination as to whether the board would accept the testimony of one physician, which authorized the award for the claimant, or the testimony of two other doctors, which would have authorized an award denying compensation. United States Fid. & Guar. Co. v. Doyle, 96 Ga. App. 745, 101 S.E.2d 600 (1957) (decided under former Code 1933, § 38-1710).

Expert testimony is not absolutely obligatory on the jury, even if uncontradicted. Smith v. Godfrey, 155 Ga. App. 113, 270 S.E.2d 322 (1980) (decided under former Code 1933, § 38-1710).

Probative value of opinion evidence is for the jury. Western Union Tel. Co. v. Ford, 8 Ga. App. 514, 70 S.E. 65 (1911) (decided under former Civil Code 1910, § 5876); McDowell v. State, 78 Ga. App. 116, 50 S.E.2d 633 (1948) (decided under former Code 1933, § 38-1710); Ford Motor Co. v. Hanley, 128 Ga. App. 311, 196 S.E.2d 454 (1973) (decided under former Code 1933, § 38-1710); Arnold v. State, 155 Ga. App. 569, 271 S.E.2d 702 (1980) (decided under former Code 1933, § 38-1710).

Weight given to discredited tests in expert community. — Trial court did not err in admitting the expert testimony of the psychologist who interviewed the children even though defendant presented expert testimony that one of the tests used by the psychologist had been discredited in the psychological community; the conflicting expert opinions on test results went to the weight, rather than the admissibility, of the testimony. Hanson v. State, 263 Ga. App. 45, 587 S.E.2d 200 (2003) (decided under former O.C.G.A. § 24-9-67).

Quality of expert opinion must be considered. — An expert opinion while very valuable in many situations, nevertheless has a limited weight-carrying capacity. The "quality" of such testimony must be considered. Lashley v. Ford Motor Co., 359 F. Supp. 363 (M.D. Ga. 1972), aff'd, 480 F.2d 158 (5th Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973) (decided under former Code 1933, § 38-1710).

Jury can consider expert's credentials in assessing weight. — Whether an examining physician is or is not a psychiatrist is a matter which may affect the extent of the physician's expertise in evaluating a mental condition, and therefore may affect the weight of any opinion or evaluation, a matter to be determined by a jury, but it does not affect admissibility, nor is admissibility precluded by the fact that the physician's opinions and evaluations are based on conversations with the patient. Petty v. Folsom, 229 Ga. 477, 192 S.E.2d 246 (1972) (decided under former Code 1933, § 38-1710).

Jury can consider the expert's credentials and then give such weight and credit to the expert's testimony as jury sees fit. McCoy v. State, 237 Ga. 118, 227 S.E.2d 18 (1976) (decided under former Code 1933, § 38-1710).

Positive factual testimony outweighs negative opinion. — Affirmative and positive testimony of witnesses as to the actual facts of a particular occurrence is not overcome by testimony which is negative in its character or consists of mere opinions. West v. State, 84 Ga. 527, 10 S.E. 731 (1890) (decided under former Code 1882, § 3868).

An expert's opinion based on insufficient factual foundation or hearsay affects the weight, but not the admissibility, of the expert's testimony. Woods v. Andersen, 145 Ga. App. 492, 243 S.E.2d 748 (1978) (decided under former Code 1933, § 38-1710).

When it is developed by examination that the opinion is based on inadequate knowledge, this goes to the credibility of the witness rather than to the admissibility of the evidence. Jones v. Ray, 159 Ga. App. 734, 285 S.E.2d 42 (1981) (decided under former Code 1933, § 38-1710).

Jury instructions. — Even if the testimony of the civil engineer as to the distance between named points, introduced by the defendant in support of an alibi sought to be established by the defendant, could be considered as expert evidence, the omission to charge the law in regard to expert testimony as set forth in the former statute, declaring that "the opinions of experts, on any question of science, skill, trade, or like questions,

shall always be admissible; and such opinions may be given on the facts as proved by other witnesses," was not, as contended, an expression of opinion as to credibility of the witness and weight of the testimony; nor was it erroneous to omit to charge on that subject without request. Stone v. State, 180 Ga. 223, 178 S.E. 435 (1935) (decided under former Code 1933, § 38-1710).

Charge that opinion evidence could be accepted by the jury and considered along with all the other evidence in the case, but that the jury was not bound by the opinions of experts or nonexperts was not error. Allen v. Allen, 71 Ga. App. 272, 30 S.E.2d 665 (1944) (decided under former Code 1933, § 38-1710).

Jury charge upheld. — There was no reversible error, despite the defendant's argument on appeal that the trial court's charge to the jury on DNA evidence was incomplete and prejudicial as a matter of law because: (1) a review of the record showed that the charge given by the court tracked the language set forth in the pattern charge and was otherwise a correct statement of law with respect to the collection and testing of DNA; and (2) the defendant's proposed jury charge was argumentative and composed primarily of evidentiary matters that were not proper for a jury instruction. Moreover, there was no request for the additional charge the defendant asserted was erroneously omitted present in the record. Stanley v. State, 289 Ga. App. 373, 657 S.E.2d 305 (2008) (decided under former O.C.G.A. § 24-9-67).

Cross-Examination

Matters admissible on cross examination. — Matters the expert may have omitted from consideration in the expert's appraisal of property were appropriate matters for cross-examination and rebuttal, and ultimately for the weight to be given the opinion by the jury. Brookhaven Supply Co. v. DeKalb County, 134 Ga. App. 878, 216 S.E.2d 694 (1975) (decided under former Code 1933, § 38-1710).

Reasoning the expert used in reaching expert's opinion may be explored on cross-examination and need not be presented in toto as a condition precedent to admissibility. Woods v. Andersen, 145 Ga. App. 492, 243 S.E.2d 748 (1978) (decided under former Code 1933, § 38-1710).

Introducing inadmissible evidence by cross-examination. — Party should not be allowed to introduce in evidence an opinion of an expert witness based on hearsay by the method of cross-examining such witness when such evidence would have been entirely inadmissible on direct examination. Moore v. State, 221 Ga. 636, 146 S.E.2d 895 (1966) (decided under former Code 1933, § 38-1710).

Volunteered testimony. — Testimony of an expert witness is not reversible error if the expert volunteered testimony during cross-examination which was substantially the same or similar to that later objected to. DOT v. Coley, 184 Ga. App. 206, 360 S.E.2d 924 (1987) (decided under former O.C.G.A. § 24-9-67).

Illustrations

1. Opinions Admissible

Experts were permitted to testify in the following cases. — See Hook v. Stovall, Dunn & Co., 26 Ga. 704 (1859) (physician on disease) (decided under former law); Walker v. Fields, 28 Ga. 237 (1859) (willwright) (decided under former law); May v. Dorsett, 30 Ga. 116 (1860) (banking expert) (decided under former law); White v. Clements, 39 Ga. 232 (1869) (physician on disease; ethnologist on question of race) (decided under former Code 1863, § 3792); Everett v. State, 62 Ga. 65 (1878) (physician) (decided under former Code 1873, § 3868); Taylor v. State, 83 Ga. 647, 10 S.E. 442 (1889) (physician on sanity) (decided under former Code 1882, § 3868); Von Pollnitz v. State, 92 Ga. 16, 18 S.E. 301, 44 Am. St. R. 72 (1893) (physician) (decided under former Code 1882, § 3868); Perry v. State, 110 Ga. 234, 36 S.E. 781 (1900) (physician) (decided under former Penal Code 1895, § 1022); Wheeler v. State, 112 Ga. 43, 37 S.E. 126 (1900) (acoustics expert on whether conversation could be overheard) (decided under former Penal Code 1895, § 1022); Travelers Ins. Co. v. Thornton, 119 Ga. 455, 46 S.E. 678 (1904) (physician on death but not on contributing cause) (decided under former Civil Code 1895,

Illustrations (Cont'd)
1. Opinions Admissible (Cont'd)

§ 5287); Macon Ry. & Light Co. v. Mason, 123 Ga. 773, 51 S.E. 569 (1905) (osteopath notwithstanding lack of physician's license) (decided under former Civil Code 1895, § 5287); Bullard v. State, 127 Ga. 289, 56 S.E. 429 (1907) (physician) (decided under former Penal Code 1895, § 1022); Goodwyn v. Central of Ga. Ry., 2 Ga. App. 470, 58 S.E. 688 (1907) (railroad engineer) (decided under former Civil Code 1895, § 5287); Glover v. State, 129 Ga. 717, 59 S.E. 816 (1907) (physician on sanity) (decided under former Penal Code 1895, § 1022); Harper v. State, 129 Ga. 770, 59 S.E. 792 (1907) (physician) (decided under former Penal Code 1895, § 1022); Piedmont Cotton Mills v. Georgia Ry. & Elec. Co., 131 Ga. 129, 62 S.E. 52 (1908) (expert on location of railroad and factory) (decided under former Civil Code 1895, § 5287); Cochrell v. Langley Mfg. Co., 5 Ga. App. 317, 63 S.E. 244 (1908) (experts on machinery) (decided under former Civil Code 1895, § 5287); Garner v. State, 6 Ga. App. 788, 65 S.E. 842 (1909) (gun expert on caliber of bullet) (decided under former Penal Code 1895, § 1022); Western Union Tel. Co. v. Ford, 8 Ga. App. 514, 70 S.E. 65 (1911) (whether sight could have been saved by timely arrival of oculist) (decided under former Civil Code 1910, § 5876); Lanier v. State, 141 Ga. 17, 80 S.E. 5 (1913) (expert testimony on manner and cause of death) (decided under former Penal Code 1910, § 1048); Wilensky v. State, 15 Ga. App. 360, 83 S.E. 276 (1914) (jeweler as to symbol on watch) (decided under former Penal Code 1910, § 1048); Byrd v. State, 142 Ga. 633, 83 S.E. 513, 1915B L.R.A. 1143 (1914) (gun expert on wound) (decided under former Penal Code 1910, § 1048); Bates v. State, 18 Ga. App. 718, 90 S.E. 481 (1916) (handwriting expert on authorship of papers) (decided under former Penal Code 1910, § 1048); Spence v. State, 20 Ga. App. 61, 92 S.E. 555, cert. denied, 20 Ga. App. 832 (1917) (accountant as to what books show) (decided under former Penal Code 1910, § 1048); Holtzendorf v. McNeil, 25 Ga. App. 792, 104 S.E. 919 (1920) (dentist on value of extracted tooth) (decided under former Civil Code 1910, § 5876); Bullard v. Metropolitan Life Ins. Co., 31 Ga. App. 641, 122 S.E. 75 (1924) (physician on death but not on contributing cause) (decided under former Civil Code 1910, § 5876); Southern Ry. v. Wessinger, 32 Ga. App. 551, 124 S.E. 100, cert. denied, 32 Ga. App. 807 (1924) (railroad engineer) (decided under former Civil Code 1910, § 5876); Taber Mill v. Southern Brighton Mills, 49 Ga. App. 390, 175 S.E. 665 (1934) (expert on customs and usages of trade) (decided under former Code 1933, § 38-1710); Pollard v. Page, 56 Ga. App. 503, 193 S.E. 117 (1937) (physician on plaintiffs' condition, after giving basic facts) (decided under former Code 1933, § 38-1710); Southern Ry. v. Blanton, 59 Ga. App. 252, 200 S.E. 471 (1938), later appeal, 63 Ga. App. 93, 10 S.E.2d 430 (1940) (railroad engineer on safety practices) (decided under former Code 1933, § 38-1710); Sockwell v. Lucas & Jenkins, Inc., 71 Ga. App. 765, 32 S.E.2d 201 (1944) (building inspector on conformance to building code) (decided under former Code 1933, § 38-1710); McDowell v. State, 78 Ga. App. 116, 50 S.E.2d 633 (1948) (undertaker on cause of corpse's mutilation) (decided under former Code 1933, § 38-1710); Central Truckaway Sys. v. Harrigan, 79 Ga. App. 117, 53 S.E.2d 186 (1949) (physician on permanency of patient's injuries) (decided under former Code 1933, § 38-1710); Eller v. Matthews, 216 Ga. 315, 116 S.E.2d 235 (1960) (teacher on emotional state of pupil) (decided under former Code 1933, § 38-1710); State Hwy. Dep't v. Sinclair Ref. Co., 103 Ga. App. 18, 118 S.E.2d 293 (1961) (expert on damages to property) (decided under former Code 1933, § 38-1710); McGuire v. Davis, 437 F.2d 570 (5th Cir. 1971) (physician on pain suffered by patient) (decided under former Code 1933, § 38-1710); Altamaha Convalescent Ctr., Inc. v. Godwin, 137 Ga. App. 394, 224 S.E.2d 76 (1976) (plaintiff's attorney on reasonableness of attorney's fee) (decided under former Code 1933, § 38-1710); Hall v. State, 138 Ga. App. 20, 225 S.E.2d 705 (1976) (fingerprints) (decided under former Code 1933, § 38-1710); Harris v. Atlantic Creosote Co., 142 Ga. App. 695, 236 S.E.2d 909

(1977) (expert on vehicle's stopping distance) (decided under former Code 1933, § 38-1710); Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349 (1980) (expert on whether wound was self-inflicted) (decided under former Code 1933, § 38-1710); Smith v. State, 247 Ga. 612, 277 S.E.2d 678 (1981) (expert on battered woman's syndrome) (decided under former Code 1933, § 38-1710); Paxton v. State, 159 Ga. App. 175, 282 S.E.2d 912, cert. denied, 248 Ga. 231, 283 S.E.2d 235 (1981) (common origin of pubic hairs) (decided under former Code 1933, § 38-1710); Inta-Roto, Inc. v. Guest, 160 Ga. App. 75, 286 S.E.2d 61 (1981) (expert on mechanical engineering) (decided under former Code 1933, § 38-1710); Davis v. Williams, 165 Ga. App. 45, 299 S.E.2d 102 (1983) (surveyor as to boundary line) (decided under former O.C.G.A. § 24-9-67); Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984) (experts in automobile engineering and systems safety analysis) (decided under former O.C.G.A. § 24-9-67); Concrete Constr. Co. v. City of Atlanta, 176 Ga. App. 873, 339 S.E.2d 266 (1985) (expert in electric engineering familiar with the installation of gas lines) (decided under former O.C.G.A. § 24-9-67); Ingram v. State, 178 Ga. App. 292, 342 S.E.2d 765 (1986) (Georgia Bureau of Investigation (GBI) agent qualified to testify as an expert in drug business methods and language interpretation) (decided under former O.C.G.A. § 24-9-67); Height v. State, 221 Ga. App. 647, 472 S.E.2d 485 (1996) (drug investigator on amount and manner of packaging of cocaine) (decided under former O.C.G.A. § 24-9-67).

Battered women's syndrome expert was properly permitted to testify as to why a victim would not have reported instances of abuse and why the victim dismissed a complaint for divorce and reconciled with defendant; further, the expert was properly permitted to testify as to the expert's qualifications in the presence of the jury. Watson v. State, 278 Ga. 763, 604 S.E.2d 804 (2004) (decided under former O.C.G.A. § 24-9-67).

Fingerprint comparison expert. — State's fingerprint expert was properly permitted to testify as fingerprint comparison evidence was not novel and was widely accepted in Georgia courts. Dailey v. State, 271 Ga. App. 492, 610 S.E.2d 126 (2005) (decided under former O.C.G.A. § 24-9-67).

Rheumatologist testifying on the cause of an injured party's scleroderma. — Trial court properly allowed a customer who fell while shopping at a home products store to offer the testimony of experts who opined that scleroderma the customer developed shortly after the customer underwent surgical fusion of two vertebrae was caused by trauma the customer suffered when the customer fell, and the court did not err when the court declined to apply the test established by the Supreme Court of Georgia in its Harper decision when it decided if the customer's experts could testify. Home Depot U.S.A., Inc. v. Tvrdeich, 268 Ga. App. 579, 602 S.E.2d 297 (2004) (decided under former O.C.G.A. § 24-9-67).

Contract terms. — If there was no applicable custom to determine, in a timber lease, the size of trees meant by the phrase "suitable for turpentine purposes," opinion evidence would be admissible. It should be admitted, however, not to explain the meaning of descriptive terms in the contract, but simply for the purpose of determining what class of trees or timber as to size would come within such description. Nor would the quoted phrase be varied in the phrase's legal meaning because of the different methods of proof, for that would be the same whether a custom be shown or not, since any such custom, if existing, would presumably represent the standard of ordinarily prudent men. Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783 (1947) (decided under former Code 1933, § 38-1710).

Expert testimony on credibility of witness. — Generally, expert testimony as to the credibility of a witness is admissible if the subject matter involves organic or mental disorders, such as insanity, hallucinations, nymphomania, retrograde amnesia, and testimony concerning physical maladies which tend to impair mental or physical faculties. Jones v. State, 232 Ga. 762, 208 S.E.2d 850 (1974) (decided under former Code 1933, § 38-1710).

Expert's testimony as to whether victims' videotaped statements were

Illustrations (Cont'd)
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coached. — Expert's testimony as to whether victims' videotaped statements were coached was inadmissible in a prosecution for child molestation since the jury saw the interviews for themselves and heard the victims' direct and cross-examination as witnesses. Wright v. State, 233 Ga. App. 358, 504 S.E.2d 261 (1998) (decided under former O.C.G.A. § 24-9-67).

An expert on insanity may give an opinion based upon the expert's own examination of a person, upon the expert's observation of that person, or upon any state of facts, supported by some evidence in the case, which the expert assumes as true. Moore v. State, 221 Ga. 636, 146 S.E.2d 895 (1966) (decided under former Code 1933, § 38-1710).

Testimony by examining physician. — Physician who has examined an injured party may describe what the physician has seen and give the physician's expert inferences therefrom. McGuire v. Davis, 437 F.2d 570 (5th Cir. 1971) (decided under former Code 1933, § 38-1710).

Opinion on ultimate fact. — Defendant's claim that a doctor improperly gave an opinion as to an ultimate fact was rejected as the doctor did not testify concerning child neglect syndrome when the doctor testified that the doctor's overall impression was a possible child-neglect scenario, the syndrome had been recognized and expert testimony concerning the syndrome was admissible, and a treating physician could testify that the examination of a child raised a strong suspicion of child abuse. Revells v. State, 283 Ga. App. 59, 640 S.E.2d 587 (2006) (decided under former O.C.G.A. § 24-9-67).

Testimony by examining psychologist. — Juvenile court properly allowed expert to testify about mother's mental health status and its effects on the mother's parenting abilities even though the testing occurred two years prior to the hearing. In the Interest of A.K., 272 Ga. App. 429, 612 S.E.2d 581 (2005) (decided under former O.C.G.A. § 24-9-67).

In a child molestation case, there was no error in allowing certain expert testimony by a psychologist. The psychologist was properly allowed to explain conclusions based on tests developed either in the scientific community or from the psychologist's own clinical experience; the psychologist could testify that the victim's symptoms and accounts were highly consistent with sexual abuse; and because the trial court was authorized to conclude that one's ability to manufacture stories of abuse based upon his or her intelligence quotient (IQ) level fell beyond the ken of the average juror, the psychologist was properly allowed to testify that a person with the victim's IQ of 74 would have difficulty fabricating a detailed fictional account of abuse. Mullis v. State, 292 Ga. App. 218, 664 S.E.2d 271 (2008) (decided under former O.C.G.A. § 24-9-67).

Testimony by examining nurse. — In a prosecution on charges of both child molestation and aggravated child molestation, the trial court did not abuse the court's discretion in allowing an examining registered nurse to give an opinion that a child sex abuse victim's injuries were consistent with ones caused by penetration by a finger when, prior to testifying, the nurse outlined the nurse's relevant background including completion of a sexual assault nurse examiner's program, advanced pediatric training under the supervision of a doctor involved in child abuse cases, and training and experience in performing numerous pelvic examinations on child abuse victims. Rodriguez v. State, 281 Ga. App. 129, 635 S.E.2d 402 (2006) (decided under former O.C.G.A. § 24-9-67).

Trial court did not err in denying the defendant's motion in limine to exclude a nurse's testimony, stating that the victim's normal physical examination was consistent with claims of molestation, as the nurse simply testified that the victim's physical examination results were consistent with the allegations, and as such was a permissible expression of the expert's opinion. Noe v. State, 287 Ga. App. 728, 652 S.E.2d 620 (2007) (decided under former O.C.G.A. § 24-9-67).

Experts on toxicology. — As an expert witness was not a mere conduit for a toxicologist's findings, because the expert

reviewed the data and testing procedures to determine the accuracy of the toxicologist's report, the expert's testimony was properly admitted. Therefore, defense counsel was not ineffective for failing to object to the testimony. Watkins v. State, 285 Ga. 355, 676 S.E.2d 196 (2009) (decided under former O.C.G.A. § 24-9-67).

Psychologist's hypothetical based on evidence adduced at trial. — When appellant was charged with sexually molesting his daughter, and appellant acknowledged that he had sexually molested his first daughter by a previous marriage over a ten year period, the trial court did not err by admitting a psychologist's testimony about the mathematical probabilities regarding the self-rehabilitation of pedophiles or persons with incestuous behavior, since the likelihood of a person with compulsive behavior rehabilitating himself without treatment was a subject matter not within the scope of the ordinary laymen's knowledge and experience, and thus evidence regarding these matters was properly admissible under former O.C.G.A. § 24-9-67. Harwood v. State, 195 Ga. App. 465, 394 S.E.2d 109 (1990) (decided under former O.C.G.A. § 24-9-67).

Testimony on psychiatric disorders. — Testimony of experts that plaintiff suffered from recognized psychiatric disorders that caused the plaintiff to have or complain of physical symptoms out of proportion to any injuries the plaintiff may have experienced did not go solely to the credibility of the plaintiff and was admissible. Rose v. Figgie Int'l, Inc., 229 Ga. App. 848, 495 S.E.2d 77 (1998) (decided under former O.C.G.A. § 24-9-67).

Medical social worker. — Witness's testimony that a baby's injuries were inconsistent with the history of events the defendant had described was well within the witness's purview as a medical social worker because the witness's daily duties required consideration of medical evidence along with personal observations to determine whether factors were present which could indicate child abuse. Nichols v. State, 278 Ga. App. 46, 628 S.E.2d 131 (2006) (decided under former O.C.G.A. § 24-9-67).

Testimony of a mechanic was sufficient to prove the value of the damage to the victim's car in a case charging second degree criminal damage to property. Wyche-Hinkle v. State, 268 Ga. App. 898, 602 S.E.2d 902 (2004) (decided under former O.C.G.A. § 24-9-67).

Expert on property value. — In an action to acquire land, a duly qualified expert may state the expert's opinion as to value without the necessity of stating the facts on which the expert's opinion is based. DeKalb County v. Cowan, 151 Ga. App. 753, 261 S.E.2d 478 (1979) (decided under former Code 1933, § 38-1710).

In an action to acquire land, if the expert testifies that the expert's opinion is based in part on a personal inspection of the property, it is no ground for objection that the expert's inspection was made subsequent to the taking. DeKalb County v. Cowan, 151 Ga. App. 753, 261 S.E.2d 478 (1979) (decided under former Code 1933, § 38-1710).

In an action to acquire land, it was not error to allow expert testimony as to the rental value of the property over the county's objection that the figure was based on the rental value of other property which was not shown to be comparable as the comparability of the other property was a matter going to the weight to be given the testimony, not its admissibility, and further, the testimony was relevant on the issue of consequential damages for the temporary loss of use of the property. DeKalb County v. Cowan, 151 Ga. App. 753, 261 S.E.2d 478 (1979) (decided under former Code 1933, § 38-1710).

Expert's reliance on hearsay. — Trial court did not err in overruling a landowner's objection to the admission of evidence of a survey conducted by another surveyor employed by the landowner's neighbors in that the survey was prepared in partial reliance on data outside of the surveyor's personal knowledge; an expert may base the expert's opinion on hearsay and may be allowed to testify as to the basis for the expert's findings, and the lack of the expert's personal knowledge goes to the weight assigned to the opinion. Ellis v. Holder, 267 Ga. App. 503, 600 S.E.2d 425 (2004) (decided under former O.C.G.A. § 24-9-67).

Value of condemned land. — Expert's opinion as to what expert would pay

Illustrations (Cont'd)
1. Opinions Admissible (Cont'd)

for condemned land was probative of the land's fair market value and improperly excluded by the trial court. Jotin Realty Co. v. Department of Transp., 174 Ga. App. 809, 331 S.E.2d 605 (1985) (decided under former O.C.G.A. § 24-9-67).

Expert on safety and causation. — Propriety of expert opinion as to whether a particular condition is safe or unsafe certainly is within the scope and purview of an expert's opinion; moreover, testimony as to causation is a proper matter for expert testimony. Pembrook Mgt., Inc. v. Cossaboon, 157 Ga. App. 675, 278 S.E.2d 100 (1981) (decided under former O.C.G.A. § 24-9-67).

Testimony of pathologist in murder was not inadmissible because it might possibly give rise to inferences adverse to defendant. Bethea v. State, 251 Ga. 328, 304 S.E.2d 713 (1983) (decided under former O.C.G.A. § 24-9-67).

Medical expert on murder victim's fatal condition. — It was within the medical examiner's expertise to testify, based upon the examiner's observation of the blood stains at victim's condo and the significance of the blood loss indicated by those stains, that in the absence of immediate medical care victim was probably dead. White v. State, 263 Ga. 94, 428 S.E.2d 789 (1993) (decided under former O.C.G.A. § 24-9-67).

Medical examiner properly allowed to state opinion on cause of death. — County medical examiner was properly permitted to state examiner's opinion, based on the facts contained in a 1979 autopsy report, that the victim died of a gunshot wound to the abdomen, and such opinion was not the restatement of the diagnostic opinion of another expert. Turner v. State, 273 Ga. 340, 541 S.E.2d 641 (2001), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001) (decided under former O.C.G.A. § 24-9-67).

Testimony from medical examiner on findings. — State was properly allowed to ask a medical examiner (ME) whether the defendant's account of the homicide was consistent with the ME's findings in the autopsy as: 1) the ME did not state an opinion as to the veracity of any witness or the defendant; and 2) the ME's testimony did not go to the ultimate issue because the defendant admitted strangling the victim but claimed self-defense. Cade v. State, 289 Ga. 805, 716 S.E.2d 196 (2011) (decided under former O.C.G.A. § 24-9-67).

Forensic pathologist on single fatal blow. — Expert's testimony regarding the possibility of death by a single blow, and the possibility of subsequent head movement following death in that manner, was admissible because it was based on facts in evidence and because this testimony pertained to conclusions jurors would not ordinarily be able to draw for themselves. Maxwell v. State, 263 Ga. 57, 428 S.E.2d 76 (1993) (decided under former O.C.G.A. § 24-9-67).

Testimony by pathologist instead of physician on injury was proper. — In a prosecution for kidnapping and aggravated assault, the trial court properly allowed a pathologist instead of a physician to testify as to whether the holes in the victim's shoe and an injury to the victim's toe were caused by a bullet; the pathologist had experience in inspecting gunshot wounds on people and in clothing and footwear. Winfrey v. State, 286 Ga. App. 450, 649 S.E.2d 561 (2007) (decided under former O.C.G.A. § 24-9-67).

Expert trained in behavioral science. — Expert in the areas of homicide investigation and crime scene reconstruction was allowed to testify regarding the reasons why a perpetrator might reposition and cover a victim since the challenged testimony was well within the expert's range of training and experience and the average juror does not possess the experience necessary to discern the most common complex behavioral reasons for a perpetrator's acting in such a manner. Foster v. State, 273 Ga. 34, 537 S.E.2d 659 (2000) (decided under former O.C.G.A. § 24-9-67).

Expert testimony on DNA profile. — Expert's testimony regarding the frequency in the population of the DNA profile obtained from three rape victims was admissible given the expert's credentials and expertise and the expert's testimony as to the computer program which gener-

ated the statistical frequencies to which the expert testified. Collins v. State, 267 Ga. App. 784, 600 S.E.2d 802 (2004) (decided under former O.C.G.A. § 24-9-67).

No error resulted by admitting expert testimony on the issue of DNA testing, and because the defendant did not contend that the expert's testimony failed to meet the Harper standard, no basis for reversal on this ground existed. Carruth v. State, 286 Ga. App. 431, 649 S.E.2d 557 (2007) (decided under former O.C.G.A. § 24-9-67).

Expert testimony on pancreatic injury. — Trial court did not abuse the court's discretion in allowing the state's expert witness to testify to the cause of certain of the victim's injuries because the expert testified that one of the victim's injuries was caused by blunt force trauma without opining on how such trauma occurred; the opinion offered by the expert regarding the cause of the victim's pancreatic injury was one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion was beyond the ken of the average layman. Amador v. State, 310 Ga. App. 280, 713 S.E.2d 423 (2011) (decided under former O.C.G.A. § 24-9-67).

Pediatrician's opinion that a child had been molested was one of fact and one which the jurors would not ordinarily be able to draw for themselves, and was admissible even though the testimony indirectly involved the child's credibility. State v. Butler, 256 Ga. 448, 349 S.E.2d 684 (1986), aff'd, 181 Ga. App. 589, 353 S.E.2d 855 (1987) (decided under former O.C.G.A. § 24-9-67).

Defendant had no ground to contest the trial court's decision to allow a pediatrician to give opinion testimony to show that the victims' recitation of events was consistent with child abuse because the state proffered the pediatrician as an expert in the field of child sexual abuse, and with no objection from the defense, the trial court so qualified the pediatrician. Ledford v. State, 313 Ga. App. 389, 721 S.E.2d 585 (2011) (decided under former O.C.G.A. § 24-9-67).

Expert's opinion that child molested. — Expert's testimony that in expert's opinion the child had been molested without comment as to whether the defendant was the molester was not testimony as to the ultimate issue in the case and was not objectionable. Karonen v. State, 205 Ga. App. 852, 424 S.E.2d 47, cert. denied, 205 Ga. App. 900, 424 S.E.2d 47 (1992) (decided under former O.C.G.A. § 24-9-67).

Child abuse syndrome. — Trial court properly allowed a psychologist, who had examined a child molestation victim, to testify as to the psychologist's conclusion that the victim suffered from child abuse syndrome, since the testimony was not a conclusion that the victim was in fact abused and that issue was left to the jury to determine. Cooper v. State, 200 Ga. App. 560, 408 S.E.2d 797 (1991) (decided under former O.C.G.A. § 24-9-67).

Trial court properly admitted an expert's testimony as to child sexual abuse syndrome as: (1) it was helpful to the jury; and (2) laymen could not understand this syndrome without expert testimony, nor would laymen be likely to believe that a child who denied a sexual assault, or who was reluctant to discuss an assault, in fact had been assaulted; further, the expert offered no opinion as to whether the victims were being truthful, but left that determination for the jury. McCoy v. State, 278 Ga. App. 492, 629 S.E.2d 493 (2006) (decided under former O.C.G.A. § 24-9-67).

Testimony of burglary investigator. — Testimony of a sheriff's department's burglary investigator as to whether, based on his training and experience, items are sometimes sold when items are stolen and whether the crime lab would process fingerprints taken from a burglary crime scene was admissible. Hestley v. State, 216 Ga. App. 573, 455 S.E.2d 333 (1995) (decided under former O.C.G.A. § 24-9-67).

Testimony on blood samples based on electrophoresis procedure. — Expert witness may testify concerning identification of blood samples based on procedure known as electrophoresis, the statistical or mathematical probability of certain enzymes being found in the blood of the general population. Graham v. State, 168 Ga. App. 23, 308 S.E.2d 413 (1983) (decided under former O.C.G.A. § 24-9-67).

Illustrations (Cont'd)
1. Opinions Admissible (Cont'd)

Evidence of source of DNA. — Trial counsel was not ineffective in failing to make a meritless objection based on the state's expert's testimony as to the source of the DNA on a sock as the possible mechanisms by which epithelial cells ended up on a sock were beyond the ken of the average layman; since the evidence at issue was admissible, defendant's trial counsel was not required to object. Eley v. State, 266 Ga. App. 45, 596 S.E.2d 660 (2004) (decided under former O.C.G.A. § 24-9-67).

Expert testimony as to the practices of an industry is admissible. Dan Gurney Indus., Inc. v. Southeastern Wheels, Inc., 168 Ga. App. 504, 308 S.E.2d 637 (1983) (decided under former O.C.G.A. § 24-9-67).

Expert could rely on the Safety Code for Elevators and Escalators in forming the expert's opinion. Millar Elevator Serv. Co. v. O'Shields, 222 Ga. App. 456, 475 S.E.2d 188 (1996) (decided under former O.C.G.A. § 24-9-67).

Product liability action. — Trial court did not abuse the court's discretion in allowing an expert witness to testify, pursuant to former O.C.G.A. § 24-9-67, in a truck owner's products liability action against a truck modifying company regarding an allegedly defective switch that was installed on the floorboard of the truck, as the expert testified that the expert had some knowledge of electrical systems, vehicle wiring, and in investigating electrical fires; accordingly, the expert's opinion that the origin of the fire was electrical and the expert's explanation as to the meaning of a flammability rating and the expert's testimony thereon was properly admitted. Cottrell, Inc. v. Williams, 266 Ga. App. 357, 596 S.E.2d 789 (2004) (decided under former O.C.G.A. § 24-9-67).

In an action for libel, there was no error in the admission of the testimony of a journalism professor who testified as to certain generally recognized minimum standards in journalism and then stated the professor's opinion that the conduct described in a hypothetical question did not meet these standards. News Publishing Co. v. DeBerry, 171 Ga. App. 787, 321 S.E.2d 112 (1984), cert. denied, 471 U.S. 1053, 105 S. Ct. 2112, 85 L. Ed. 2d 477 (1985) (decided under former O.C.G.A. § 24-9-67).

Testimony of police officer on cocaine use admissible. — Knowledge of the amount of crack cocaine one would generally possess for personal use or the amount which might evidence distribution was not necessarily within the scope of the ordinary layman's knowledge and experience. Therefore, the testimony of a veteran police officer on the subject would have been properly admissible under former O.C.G.A. § 24-9-67. Davis v. State, 200 Ga. App. 44, 406 S.E.2d 555 (1991) (decided under former O.C.G.A. § 24-9-67).

Police officer's opinion testimony that the amount of cocaine seized in the execution of a search warrant upon defendant's residence would typically be intended for distribution by the defendant rather than for the defendant's personal use was properly admissible. Wise v. State, 257 Ga. App. 211, 570 S.E.2d 656 (2002) (decided under former O.C.G.A. § 24-9-67).

Unqualified testimony of a police officer offered to show intent to distribute cocaine, based on the amount of cocaine and the officer's knowledge of defendant, was not competent evidence of an intent to distribute. Stephens v. State, 219 Ga. App. 881, 467 S.E.2d 201 (1996) (decided under former O.C.G.A. § 24-9-67).

Crime lab chemist qualified regarding street value of drugs. — It was not error for the trial court to permit the state expert, a crime laboratory chemist, to testify concerning the "street value" of confiscated drugs, where the chemist testified that the chemist had accumulated knowledge of the street value of cocaine as a result of the chemist's experience over years of comparing the prices paid by undercover officers during their undercover purchases with that which was supplied to the chemist for analysis. Robinson v. State, 203 Ga. App. 759, 417 S.E.2d 404, cert. denied, 203 Ga. App. 907, 417 S.E.2d 404 (1992) (decided under former O.C.G.A. § 24-9-67).

Although a print card was not admitted as a business record, it was

relevant as the basis for an expert's conclusion that defendant's print matched that taken from the victim's vehicle; despite defendant's hearsay objection, the expert's testimony connected defendant to the crime, and the admissibility of the expert's inculpatory testimony did not depend upon the admission of the print. Roebuck v. State, 277 Ga. 200, 586 S.E.2d 651 (2003) (decided under former O.C.G.A. § 24-9-67).

Opinion of police officer on auto accident. — Investigating officer's opinion testimony regarding the sequence of events involved in a vehicle collision is admissible evidence as a police officer with investigative experience on automobile collisions is an expert who may testify as to the cause of an accident the officer investigated. Bennett v. Mullally, 263 Ga. App. 215, 587 S.E.2d 385 (2003) (decided under former O.C.G.A. § 24-9-67).

Officer is an expert on narcotics investigations. — Arresting officer should have been qualified as an expert in "narcotics investigation"; although the trial court allowed the officer's testimony over objection. Davis v. State, 209 Ga. App. 572, 434 S.E.2d 132 (1993) (decided under former O.C.G.A. § 24-9-67).

Officer's testimony on effects of alcohol on body. — At the time of a defendant's driving under the influence (DUI) trial, the arresting officer had over four years of law enforcement experience, had been trained in DUI detection and field sobriety testing, and had been involved in over 100 DUI arrests. Based on the officer's training and experience, the officer was qualified to testify about the effects of alcohol consumption on the body. Lanwehr v. State, 265 Ga. App. 359, 593 S.E.2d 897 (2004) (decided under former O.C.G.A. § 24-9-67).

Dock signals expert. — Trial court did not err in permitting witness to testify as an expert for procedures where hand signals or sight alone is insufficient in a personal injury action brought by longshoreman against state port authority. Georgia Ports Auth. v. Hutchinson, 209 Ga. App. 726, 434 S.E.2d 791 (1993) (decided under former O.C.G.A. § 24-9-67).

Highway signal engineer. — Trial court did not abuse court's discretion in permitting a Department of Transportation engineer, qualified as a signal engineer, to testify whether the state was negligent in designing an intersection and signal timing at the intersection. Fouts v. Builders Transp., Inc., 222 Ga. App. 568, 474 S.E.2d 746 (1996) (decided under former O.C.G.A. § 24-9-67).

Testimony by polygraph examiner. — Trial court did not err by allowing a polygraph examiner to testify that the defendant showed deception to questions concerning an armed robbery because the defendant, by stipulation, voluntarily consented to admission of the polygraph test results. Therefore, the defendant agreed to the admission of the examiner's opinion testimony concerning the polygraph examination, and the trial court did not err by overruling the defendant's objection to the qualifications of the examiner, or by allowing the examiner to testify as an expert concerning the polygraph test which the examiner administered on the defendant. Jones v. State, 309 Ga. App. 886, 714 S.E.2d 590 (2011) (decided under former O.C.G.A. § 24-9-67).

Failure to identify expert before hearing not grounds to exclude testimony. — In a child deprivation hearing, a parent's claim that the trial court erred by allowing the state to call an expert witness without identifying the expert or producing the medical records in advance of the hearing was meritless because: (1) the parent's discovery request did not ask the state to identify each person whom the state expected to call as an expert witness at trial; and (2) the parent did not show prejudice from the lack of any additional information other than a broad assertion of insufficient time to prepare for the hearing. In the Interest of A.A., 293 Ga. App. 471, 667 S.E.2d 641 (2008) (decided under former O.C.G.A. § 24-9-67).

Expert testimony not objectionable. — Trial court did not err in denying a defendant's motion for a new trial based on the ineffective assistance of counsel in failing to object to an expert's opinion testimony because the record did not support the defendant's argument that the expert's testimony was objectionable; the expert's testimony was limited to describing how the expert and doctors in the

Illustrations (Cont'd)
1. Opinions Admissible (Cont'd)

medical community generally performed genital examinations of female patients and did not touch on whether either the defendant or the victim was telling the truth on whether the defendant committed aggravated sexual battery, and the expert's testimony regarding the typical medical examination of a preadolescent girl's genitals was relevant to the issues raised by the defendant's defense. Lee v. State, 300 Ga. App. 214, 684 S.E.2d 348 (2009) (decided under former O.C.G.A. § 24-9-67).

Expert testimony on interviewing techniques in child abuse case not improperly restricted. — Trial court did not improperly restrict the testimony of the defendant's expert because the expert was permitted to testify at length on the propriety and effect of interviewing techniques in child sexual abuse cases; the defendant did not point out how the trial court's decision to sustain the state's objection to the expert's statement unfairly restricted the expert's testimony when the expert went on to provide the expert's criticisms of how the victim's interview was conducted. Rayner v. State, 307 Ga. App. 861, 706 S.E.2d 205 (2011) (decided under former O.C.G.A. § 24-9-67).

2. Opinions Inadmissible

Testimony was inadmissible as expert testimony in the following cases. — See Wylly v. Gazan, 69 Ga. 506 (1882) (meaning of "more or less" in deed) (decided under former Code 1882, § 3868); Central R.R. v. DeBray, 71 Ga. 406 (1883) (whether employees were required to get on or off moving train) (decided under former Code 1882, § 3868); Carter v. Carter Elec. Co., 156 Ga. 297, 119 S.E. 737 (1923) (damage to business from use of similar name by competitor) (decided under former Civil Code 1910, § 5876); Davies v. Blasingame, 177 Ga. 450, 170 S.E. 477 (1933) (soundness of property title) (decided under former Code 1933, § 38-1710); United States v. Roberts, 192 F.2d 893 (5th Cir. 1951) (continuing total disability a matter of law and fact) (decided under former Code 1933, § 38-1710).

Trial court properly granted summary judgment in favor of a drug store in a suit brought by the parents of a teenager who died while huffing butane for wrongful death and in a suit brought by the parents of two other teens who were injured when: the teens assumed the risk; the expert's affidavit presented by the parents was not based on personal knowledge from interviewing the teens, and was conclusory and speculative; to the extent that the expert's affidavit fit within former O.C.G.A. § 24-9-67, the expert's generalizations about the beliefs of adolescents about death or the propensity of adolescents to exercise poor judgment and behave irresponsibly were not appropriate yardsticks for assessing the minors' knowledge of the risk; the parents' claim that the drug store knew that the teens were going to misuse the butane was based on hearsay; and the parents' public policy claims were rejected as O.C.G.A. § 16-13-90 created a list of dangerous substances not to be sold to minors, butane was not on the list, and any change in the law had to be legislatively enacted. Garner v. Rite Aid of Ga., Inc., 265 Ga. App. 737, 595 S.E.2d 582 (2004) (decided under former O.C.G.A. § 24-9-67).

In a negligence and premises liability action, an administrator's expert affidavit regarding the foreseeability of a shooting of the decedent, a licensee, on the premises was inadmissible as there was no need for expert testimony to determine whether ordinary care was exercised in running the premises' business; moreover, because the evidence showed that there had never been an accidental shooting of one hunter by another on the premises, no basis existed for holding that the owners or operator should have foreseen that a third party would come onto the property and illegally shoot at a target which the third party could not identify. Hadden v. ARE Props., LLC, 280 Ga. App. 314, 633 S.E.2d 667 (2006) (decided under former O.C.G.A. § 24-9-67).

Trial court did not abuse the court's discretion in refusing to admit the testimony of a defendant's expert because the mistake charged to an arresting officer in

administering an alco-sensor test too soon after the officer first stopped the defendant would not have affected the test result to which the arresting officer testified since the defendant admitted that defendant had been drinking, and the trial court admitted only the officer's testimony that the alco-sensor produced a positive result. Oliver v. State, 294 Ga. App. 299, 669 S.E.2d 162 (2008) (decided under former O.C.G.A. § 24-9-67).

Opinion going to matter of ultimate fact. — Medical expert witness may give the expert's opinion as to the cause of an injury, but if the cause of the injury constituted the ultimate issue of fact to be determined by the fact finding tribunal, this opinion was not absolutely binding on such tribunal. Lockheed Aircraft Corp. v. Marks, 88 Ga. App. 167, 76 S.E.2d 507 (1953), overruled on other grounds, Fowler v. City of Atlanta, 116 Ga. App. 352, 157 S.E.2d 306 (1967) (decided under former Code 1933, § 38-1710).

Whether or not an attorney at law may qualify and testify as an expert witness as to what the law is and who has title and owns property as found by the attorney from examination of title records was a part of the ultimate fact to be decided by the jury. Bishop v. Lamkin, 221 Ga. 687, 146 S.E.2d 772 (1966) (decided under former Code 1933, § 38-1710).

Trial court did not err in refusing to permit a mother's expert to opine that a son's murder was foreseeable because it was within the discretion of the trial court to determine that no expert testimony on the question of foreseeability was required; the jury in this case, having heard evidence of numerous prior criminal acts that occurred in or around the complex, was capable of deciding the question of foreseeability without expert testimony on the ultimate issue. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135 (2011), cert. denied, No. S12C0436, 2012 Ga. LEXIS 270 (Ga. 2012) (decided under former O.C.G.A. § 24-9-67).

Expert testimony on credibility of witness. — If the characteristic of a witness attacked does not involve some organic or mental disorder or some impairment of the mental or physical faculties by injury, disease, or otherwise, or if there has been insufficient observation by the expert, expert testimony is usually excluded. Jones v. State, 232 Ga. 762, 208 S.E.2d 850 (1974) (decided under former Code 1933, § 38-1710).

Trial court erred by allowing a state's expert to testify, over the defendant's objection, that the expert did not believe the victim made up the allegations against the defendant, as such was an ultimate issue of fact, and nothing suggested that the determination of the victim's credibility was beyond the ken of the jurors; thus, to the extent that Smith v. State, 257 Ga. App. 88, 570 S.E.2d 400 (2002), allowed an expert to give an opinion on a witness's credibility or to express an opinion on the ultimate issue of defendant's guilt to rehabilitate the credibility of a witness whose veracity was attacked, it was overruled. Patterson v. State, 278 Ga. App. 168, 628 S.E.2d 618 (2006) (decided under former O.C.G.A. § 24-9-67).

Expert testimony on transference theory. — Trial court's refusal to admit eyewitness expert testimony was supported by extensive corroborating evidence because there was no factual basis for allowing testimony regarding the potential for misidentification based on transference theory; the defendant presented no evidence indicating that the victim saw or could have seen any other person at the time the instant offenses took place. Cannon v. State, 310 Ga. App. 262, 712 S.E.2d 645 (2011) (decided under former O.C.G.A. § 24-9-67).

Opinion based on out-of-court evidence. — Medical expert does not have the right to give in evidence an opinion based on information which the expert has derived from private conversations with third parties. Moore v. State, 221 Ga. 636, 146 S.E.2d 895 (1966) (decided under former Code 1933, § 38-1710).

Trial court erred in admitting a treating physician's opinions which were predicated in part on the opinions of other health care providers which were not admitted into evidence. Southern Bell Tel. & Tel. Co. v. Franklin, 196 Ga. App. 474, 396 S.E.2d 514 (1990) (decided under former O.C.G.A. § 24-9-67).

Witness invaded province of jury. — Expert witness's testimony that the child-

Illustrations (Cont'd)
2. Opinions Inadmissible (Cont'd)

hood maltreatment syndrome or abused child syndrome was the "manner" in which the fatal injuries occurred, and that the fatal injuries occurred "in the process" of the childhood maltreatment syndrome, constituted the expert's opinion that the fatal injuries in fact resulted from child abuse. Accordingly, as the jurors had the ability to reach this conclusion personally, the trial court erred by allowing the expert witness's testimony. McCartney v. State, 262 Ga. 156, 414 S.E.2d 227 (1992), overruled on other grounds, 287 Ga. 881, 700 S.E.2d 394 (2010) (decided under former O.C.G.A. § 24-9-67).

When testimony is not based on an expert opinion and is mere speculation, it is worthless and the trial court does not err in striking the testimony from the record. Gould v. State, 168 Ga. App. 605, 309 S.E.2d 888 (1983) (decided under former O.C.G.A. § 24-9-67); Welborn v. State, 174 Ga. App. 853, 331 S.E.2d 890 (1985) (decided under former O.C.G.A. § 24-9-67).

When an expert did not present sufficient evidence to show a relevant point, given lack of support for the expert's opinion, the lower court did not abuse the court's discretion in excluding the expert's testimony. Cromer v. Mulkey Enters., Inc., 254 Ga. App. 388, 562 S.E.2d 783 (2002) (decided under former O.C.G.A. § 24-9-67).

When differing ultimate conclusions of physicians as to whether a doctor-patient relationship existed evinced no more than a difference of nonmedical opinion between witnesses who happened to be physicians, those conclusions were neither admissible nor probative as expert medical testimony. Clanton v. Von Haam, 177 Ga. App. 694, 340 S.E.2d 627 (1986) (decided under former O.C.G.A. § 24-9-67).

Psychiatrist's reliance on psychologist's test results. — To the extent the state's psychiatric expert relied upon the opinion of another psychologist expert not before the court, the expert's testimony was inadmissible hearsay without probative value even in the absence of an objection. Brown v. State, 206 Ga. App. 800, 427 S.E.2d 9 (1992) (decided under former O.C.G.A. § 24-9-67).

Psychologist's opinion irrelevant. — State's motion in limine seeking to exclude the testimony of a defendant's psychologist was properly granted as the defendant claimed that defendant shot the victim in self-defense; the defendant's psychological state was irrelevant. Lott v. State, 281 Ga. App. 373, 636 S.E.2d 102 (2006) (decided under former O.C.G.A. § 24-9-67).

School counselor's opinion. — Admission of a school counselor's opinion that a child had been molested based on the child's behavior and demeanor during the counselor's interview of the child was reversible error. Hilliard v. State, 226 Ga. App. 478, 487 S.E.2d 81 (1997) (decided under former O.C.G.A. § 24-9-67).

Medical examiner's opinion on defendant's demeanor admissible. — Trial court did not err in allowing the testimony of the deputy medical examiner in which the examiner related observations of the defendant during an interview of the defendant because the examiner stated the general observation of the defendant's demeanor upon being told that the defendant's child had died. Smith v. State, 290 Ga. 428, 721 S.E.2d 892 (2012) (decided under former O.C.G.A. § 24-9-67).

Opinion as to alcohol content drop in dead person. — Question propounded to a forensic chemist concerning whether or not the fact that a person might have died and it had been some days before the person was found would in any way decrease the alcohol content of the victim's body was proper under former O.C.G.A. § 24-9-67 (see now O.C.G.A. § 24-9-67). Cameron v. State, 256 Ga. 225, 345 S.E.2d 575 (1986) (decided under former O.C.G.A. § 24-9-67).

Physician's opinion of "rape." — Allowing any question and answer of a physician who examined the victim of an alleged rape which would involve the physician's opinion stated in the physician's report that "this is rape" constituted reversible error. Nichols v. State, 177 Ga. App. 689, 340 S.E.2d 654 (1986) (decided under former O.C.G.A. § 24-9-67).

Physician's opinion of doctor-patient relationship. — No professional skill or specialized medical knowledge was necessarily required to resolve the issue whether a doctor-patient relationship existed since the initial creation of such a relationship was well within the comprehension of the average layman, and a physician's affidavit on this issue was neither probative nor admissible as expert medical testimony. Minster v. Pohl, 206 Ga. App. 617, 426 S.E.2d 204 (1992) (decided under former O.C.G.A. § 24-9-67).

Ophthalmologist testimony in DUI case inadmissible. — Trial court did not err in not allowing an ophthalmologist to testify as an expert that a DUI defendant had two surgeries in the past, which could have affected the defendant's performance on walk-and-turn and one-leg-stand tests. The witness had no personal knowledge of the surgery in question or of the medical records referring to the surgeries; moreover, the defendant's live-in companion was permitted to testify at length regarding the defendant's medical issues arising from the surgery and its effect on the defendant's ability to walk normally at the time of the arrest. Aal v. State, 290 Ga. App. 252, 659 S.E.2d 609 (2008) (decided under former O.C.G.A. § 24-9-67).

Medical causation not within scope of psychological expertise. — It is a matter within the sound discretion of the trial judge as to whether a witness has such learning and experience in a particular art, science or profession as to entitle the witness to be deemed prima facie an expert; therefore, when a neuropsychologist testified to the specific chemical which caused organic brain damage, the trial court did not abuse the court's discretion in striking portions of the affidavit of the psychologist, because medical causation is not a subject within the scope of psychological expertise. Chandler Exterminators, Inc. v. Morris, 262 Ga. 257, 416 S.E.2d 277 (1992) (decided under former O.C.G.A. § 24-9-67).

Officer's testimony on marijuana test results. — Officer's testimony regarding officer's training and experience with "ontrack system" urine specimen analysis for the presence of tetrahydrocannabinol was insufficient foundation for the admission of the test results. Hubbard v. State, 207 Ga. App. 703, 429 S.E.2d 123 (1993) (decided under former O.C.G.A. § 24-9-67).

Hair analysis results cannot be used to make positive identification of an individual. Hudson v. State, 166 Ga. App. 660, 305 S.E.2d 409 (1983) (decided under former O.C.G.A. § 24-9-67).

Reconstruction of accident. — Expert accident reconstructionist was not qualified to render an opinion as to which of two impacts caused plaintiff's injury. Johnson v. Knebel, 267 Ga. 853, 485 S.E.2d 451 (1997) (decided under former O.C.G.A. § 24-9-67).

False confession theory. — Trial court did not abuse the court's discretion or violate the defendant's Sixth and Fourteenth Amendment rights by excluding expert testimony about false confessions; the Georgia Supreme Court found that the false confession theory was not reliable and had not yet reached a verifiable stage of scientific certainty. Crawford v. State, 283 Ga. App. 645, 642 S.E.2d 335 (2007) (decided under former O.C.G.A. § 24-9-67).

Trial court did not improperly exclude testimony from the defendant's proffered expert witness on police interrogation tactics resulting in false confessions, as such theory had not reached a verifiable stage of scientific certainty, and because the issue of whether the defendant's inculpatory statements were the results of threats or coercion was a matter the jury could discern for itself. Lyons v. State, 282 Ga. 588, 652 S.E.2d 525 (2007), overruled on other grounds, Garza v. State, 2008 Ga. LEXIS 865 (Ga. 2008) (decided under former O.C.G.A. § 24-9-67).

Airport operations manager failed to demonstrate qualifications as an expert witness to express an opinion regarding the acceptable and safe number of pounds of force of closing pressure for automatic doors on shuttle trains, or to present a factual predicate for a lay opinion. Saltis v. A.B.B. Daimler-Benz Ad Tranz Atlanta, Inc., 243 Ga. App. 603, 533 S.E.2d 772 (2000) (decided under former O.C.G.A. § 24-9-67).

Illustrations (Cont'd)

3. Witness Qualified as Expert

Automobile mechanic. — Contention that testimony of witness qualified as an expert was erroneously admitted for the reason that the witness had testified that the witness did not see the car before impact, and therefor could not testify as to the car's value before the car was damaged, was without merit since the witness actually repaired the car, and was not only a mechanic, but had long experience in buying and selling cars of the same type and model. Hill v. Kirk, 78 Ga. App. 310, 50 S.E.2d 785 (1948) (decided under former Code 1933, § 38-1710).

Electrical engineer. — When a witness was an electrical engineer of 31 years experience, and the engineer's opinions were based on proven facts, the opinions were admissible. Little v. Georgia Power Co., 205 Ga. 51, 52 S.E.2d 322 (1949) (decided under former Code 1933, § 38-1710).

Building inspector who held a license in the inspector's individual name at the time of conducting an inspection qualified as an expert; the fact that the inspector was unaware that the inspector was also required to get a license in the name under which the inspector conducted business did not prevent the inspector's qualification as an expert. Williamson v. Harvey Smith, Inc., 246 Ga. App. 745, 542 S.E.2d 151 (2000) (decided under former O.C.G.A. § 24-9-67).

A Ph. D. in entomology was not required to have a pest control operator's license before being qualified to testify in an action arising from termite infestation of property. Dayoub v. Yates-Astro Termite Pest Control Co., 239 Ga. App. 578, 521 S.E.2d 600 (1999) (decided under former O.C.G.A. § 24-9-67).

Specialist in obstetrics and gynecology. — In a prosecution for rape, a physician may offer the physician's opinion as to what caused the tear in the victim's vagina over an objection that the physician's expertise to offer such an opinion has not been established, where the physician is duly qualified as a specialist in obstetrics and gynecology and testifies that one of the physician's duties at the medical center where the physician worked was to examine rape victims. Holt v. State, 147 Ga. App. 186, 248 S.E.2d 223 (1978) (decided under former Code 1933, § 38-1710).

Qualified medical expert with a first-hand knowledge of the material facts is well within permissible bounds in stating the expert's opinion and inferences concerning the existence and cause of a medical condition. McGuire v. Davis, 437 F.2d 570 (5th Cir. 1971) (decided under former Code 1933, § 38-1710).

Practicing physician was an expert witness on sanity. Petty v. Folsom, 229 Ga. 477, 192 S.E.2d 246 (1972) (decided under former Code 1933, § 38-1710).

Specialists in cardiac physiology. — Two doctors who specialized in cardiac physiology were qualified to testify about the effects on a patient of a heart medication a doctor gave to a patient, and the appellate court reversed the trial court's ruling that the doctors could not testify and the court's judgment dismissing the spouse's claims against a pharmaceutical manufacturer that produced the medication, alleging strict products liability and negligent failure to warn. Bryant v. Hoffmann-La Roche, Inc., 262 Ga. App. 401, 585 S.E.2d 723 (2003) (decided under former O.C.G.A. § 24-9-67).

Investigator testifying as an expert. — In an aggravated assault case, it was permissible for an investigator, testifying as an expert, to state that based on the investigator's experience, persons who suffered from cuts or stab wounds often did not remember being stabbed. This was a conclusion that was beyond the ken of the average layperson; even if the investigator's testimony was somewhat based upon hearsay, the opinion was mainly derived from the investigator's many years of professional experience. Jackson v. State, 291 Ga. App. 287, 661 S.E.2d 665 (2008) (decided under former O.C.G.A. § 24-9-67).

Officer properly qualified as expert witness in drug possession and distribution. — In a prosecution for possession of cocaine with intent to distribute (O.C.G.A. § 16-13-30(b)), as the arresting officer testified to making 35 to 40 drug-related arrests, about half of which

were for possession with intent to distribute, the trial court did not abuse the court's discretion in qualifying the officer as an expert witness in drug possession and distribution. Hight v. State, 293 Ga. App. 254, 666 S.E.2d 678 (2008) (decided under former O.C.G.A. § 24-9-67).

Any error waived by failure to object. — Pro se defendant's claim that the trial court improperly admitted lay testimony on blood splatters was rejected as defendant failed to object to the admission of the lay opinions at trial; further, in light of the overwhelming evidence of defendant's guilt, any error was harmless. Swain v. State, 268 Ga. App. 135, 601 S.E.2d 491 (2004) (decided under former O.C.G.A. § 24-9-67).

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Am. Jur. Proof of Facts. — Criminal Law — The Battered Woman Defense, 34 POF2d 1.

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C.J.S. — 32 C.J.S., Evidence, §§ 593, 594, 607, 608, 732, 733, 737 et seq., 758 et seq.

ALR. — Opinion or expert evidence as to whether pain is real or feigned, or as to its severity, 28 ALR 362; 97 ALR 1284.

Dental condition as subject of expert testimony; qualification of witness as expert, 49 ALR 666.

Competency of physician or surgeon as an expert witness as affected by the fact that he is not a specialist, 54 ALR 860.

Admissibility of opinion of medical expert as affected by his having heard the person in question give the history of his case, 65 ALR 1217; 51 ALR2d 1051.

Right of witness to give summary based on inspection of number of documents, 66 ALR 1206.

Constitutionality of statutes relating to expert witnesses, 71 ALR 1017.

Expert testimony to interpret or explain or draw conclusion from photograph, 77 ALR 946.

Testimony of expert witness as to ultimate fact, 78 ALR 755.

Right of witness to state his opinions or conclusion, based on examination of books and accounts, as to solvency or insolvency, 81 ALR 1431.

Hypothetical questions in case of expert witness who has personal knowledge or observation of facts, 82 ALR 1338.

Right of expert to give an opinion based on testimony of other witnesses not incorporated in a hypothetical question, 82 ALR 1460.

Opinion evidence directly as to the ultimate question of the amount of damage to property, 86 ALR 1449.

Opinion evidence as to speed of automobile, 94 ALR 1190.

Testimony of expert predicated in whole or in part upon opinions, inferences, or conclusions of others, 98 ALR 1109.

Right of expert witness to testify as to "total disability" or other physical condition contemplated by specific provision of insurance policy, 111 ALR 603.

Necessity of expert evidence to warrant submission to jury of issue as to permanency of injury or as to future pain and suffering, or to sustain award of damages on that basis, 115 ALR 1149.

Opinion or expert testimony as to materiality of misrepresentation in application for insurance or as to increase of risk or as to practice or usage of insurance companies regarding acceptance or rejection of certain class of risk, 135 ALR 411.

Sufficiency of expert evidence to establish causal relation between accident and physical condition or death, 135 ALR 516.

Opinion or expert evidence regarding loss or time of loss within fidelity bond, 135 ALR 1145.

Opinion evidence as to distance within which automobile can be stopped, 135 ALR 1404.

Admissibility of opinion evidence as to cause of death, disease, or injury, 136 ALR 965; 66 ALR2d 1082.

Expert or opinion evidence regarding lights on automobiles and the distance at which lights will "pick up" an object, 137 ALR 753.

Necessity of expert evidence to support an action for malpractice against a physician or surgeon, 141 ALR 5; 81 ALR2d 597.

Safety of condition, place, or appliance as proper subject of expert or opinion evidence in tort actions, 146 ALR 5; 62 ALR2d 1426.

Probative value of opinion testimony of handwriting experts that document is not genuine, opposed to testimony of persons claiming to be attesting witnesses, 154 ALR 649.

Comments in judge's charge to jury disparaging expert testimony, 156 ALR 530.

Review on appeal of decision of trial court as to qualification or competency of expert witnesses, 166 ALR 1067.

Testimony of physician based on information from third persons regarding physical condition or symptoms of person in question, 175 ALR 274.

Unaccepted offer for purchase or sale of real property as evidence of value, 7 ALR2d 781.

Proof of prospective earning capacity of student or trainee, or of its loss, in action for personal injury or death, 15 ALR2d 418.

Expert evidence to identify gun from which bullet or cartridge was fired, 26 ALR2d 892.

Necessity of expert testimony to show causal connection between medical treatment necessitated by injury for which defendant is liable and allegedly harmful effects of such treatment, 27 ALR2d 1263.

Cross-examination of expert witness as to fees, compensation, and the like, 33 ALR2d 1170.

Blood grouping tests, 46 ALR2d 1000.

Admissibility of opinion evidence of lay witnesses as to diseases and physical condition of animals, 49 ALR2d 932.

Chiropractor's competency as expert in personal injury action as to injured person's condition, medical requirements, nature and extent of injury, and the like, 52 ALR2d 1384.

Admissibility, in homicide prosecution, of opinion evidence that death was or was not self-inflicted, 56 ALR2d 1447.

Use of medical or other scientific treatises in cross-examination of expert witnesses, 60 ALR2d 77.

Admissibility of evidence as to manner or ease of firing gun, in civil action involving issue of accidental death or suicide, 63 ALR2d 1150.

Right of physician, notwithstanding physician-patient privilege, to give expert testimony based on hypothetical question, 64 ALR2d 1056.

Admissibility of opinion evidence as to point of impact or collision in motor vehicle accident case, 66 ALR2d 1048.

Qualifications of chemist or chemical engineer to testify as to effect of poison upon human body, 70 ALR2d 1029.

Propriety of hypothetical question to expert witness on cross-examination, 71 ALR2d 6.

Admissibility of experimental evidence to determine chemical or physical qualities or character of material or substance, 76 ALR2d 354.

Admissibility of experimental evidence as to explosion, 76 ALR2d 402.

Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood, 77 ALR2d 971.

Compelling expert to testify, 77 ALR2d 1182; 66 ALR4th 213.

Testing qualifications of expert witness, other than handwriting expert, by objective tests or experiments, 78 ALR2d 1281.

Admissibility in wrongful death action of testimony of actuary or mathematician for purpose of establishing present worth of pecuniary loss, 79 ALR2d 259.

Admissibility of testimony of actuary or mathematician as to present value of loss or impairment of injured person's general earning capacity, 79 ALR2d 275.

Exclusion from courtroom of expert witnesses during taking or testimony in civil case, 85 ALR2d 478.

Propriety and effect of instructions in civil case on the weight or reliability of medical expert testimony, 86 ALR2d 1038.

Right to elicit expert testimony from adverse party called as witness, 88 ALR2d 1186.

Expert or opinion evidence as to speed based on appearance or condition of motor vehicle after accident, 93 ALR2d 287.

Trial court's appointment, in civil case, of expert witness, 95 ALR2d 390.

Expert testimony as to modus operandi

of criminals with respect to particular types of crimes, 100 ALR2d 1433.

Person performing services as competent to testify as to their value, 5 ALR3d 947.

Admissibility of expert evidence to decipher illegible document, 11 ALR3d 1015.

Admissibility, in civil case, of expert evidence as to existence or nonexistence, or severity, of pain, 11 ALR3d 1249.

Admissibility, in civil case, of expert or opinion evidence as to proposed witness's inability to testify, 11 ALR3d 1360.

Admissibility of hearsay evidence as to comparable sales of other land as basis for expert's opinion as to land value, 12 ALR3d 1064.

Necessity and admissibility of expert testimony as to credibility of witness, 20 ALR3d 684.

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CHAPTER 8

HEARSAY

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ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For article, "Evidence," see 53 Mercer L. Rev. 281 (2001). For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-8-801. Definitions.

As used in this chapter, the term:

(a) "Statement" means:

(1) An oral or written assertion; or

(2) Nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) "Declarant" means a person who makes a statement.

(c) "Hearsay" means a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) "Hearsay" shall be subject to the following exclusions and conditions:

(1) **Prior statement by witness.**

(A) An out-of-court statement shall not be hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior inconsistent statement or a prior consistent statement under Code Section 24-6-613 or is otherwise admissible under this chapter.

(B) If a hearsay statement is admitted and the declarant does not testify at the trial or hearing, other out-of-court statements of the declarant shall be admissible for the limited use of impeaching or rehabilitating the credibility of the declarant, and not as substantive evidence, if the other statements qualify as prior inconsistent statements or prior consistent statements under Code Section 24-6-613.

(C) A statement shall not be hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person; and

(2) **Admissions by party-opponent.** Admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is:

(A) The party's own statement, in either an individual or representative capacity;

(B) A statement of which the party has manifested an adoption or belief in its truth;

(C) A statement by a person authorized by the party to make a statement concerning the subject;

(D) A statement by the party's agent or employee, but not including any agent of the state in a criminal proceeding, concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy. A conspiracy need not be charged in order to make a statement admissible under this subparagraph.

The contents of the statement shall be considered but shall not alone be sufficient to establish the declarant's authority under subparagraph (C) of this paragraph, the agency or employment relationship and scope thereof under subparagraph (D) of this paragraph, or the existence of the conspiracy and the participation

therein of the declarant and the party against whom the statement is offered under subparagraph (E) of this paragraph.

(e) "Public office" means:

(1) Every state department, agency, board, bureau, commission, division, public corporation, and authority;

(2) Every county, municipal corporation, school district, or other political subdivision of this state;

(3) Every department, agency, board, bureau, commission, authority, or similar body of each such county, municipal corporation, or other political subdivision of this state; and

(4) Every city, county, regional, or other authority established pursuant to the laws of this state.

(f) "Public official" means an elected or appointed official.

(g) "Public record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form and created in the course of the operation of a public office. (Code 1981, § 24-8-801, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Failure to deny averments in pleading as constituting admission, § 9-11-8(d). Definitions that apply to this article; exclusions from hearsay, Fed. R. Evid. 801.

Law reviews. — For article discussing exceptions to the hearsay rule and advocating elimination of the res gestae exception, see 5 Mercer L. Rev. 257 (1954). For article, "Evidence from Computers," see 8 Ga. L. Rev. 562 (1974). For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For article, "The New 'Necessity Exception' to the Hearsay Rule in Georgia: A New Rule of Inclusion?," see 16 Ga. St. U.L. Rev. 573 (2000). For article, "Evidence," see 53 Mercer L. Rev. 281 (2001). For article, "Wills, Trusts & Administration of Estates," see 53 Mercer L. Rev. 499 (2001).

For note, "Lilly v. Virginia: Answering the Williamson Question — Is the Statement Against Penal Interest Exception 'Firmly Rooted' Under Confrontation Clause Analysis?," see 51 Mercer L. Rev. 1343 (2000).

For comment on Brewer v. Henson, 96 Ga. App. 501, 100 S.E.2d 661 (1957), holding that statements made by patient to physician which are not equivalent to spontaneous and voluntary expressions of present pain and suffering are not admissible as evidence, see 21 Ga. B.J. 97 (1958). For comment on Moore v. Atlanta Transit Sys., 105 Ga. App. 70, 123 S.E.2d 693 (1961), see 14 Mercer L. Rev. 445 (1963). For comment as to admissibility of evidence of a criminal conviction in a civil action arising out of the same factual situation, in light of Hurtt v. Stirone, 416 Pa. 493, 206 A.2d 624 (1965), see 16 Mercer L. Rev. 464 (1965). For comment on Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), and Georgia's coconspirator exception to the hearsay rule, see 22 Mercer L. Rev. 791 (1971). For comment on Argonaut Ins. Co. v. Allen, 123 Ga. App. 741, 182 S.E.2d 508 (1971), upholding admission of psychiatric opinion based on subjective declarations of patient, see 8 Ga. St. B.J. 554 (1972). For comment, "24-3-2: Evidence to Explain Conduct and Ascertain Motive Gets Disciplined," see 36 Mercer L. Rev. 733 (1985).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, §§ 2206, 3784, 3790, former Code 1882, §§ 2206, 3771, 3774, 3790, former Civil Code 1895, §§ 3034, 5176, 5189, 5195, former Penal Code 1895, §§ 997, 1002, 1003, former Civil Code 1910, §§ 3606, 5762, 5763, 5766, 5776, 5782, former Penal Code 1910, §§ 1023, 1025, 1028, 1029, former Code 1933, §§ 4-315, 38-302, 38-306, 38-401, 38-403, 38-409, and former O.C.G.A. §§ 10-6-64, 24-3-1, 24-3-2, 24-3-5, 24-3-15, 24-3-31, and 24-3-36 are included in the annotations for this Code section.

Evidence not offered to prove truth of matter asserted. — Challenged testimony was not inadmissible hearsay be-

General Consideration (Cont'd)

cause: (1) neither the identification testimony by the victim, nor a detective regarding the alleged hearsay in obtaining the defendant's name, violated the defendant's rights to confrontation and cross-examination as neither witness actually repeated any alleged hearsay; (2) the evidence did not create a credibility problem that could only be cured by cross-examination, and the state did not offer the evidence to establish the truth of the matter asserted; and (3) the testimony explained why the police included the defendant's photograph in the line-up. Jennings v. State, 285 Ga. App. 774, 648 S.E.2d 105 (2007), cert. denied, No. S07C1576, 2007 Ga. LEXIS 667 (Ga. 2007) (decided under former O.C.G.A. § 24-3-1).

Homeowner countersued a contractor for fraud. Testimony by a subcontractor that the contractor's project supervisor told the subcontractor to increase the bid because the homeowner was "loaded" was not hearsay, because the testimony was not admitted to show the truth of the matters asserted, and the testimony was a circumstance relevant to the fraud claim. Lumpkin v. Deventer N. Am., Inc., 295 Ga. App. 312, 672 S.E.2d 405 (2008) (decided under former O.C.G.A. § 24-3-1).

Locksmith receipt indicating that defendant had a key made for a vehicle was not inadmissible hearsay evidence in the defendant's prosecution for, inter alia, trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1) because the receipt was not offered as proof of what was asserted therein but as evidence that a piece of paper with the defendant's name on it was found in the same residence where cocaine and firearms were located, thereby linking the defendant circumstantially to the residence and the contraband; thus, the receipt was original evidence. Weems v. State, 295 Ga. App. 680, 673 S.E.2d 50 (2009) (decided under former O.C.G.A. § 24-3-1).

As an officer's testimony about a dispatcher's statement that two Hispanic males were involved in a firearm discharge was not offered for the truth of the dispatcher's statement, but to explain the officer's subsequent conduct, the testimony was not hearsay. Herieia v. State, 297 Ga. App. 872, 678 S.E.2d 548 (2009) (decided under former O.C.G.A. § 24-3-1).

Probate court did not abuse the court's discretion by admitting double hearsay from a witness who, when asked what the testator told the witness that the propounder had said about the caveator, responded, "that the caveator had taken his money and went to Florida and was not coming back" because the second level of alleged hearsay, what the propounder said to the testator about the caveator, was not hearsay, since it was not introduced for the truth of the matter asserted but rather for the effect it had on the testator; the caveator's theory of the case was that the statement by the propounder to the testator was not true, and the evidence was introduced to show where the testator got the misinformation. McDaniel v. McDaniel, 288 Ga. 711, 707 S.E.2d 60 (2011) (decided under former O.C.G.A. § 24-3-1).

Prior consistent statement. — Because the veracity of a witness's trial testimony was placed in issue, the witness's prior testimony was properly admitted as a prior consistent statement. Jackson v. State, 271 Ga. App. 278, 609 S.E.2d 207 (2005) (decided under former O.C.G.A. § 24-3-1).

Victim's statement to a doctor was properly admitted as a prior consistent statement as the victim testified at trial and was cross-examined by the defendant; the defendant had asserted in opening statement and the defendant implied during cross-examination that because the victim's parent would have been upset if the parent believed the victim were having consensual sex, the victim falsely testified that the defendant forced the victim to engage in sex, which testimony was designed to preserve the victim's relationship with the parent, and to continue the victim's receipt of food and shelter from the parent. Smith v. State, 282 Ga. App. 339, 638 S.E.2d 791 (2006) (decided under former O.C.G.A. § 24-3-1).

When a victim testified that the victim could not remember all of the details of a robbery, which occurred six years before the trial, it was not error to introduce the

victim's prior consistent statement. The victim was a forgetful witness who testified at trial and who was cross-examined by the defendant. Williams v. State, 291 Ga. App. 279, 661 S.E.2d 658 (2008) (decided under former O.C.G.A. § 24-3-1).

After the victim's mother testified that the defendant admitted to the mother that the defendant molested the victim, the trial court did not err in allowing an investigator to testify that the mother had told the investigator the same thing because the mother testified at trial and was cross-examined, and the defendant placed the mother's veracity in issue during cross-examination by attempting to show that the mother had an improper motive for testifying against the defendant, a motive that developed after the mother made the prior consistent statement to the investigator. Davis v. State, 303 Ga. App. 799, 694 S.E.2d 381 (2010) (decided under former O.C.G.A. § 24-3-1).

Admission of an investigator's summary of a victim's prior consistent statement was not reversible error because the record contained other unchallenged testimony by witnesses other than the victim conveying the content of the victim's prior statement and that the victim's prior statement was consistent with the victim's trial testimony; it was not likely that the subsequent admission of the victim's statement itself contributed to the guilty verdict, and by the time the statement was read, any bolstering effect of the repetitive nature of the prior statement had occurred without objection. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err by admitting prior consistent statements of the victim and the defendant's son in videotaped interviews that also included comments by the interviewer because nothing in the record demonstrated that the portion of the videotape that the trial court ruled would not be presented for the jury was played for the jury, and the defendant's counsel made no objection after the videotape was played. Wade v. State, 305 Ga. App. 382, 700 S.E.2d 827 (2010), cert. denied, U.S. , 131 S. Ct. 3066, 180 L. Ed. 2d 893 (2011) (decided under former O.C.G.A. § 24-3-1).

When testimony considered hearsay. — Testimony is considered hearsay only if the witness is testifying to another party's statement in order to prove or demonstrate the truth of that statement. Otherwise it is a verbal act and thus original evidence rather than hearsay. Hurston v. State, 194 Ga. App. 226, 390 S.E.2d 119 (1990) (decided under former O.C.G.A. § 24-3-1).

Evidence of violent acts committed by the victim against either the defendant or against third parties may be introduced by a criminal defendant claiming justification, and that is so because the key showing must be that the victim was the aggressor in the fatal encounter. State v. Hodges, 291 Ga. 413, 728 S.E.2d 582 (2012) (decided under former O.C.G.A. § 24-3-2).

Failure to preserve issue for appeal. — Defendant's claim that the trial court erred in permitting into evidence three instances of inaccurate and prejudicial hearsay testimony that the defendant was involved in two murders were not properly reviewed on appeal because the defendant did not make any contemporaneous objection to the cited testimony on the basis of hearsay or otherwise. Bailey v. State, 291 Ga. 144, 728 S.E.2d 214 (2012) (decided under former O.C.G.A. § 24-3-5).

Cited in Thompson v. State, 739 S.E.2d 434, No. A12A2000, 2013 Ga. App. LEXIS 141 (2013).

Admissibility

1. In General

Trial court must be vested with considerable discretion in determining admissibility of testimony of collateral matters. Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 164 S.E.2d 318 (1968) (decided under former Code 1933, § 38-302).

Hearsay when admissible derives its competency from necessity of case. Todd v. State, 200 Ga. 582, 37 S.E.2d 779 (1946) (decided under former Code 1933, § 38-302); Price v. Whitley Constr. Co., 91 Ga. App. 257, 85 S.E.2d 528 (1954) (decided under former Code 1933, § 38-302).

Admissibility (Cont'd)
1. In General (Cont'd)

When evidence not admissible. — While hearsay evidence is admissible under some circumstances to show motive, it is not admissible to evidence the truth of the matters contained in the hearsay testimony. Rogers v. State, 224 Ga. 436, 162 S.E.2d 411 (1968) (decided under former Code 1933, § 38-302).

Relevancy. — When, in a legal investigation, conduct and motives of an actor are matters concerning which the truth must be found (i.e., are relevant to issues on trial), then information, conversations, letters, and replies, and similar evidence known to the actor are admissible to explain the actor's conduct; but if conduct and motives of actor are not matters concerning which the truth must be found (i.e., are irrelevant to the issues of trial) then the information, etc., on which the actor acted shall not be admissible under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801). Momon v. State, 249 Ga. 865, 294 S.E.2d 482 (1982) (decided under former O.C.G.A. § 24-3-2); Teague v. State, 252 Ga. 534, 314 S.E.2d 910 (1984) (decided under former O.C.G.A. § 24-3-2); Bryant v. Carver State Bank, 207 Ga. App. 659, 428 S.E.2d 621 (1993) (decided under former O.C.G.A. § 24-3-2); Jackson v. Dunkin' Donuts, Inc., 211 Ga. App. 596, 440 S.E.2d 56 (1994) (decided under former O.C.G.A. § 24-3-2).

Admissibility of evidence under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) is not a determination based only on the evidence's relevancy to explain conduct: the conduct to be explained must itself be a relevant issue in the case. Noles v. State, 172 Ga. App. 228, 322 S.E.2d 910 (1984) (decided under former O.C.G.A. § 24-3-2).

When testimony regarding whether any of the plaintiff's healthcare providers had instructed plaintiff not to work after plaintiff's injuries was offered to explain why plaintiff did not return to work, it was relevant to whether plaintiff's lost income was attributable to plaintiff's injuries, and therefore admissible as original evidence, not hearsay. Harrison v. Jenkins, 235 Ga. App. 665, 510 S.E.2d 345 (1998) (decided under former O.C.G.A. § 24-3-2).

Trial court did not abuse the court's discretion in excluding a letter offered as evidence by the defendant as the appeals court could not see how the defendant's reliance on the letter could have justified or explained the defendant's evasiveness towards an officer lawfully investigating a loud noise complaint at the defendant's residence. Williams v. State, 289 Ga. App. 402, 657 S.E.2d 556 (2008) (decided under former O.C.G.A. § 24-3-2).

Explanation of officer's motive. — Defendant was not entitled to present testimony under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) of an investigating officer, which indicated that an acquaintance of the victim said that the acquaintance was not present at the scene of the crime but that a third person told the acquaintance what happened, to explain the officer's conduct and motives with regard to the officer's lack of further investigation into potentially exculpatory evidence as the motives of the officer were not relevant to any issue in the defendant's prosecution for felony murder based on arson in the first degree. Vega v. State, 285 Ga. 32, 673 S.E.2d 223 (2009) (decided under former O.C.G.A. § 24-3-2).

What would otherwise be hearsay testimony was properly elicited by the state to explain a narcotics investigator's conduct and to ascertain the investigator's motives because the defendant was challenging the motives of the narcotics investigator and arguing that the investigator was not acting in good faith as part of defendant's entrapment defense. Martinez v. State, 303 Ga. App. 166, 692 S.E.2d 766 (2010) (decided under former O.C.G.A. § 24-3-2).

Testimony admissible to explain conduct. See Athena Prods., Ltd. v. Geographics, Inc., 168 Ga. App. 828, 310 S.E.2d 547 (1983) (decided under former O.C.G.A. § 24-3-2); Thomas v. State, 169 Ga. App. 119, 312 S.E.2d 373 (1983) (decided under former O.C.G.A. § 24-3-2).

In a sexual molestation case, testimony that the victim's grandmother had learned in the past that the victim's aunt

had been sexually molested was not hearsay since the testimony was not used to establish the truth of the matter asserted, that the aunt had been sexually molested, but was offered to show that the grandmother had a history of tolerating the sexual abuse of young children. Walker v. State, 308 Ga. App. 176, 707 S.E.2d 122 (2011) (decided under former O.C.G.A. § 24-3-2).

Testimony admitted for limited purpose of explaining witness's conduct. — See Davis v. State, 168 Ga. App. 272, 308 S.E.2d 602 (1983) (decided under former O.C.G.A. § 24-3-2); Hampton v. State, 272 Ga. 284, 527 S.E.2d 872 (2000) (decided under former O.C.G.A. § 24-3-2).

Fact that a statement may be properly admitted under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) does not overcome other objections such as impermissibly placing character in evidence. Echols v. State, 174 Ga. App. 829, 331 S.E.2d 619 (1985) (decided under former O.C.G.A. § 24-3-2).

Admission of cumulative hearsay testimony is not harmful error. — Although certain portions of a police officer's testimony were erroneously admitted as being within the purview of former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801), when the hearsay testimony is merely cumulative, the admission of the testimony does not constitute harmful error requiring the reversal of the defendant's convictions. Simmons v. State, 174 Ga. App. 906, 331 S.E.2d 923 (1985) (decided under former O.C.G.A. § 24-3-2).

Trial court did not abuse its discretion in allowing a witness to testify about the victim's statement regarding threats the victim received a few days before the shooting as the requirements of the necessity exception to the hearsay rule were met; the victim was deceased and unavailable to testify, the witness testified that the victim and the witness were friends, and the defendant identified no alternative source of the information revealed in the statement. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661 (2012) (decided under former O.C.G.A. § 24-3-1).

2. Original Evidence

Proof of statements that are merely part of surrounding circumstances of an occurrence, not offered to prove the fact asserted in the statement, is original evidence, not an exception to hearsay. Atlanta Gas Light Co. v. Slaton, 117 Ga. App. 317, 160 S.E.2d 414 (1968) (decided under former Code 1933, § 38-302).

Because the circumstances of the defendant's arrest would have been virtually inexplicable without the investigating officer's testimony regarding the arrest, and the officer's testimony concerned narcotics activity in the area and not the defendant's role in the activity, admission of the testimony was not erroneous, and if any error resulted by the trial court's admission, it was highly improbable that the error contributed to the verdict. Fortson v. State, 283 Ga. App. 120, 640 S.E.2d 693 (2006) (decided under former O.C.G.A. § 24-3-2).

When evidence is part of res gestae and admissible as original evidence to fix the locus or explain the conduct of parties in reference to an occurrence under investigation it should not be excluded under the hearsay rule. Ellis v. Southern Ry., 96 Ga. App. 687, 101 S.E.2d 230 (1957) (decided under former Code 1933, § 38-302).

Evidence of a victim's statement to the police, although not properly admitted as a prior inconsistent statement due to the failure to lay a proper foundation under former O.C.G.A. § 24-9-83 (see now O.C.G.A. § 24-6-613), was properly admitted as part of the res gestae under former O.C.G.A. § 24-3-3 (see now O.C.G.A. § 24-8-803) because the victim's description of a distinctive jacket worn by one of the individuals who took a pickup truck was used by the police to search the defendant's residence; because the statement was used to explain the police's conduct, it could also be admitted as original evidence under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801). Stubbs v. State, 293 Ga. App. 692, 667 S.E.2d 905 (2008) (decided under former O.C.G.A. § 24-3-2).

Testimony as to identification. — Testimony by police officer that another officer in the officer's unit knew defendant by a nickname was not hearsay but was original evidence explaining the circumstances that led to an undercover opera-

Admissibility (Cont'd)
2. Original Evidence (Cont'd)

tion involving defendant. Kendrick v. State, 224 Ga. App. 72, 479 S.E.2d 464 (1996) (decided under former O.C.G.A. § 24-3-2).

Method of proving general reputation, reputed ownership, public rumor, general notoriety, and the like is by testimony of known facts which becomes original evidence and is not hearsay. Caldwell v. Gregory, 120 Ga. App. 536, 171 S.E.2d 571 (1969) (decided under former Code 1933, § 38-302).

For purpose of identifying location of time or as explanatory of conduct, hearsay is admissible. Ellis v. Southern Ry., 96 Ga. App. 687, 101 S.E.2d 230 (1957) (decided under former Code 1933, § 38-302).

Conduct of investigating officers. — In a trial for keeping a place of prostitution, in violation of O.C.G.A. § 16-6-10, a search warrant affidavit, which contained hearsay statements from a neighborhood group purportedly linking defendant's residence to prostitution, was not admissible as original evidence to explain to the jury why the officers were investigating defendant's residence. Smoot v. State, 316 Ga. App. 102, 729 S.E.2d 416 (2012) (decided under former O.C.G.A. § 24-3-2).

3. Self-Serving Declarations

Taint of self-serving declarations not removed by former statute. — Former statute provided for the admissibility of certain types of hearsay evidence, in certain situations, and did not remove the taint of self-serving declarations. Smith v. State, 144 Ga. App. 294, 241 S.E.2d 14 (1977) (decided under former Code 1933, § 38-302).

Self-serving declarations are admissible if part of conversation. — Hearsay rule as to self-serving declarations does not apply when: (1) made in the presence of the opposite party; or (2) the declaration are part of a conversation of which some other part has already been permitted in evidence. Rozier v. State, 124 Ga. App. 481, 184 S.E.2d 203 (1971) (decided under former Code 1933, § 38-302).

Inadmissible self-serving declarations. — Self-serving declarations, when made by the accused either before or after the time of the commission of the alleged offense, are not admissible. Phipps v. State, 203 Ga. App. 128, 416 S.E.2d 319, cert. denied, 203 Ga. App. 907, 416 S.E.2d 319 (1992) (decided under former O.C.G.A. § 24-3-2).

Unsupported assertions of defendant utilizing justification defense. — Court of appeals erred in reversing the trial court's order refusing to allow the defendant to testify about a previous incident of violence the victim allegedly committed against third parties in support of a justification defense under O.C.G.A. § 16-3-21(a) because the defendant sought to introduce alleged evidence in the form of unsupported assertions by the defendant as to what was in the defendant's mind at the time the defendant killed the victim. State v. Hodges, 291 Ga. 413, 728 S.E.2d 582 (2012) (decided under former O.C.G.A. § 24-3-2).

4. Evidentiary Value

Evidentiary value of testimony admitted depends not on the credibility of the out-of-court declarant, but on the credibility of the witness on the stand who is reporting the statement for the purpose of explaining the witness's conduct and who is under oath, subject to full cross-examination, and present for the jury to observe the witness's demeanor while testifying in regard to the statement. Harrell v. State, 241 Ga. 181, 243 S.E.2d 890 (1978) (decided under former Code 1933, § 38-302).

Investigator's testimony not original evidence of alibi. — Investigator's testimony that defendant gave a purported alibi was not original evidence as to the fact of alibi and insofar as the testimony established the fact of alibi, the evidence did not derive any value from the witness, but derived value solely on the veracity and competency of the defendant who never testified. Therefore, although such evidence was not hearsay, it nevertheless did not qualify as even "slight" evidence of an affirmative defense so as to require a charge on alibi. Hartley v. State, 207 Ga. App. 683, 428 S.E.2d 683 (1993)

(decided under former O.C.G.A. § 24-3-2).

Unredacted recording of a telephone conversation. — Trial court committed harmful error when the court prevented the defendant from playing to the jury an unredacted recording of a phone conversation between a witness and a friend because the witness was essentially acting as an informant, or at least an agent of police investigators, at the time of the phone conversation, and thus, the witness's recorded statements were admissible as original evidence pursuant to former O.C.G.A. § 24-3-2; the exclusion of the evidence was not harmless because there was no physical evidence tying the defendant to the crime or the murder weapon. Redinburg v. State, 315 Ga. App. 413, 727 S.E.2d 201 (2012) (decided under former O.C.G.A. § 24-3-2).

Admissions and Confessions

1. Admissions and Confessions Distinguished

a. In General

No clear dividing line. — Admissions may be of such character as to render it difficult to say whether the admissions amount to confessions or to mere incriminating statements. The dividing line is not always clear, though the legal distinction is apparent. Covington v. State, 79 Ga. 687, 7 S.E. 153 (1887) (decided under former Code 1882, § 3783); Weaver v. State, 135 Ga. 317, 69 S.E. 488 (1910) (decided under former Penal Code 1895, § 1002).

Terms "admissions" and "confessions" are interchangeable and the probative value of a declaration that the defendant did the main fact charged is the same whether called a confession or an admission. Lumpkin v. American Sur. Co., 69 Ga. App. 887, 27 S.E.2d 412 (1943) (decided under former Code 1933, § 38-401).

Inference of guilt. — A confession is direct evidence of guilt, while an admission is circumstantial evidence from which guilt can be inferred. Riley v. State, 1 Ga. App. 651, 57 S.E. 1031 (1907) (decided under former Penal Code 1895, § 1002); Thomas v. State, 18 Ga. App. 101, 88 S.E. 917 (1916) (decided under former Penal Code 1910, § 1028); Kinard v. State, 19 Ga. App. 624, 91 S.E. 941 (1917) (decided under former Penal Code 1910, § 1028); Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870 (1972) (decided under former Code 1933, § 38-401).

Effect of admission of main fact. — An admission of the main fact, from which the essential elements of the criminal act may be inferred, amounts to an admission of the crime itself. Powers v. State, 172 Ga. 1, 157 S.E. 195 (1931) (decided under former Penal Code 1910, § 1028); Secrist v. State, 145 Ga. App. 391, 243 S.E.2d 599, cert. dismissed, 242 Ga. 69, 248 S.E.2d 157 (1978) (decided under former Code 1933, § 38-401).

If a person only admits certain facts from which the jury may or may not infer guilt, there is no confession. Chappell v. State, 71 Ga. App. 147, 30 S.E.2d 289 (1944) (decided under former Code 1933, § 38-401); Braswell v. State, 87 Ga. App. 430, 74 S.E.2d 106 (1953) (decided under former Code 1933, § 38-401).

b. Admissions

An admission in the law of evidence is a statement by a party of the existence of a fact which is relevant to the cause of the party's adversary. Brooks v. Sessoms, 47 Ga. App. 554, 171 S.E. 222 (1933) (decided under former Code 1933, § 38-401).

An admission, as applied to a criminal case, is the statement by the defendant of a fact or facts pertinent to the issues, and tending, in connection with proof of other facts or circumstances, to prove the guilt of the accused, but which is of itself insufficient to authorize conviction. Ranson v. State, 2 Ga. App. 826, 59 S.E. 101 (1907) (decided under former Penal Code 1895, § 1002); Easterling v. State, 24 Ga. App. 424, 100 S.E. 727 (1919) (decided under former Penal Code 1910, § 1028); Morris v. State, 176 Ga. 243, 167 S.E. 509 (1933) (decided under former Code 1933, § 38-401); Teague v. State, 48 Ga. App. 225, 172 S.E. 571 (1934) (decided under former Code 1933, § 38-401); Roberts v. State, 59 Ga. App. 192, 200 S.E. 233 (1938) (decided under former Code 1933, § 38-401); Timbs v.

Admissions and Confessions (Cont'd)
1. Admissions and Confessions Distinguished (Cont'd)
b. Admissions (Cont'd)

State, 71 Ga. App. 141, 30 S.E.2d 290 (1944) (decided under former Code 1933, § 38-401); Braswell v. State, 87 Ga. App. 430, 74 S.E.2d 106 (1953) (decided under former Code 1933, § 38-401); Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870 (1972) (decided under former Code 1933, § 38-401); Pendergrass v. State, 245 Ga. 626, 266 S.E.2d 225 (1980) (decided under former Code 1933, § 38-401).

An admission is to be scanned with care, but it is evidence which, with other evidence, may and often does justify a conviction. Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870 (1972) (decided under former Code 1933, § 38-401).

An admission of a fact not in itself involving criminal intent is not a confession. Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868 (1954) (decided under former Code 1933, § 38-401).

c. Confessions

Confession defined. — A confession is a voluntary statement made by a person charged with the commission of a crime, wherein the person acknowledges personally to be guilty of the offense charged. Owens v. State, 120 Ga. 296, 48 S.E. 21 (1904) (decided under former Penal Code 1895, § 1002); Ranson v. State, 2 Ga. App. 826, 59 S.E. 101 (1907) (decided under former Penal Code 1895, § 1002); Reed v. State, 15 Ga. App. 435, 83 S.E. 674 (1914) (decided under former Penal Code 1910, § 1028); Easterling v. State, 24 Ga. App. 424, 100 S.E. 727 (1919) (decided under former Penal Code 1910, § 1028); Teague v. State, 48 Ga. App. 225, 172 S.E. 571 (1934) (decided under former Code 1933, § 38-401); Grubbs v. State, 53 Ga. App. 377, 186 S.E. 140 (1936) (decided under former Code 1933, § 38-401); Braswell v. State, 87 Ga. App. 430, 74 S.E.2d 106 (1953) (decided under former Code 1933, § 38-401); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868 (1954) (decided under former Code 1933, § 38-401); Reece v. State, 212 Ga. 609, 94 S.E.2d 723 (1956) (decided under former Code 1933, § 38-401); Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870 (1972) (decided under former Code 1933, § 38-401).

Confession is rather a fact to be proved by evidence, than evidence to prove a fact. Powers v. State, 172 Ga. 1, 157 S.E. 195 (1931) (decided under former Penal Code 1910, § 1028).

Waiver of technical proof. — Confession is not so much proof that a particular thing took place as it is a waiver by the party charged of the party's right to have certain facts alleged against that party technically proven. Powers v. State, 172 Ga. 1, 157 S.E. 195 (1931) (decided under former Penal Code 1910, § 1028).

Entire criminal act must be confessed to find a confession. Owens v. State, 120 Ga. 296, 48 S.E. 21 (1904) (decided under former Penal Code 1895, § 1002); Goolsby v. State, 133 Ga. 427, 66 S.E. 159 (1909) (decided under former Penal Code 1895, § 1002); Hart v. State, 14 Ga. App. 714, 82 S.E. 164 (1914) (decided under former Penal Code 1910, § 1028); Neal v. State, 24 Ga. App. 148, 100 S.E. 12 (1919), cert. denied, 24 Ga. App. 817 (1920) (decided under former Penal Code 1910, § 1028); Powers v. State, 172 Ga. 1, 157 S.E. 195 (1931) (decided under former Penal Code 1910, § 1028); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868 (1954) (decided under former Code 1933, § 38-401).

True determinant of whether the defendant has made a confession or merely has given a statement is whether the statement is offered by the accused as exculpatory or inculpatory. Kennedy v. State, 156 Ga. App. 792, 275 S.E.2d 339 (1980) (decided under former Code 1933, § 38-401); Wells v. State, 247 Ga. 792, 279 S.E.2d 213 (1981) (decided under former Code 1933, § 38-401).

Justification not confession. — Statement which admits the commission of an act, but which also gives legal excuse or justification, is not a confession. Owens v. State, 120 Ga. 296, 48 S.E. 21 (1904) (decided under former Penal Code 1895, § 1002); Reed v. State, 15 Ga. App. 435, 83 S.E. 674 (1914) (decided under former Penal Code 1910, § 1028); Powers v. State, 172 Ga. 1, 157 S.E. 195 (1931) (decided under former Penal Code 1910,

§ 1028); Logue v. State, 149 Ga. App. 797, 256 S.E.2d 31 (1979) (decided under former Code 1933, § 38-401); Kennedy v. State, 156 Ga. App. 792, 275 S.E.2d 339 (1980) (decided under former Code 1933, § 38-401); Wells v. State, 247 Ga. 792, 279 S.E.2d 213 (1981) (decided under former O.C.G.A. § 24-3-15).

Incriminating statements distinguished. — There is a difference between an incriminating statement and a confession of guilt, since in the former only one or more facts entering into the criminal act is admitted, while in the latter the entire criminal act is confessed. Owens v. State, 120 Ga. 296, 48 S.E. 21 (1904) (decided under former Penal Code 1895, § 1002); Goolsby v. State, 133 Ga. 427, 66 S.E. 159 (1909) (decided under former Penal Code 1895, § 1002); Powers v. State, 172 Ga. 1, 157 S.E. 195 (1931) (decided under former Penal Code 1910, § 1028); Cumberlander v. State, 53 Ga. App. 276, 185 S.E. 379 (1936) (decided under former Code 1933, § 38-401); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868 (1954) (decided under former Code 1933, § 38-401); Logue v. State, 149 Ga. App. 797, 256 S.E.2d 31 (1979) (decided under former Code 1933, § 38-401).

Testimony of arresting officer as to statements made to the officer by a cab driver, in the presence of the accused, regarding the activities of the accused, while a passenger during the night after the crime was committed, was hearsay, not being original evidence, nor an exception to the hearsay rule. Rosborough v. State, 209 Ga. 362, 72 S.E.2d 717 (1952) (decided under former Code 1933, § 38-302).

d. Guilty Pleas

Confessions distinguished. — Plea of guilty differs from a full and voluntary confession in that while the latter is merely evidence of guilt, the former is a formal confession before the court on which judgment may be rendered. Lumpkin v. American Sur. Co., 69 Ga. App. 887, 27 S.E.2d 412 (1943) (decided under former Code 1933, § 38-401).

Use in civil actions. — Plea of guilty in a federal court is competent as an admission in a civil action in a state court. Lumpkin v. American Sur. Co., 69 Ga. App. 887, 27 S.E.2d 412 (1943) (decided under former Code 1933, § 38-401).

When a civil action was instituted for damages on the grounds of negligence for the violation of penal ordinances or statutes, and the defendant had previously confessed or pleaded guilty to the violation of such penal statutes whether it was in or out of court, these confessions were competent evidence as admissions against the defendant in the civil action with reference to the same transaction; and on cross-examination it was competent for the opposite party to inquire of the defendant if the defendant made such confessions. Because the defendant admitted in the civil action having made such confessions, it was unnecessary to produce an authenticated copy of the proceedings in the criminal case and such admissions were considered in determining the civil action. Roper v. Scott, 77 Ga. App. 120, 48 S.E.2d 118 (1948) (decided under former Code 1933, § 38-401).

e. Instructions

Failure to charge on a confession, in the absence of a request, is no cause for a new trial. Wilson v. State, 74 Ga. App. 42, 38 S.E.2d 750 (1946) (decided under former Code 1933, § 38-401).

Reversible error. — If a defendant has made only incriminating statements and not a confession, it is reversible error to charge the law of confession. Logue v. State, 149 Ga. App. 797, 256 S.E.2d 31 (1979) (decided under former Code 1933, § 38-401).

Proper instruction. — Charge that "admissions usually refer to civil cases and confessions to criminal cases, all admissions should be scanned with care, and confessions of guilt received with great caution," was not confusing and misleading to the jury and unsound as an abstract principle of law. Reece v. State, 212 Ga. 609, 94 S.E.2d 723 (1956) (decided under former Code 1933, § 38-401).

Evidence sufficient to authorize instructions on law of confessions in the following cases. — See Harris v. State, 207 Ga. 287, 61 S.E.2d 135 (1950) (decided under former Code 1933, § 38-401); Patrick v. State, 209 Ga. 645,

Admissions and Confessions (Cont'd)
1. Admissions and Confessions Distinguished (Cont'd)
e. Instructions (Cont'd)

74 S.E.2d 848 (1953) (decided under former Code 1933, § 38-401); Reece v. State, 212 Ga. 609, 94 S.E.2d 723 (1956) (decided under former Code 1933, § 38-401); Kennedy v. State, 156 Ga. App. 792, 275 S.E.2d 339 (1980) (decided under former Code 1933, § 38-401).

Evidence sufficient to authorize instructions on law of admissions in the following case. — See Morris v. State, 176 Ga. 243, 167 S.E. 509 (1933) (decided under former Code 1933, § 38-401).

Evidence insufficient to authorize instructions in the following cases. — See Reed v. State, 15 Ga. App. 435, 83 S.E. 674 (1914) (decided under former Penal Code 1910, § 1028); Chappell v. State, 71 Ga. App. 147, 30 S.E.2d 289 (1944) (decided under former Code 1933, § 38-401); Braswell v. State, 87 Ga. App. 430, 74 S.E.2d 106 (1953) (decided under former Code 1933, § 38-401).

2. Admissions of Parties to Record

a. In General

Nature of evidence. — Admissions by parties as to a matter relevant to the case on trial are not to be regarded as inferior evidence, but when satisfactorily proven they constitute grounds of belief on which the mind justly reposes with strong confidence. Mayo v. Owen, 208 Ga. 483, 67 S.E.2d 709 (1951) (decided under former Code 1933, § 38-403).

Admission in judicio. — Claimant's admissions in judicio against the claimant's own interests were binding upon the claimant since a solemn admission in judicio is conclusive as a matter of law on the matter stated and cannot be contradicted by other evidence unless it is withdrawn or amended on formal motion. Piedmont Aviation, Inc. v. Washington, 181 Ga. App. 730, 353 S.E.2d 847 (1987) (decided under former O.C.G.A. § 24-3-31).

Admissions in judicio as to matters of fact against one party's interest are binding on another party when the interests of the two are joint but not when their interests are adverse. Batchelor v. State Farm Mut. Auto. Ins. Co., 240 Ga. App. 366, 526 S.E.2d 68 (1999) (decided under former O.C.G.A. § 24-3-31).

Personal knowledge not required. — To be admissible in evidence, admissions do not necessarily have to be founded on the personal knowledge of the party making the admissions. Brooks v. Sessoms, 47 Ga. App. 554, 171 S.E. 222 (1933) (decided under former Code 1933, § 38-403).

Admissions do not come in, on the ground that the party making the admissions is speaking from the party's personal knowledge, but upon the ground that a party will not make admissions against oneself unless the admissions are true; the fact that the party makes the admissions against the party's interest can be reasonably explained only on the supposition that the party is constrained to do so by the force of the evidence. Mayo v. Owen, 208 Ga. 483, 67 S.E.2d 709 (1951) (decided under former Code 1933, § 38-403).

Prior admissions of a party to an action may be offered in evidence although not against interest when made and, if believed by the jury, may be considered as substantive evidence of the fact sought to be proved. W.T. Harvey Lumber Co. v. J.M. Wells Lumber Co., 104 Ga. App. 498, 122 S.E.2d 143 (1961) (decided under former Code 1933, § 38-403).

Introduction of admissions contained in a stricken plea. — Such admissions when thus made are to be taken as true, because the admissions are asserted by the party personally; and while the party may withdraw the admissions formally from the pleadings, the party cannot by a mere withdrawal avoid the effect of the admissions since the admissions may still be used as evidence against the party. Stallings v. Britt, 204 Ga. 250, 49 S.E.2d 517 (1948) (decided under former Code 1933, § 38-403).

While one may withdraw admissions formally from the pleadings, one cannot by a mere withdrawal avoid the effect of the admissions made as the admissions remain admissible into evidence. Richmond County v. Sibert, 218 Ga. 209, 126

S.E.2d 761 (1962) (decided under former Code 1933, § 38-403).

Estimates. — An admission in the testimony of a party is not, as a matter of law, to be taken as conclusively true, when the admission is in the nature of an estimate or guess; in such case it may be overcome by evidence of the facts and circumstances which form the basis of the admission. Hansberger Motor Transp. Co. v. Pate, 51 Ga. App. 877, 181 S.E. 796 (1935) (decided under former Code 1933, § 38-403).

Charge by court. — Court is not required to charge on the effect of admissions without a special request to that effect. Hawkins v. Kermode, 85 Ga. 116, 11 S.E. 560 (1890) (decided under former Code 1882, § 3784); Wrightsville & Tennille R.R. v. Lattimore, 118 Ga. 581, 45 S.E. 453 (1903) (decided under former Civil Code 1895, § 5189).

b. Parties

Joint parties. — Admissions of one of two or more parties to the record are not admissible to bind the others, until a joint interest is proven by other testimony. Boswell v. Blackman, 12 Ga. 591 (1853) (decided under former law); Kirk v. Barnes, 147 Ga. App. 423, 249 S.E.2d 140 (1978) (decided under former Code 1933, § 38-403).

Because no joint interest existed between an LLC and its sole managing member, but instead the evidence showed that the two had separate and distinct positions in a lawsuit, the interest of both were not so joint and coextensive so as to justify treating the judicial admissions of the LLC as binding on the managing member. Milk v. Total Pay & HR Solutions, Inc., 280 Ga. App. 449, 634 S.E.2d 208 (2006) (decided under former O.C.G.A. § 24-3-31).

Rapist's admission to entering an apartment building through a broken gate was admissible evidence that could be used against the rapist's codefendants, a landlord and a security company, in the victim's premises liability action against the landlord and security company. The admission could be used to establish the rapist's conduct even though the conduct could not be imputed to the landlord and security company. Walker v. Aderhold Props., 303 Ga. App. 710, 694 S.E.2d 119 (2010) (decided under former O.C.G.A. § 24-3-31).

When the personal representative of a deceased person is a substantial party to a suit, the testimony of a witness as to statements made by the deceased to the witness, concerning the vital issue in the cause, adverse to the contention of such personal representative, when offered by the opposite party, the witness not being incompetent to testify, is admissible in evidence as admissions. Ferrell v. Wight, 187 Ga. 360, 200 S.E. 271 (1938) (decided under former Code 1933, § 38-403); Fuller v. Fuller, 107 Ga. App. 429, 130 S.E.2d 520 (1963) (decided under former Code 1933, § 38-403).

Wills. — Admission of an executor before qualification, or of a legatee, unless the sole legatee, shall not be admissible in evidence to impeach the will. To this general rule there is an exception: if the admission be in reference to the conduct or the acts of the executor or legatee personally as to some matter relevant to the issue on trial, the same will be admitted to impeach the will, although made by the executor before qualification, or by a legatee who is not the sole legatee. Brown v. Kendrick, 163 Ga. 149, 135 S.E. 721 (1926) (decided under former Civil Code 1910, § 5776).

Admissions of nominal defendant as error. — Although the reception in evidence of the admissions of a nominal defendant was error, in view of former Civil Code 1910, §§ 5776 and 6083 (see O.C.G.A. §§ 5-5-22 and 24-8-801), it will not work the grant of a new trial, since the judge below, in the exercise of the judge's discretion, refused to grant a new trial on this ground. Jenkins v. Lane, 154 Ga. 454, 115 S.E. 126 (1922) (decided under former Civil Code 1910, § 5776).

When admission by person not party to action is admissible. — Rule, as to parties to a suit is that a plea of guilty may be shown as an admission against interest; admissions by persons not a party to an action, however, are admissible in evidence only when the party making the admission is the real party in interest, although not a party to the record, or when a party to the record

Admissions and Confessions (Cont'd)
2. Admissions of Parties to Record (Cont'd)
b. Parties (Cont'd)

refers another to such third party for information, or when there is an admission by a third person against that person's interest as to a fact collateral to the main issue between the litigants but essential to the adjudication of the cause. Cobb v. Garner, 158 Ga. App. 110, 279 S.E.2d 280 (1981) (decided under former Code 1933, § 38-403).

c. Defendants in Execution in Claim Cases

Term "litigation," as employed in statute, is not confined merely to the determination of a possible issue which may arise after levy, between the plaintiff in fi. fa. and some possible claimant, but the term includes also the previous suit in which the fi. fa. had its origin. Smith v. Johnson, 13 Ga. App. 837, 80 S.E. 1051 (1913) (decided under former Civil Code 1910, § 5776).

Not relevant to competency. — Provision upon the subject of the admissibility of admissions of defendants in fi. fa. in claim cases has no reference to the competency of a defendant in fi. fa. as a witness in the trial of such a case, and would be no authority for excluding one's testimony on objection of the plaintiff in fi. fa. when offered by the claimant. Cornelia Bank v. Taylor, 37 Ga. App. 538, 140 S.E. 901 (1927) (decided under former Civil Code 1910, § 5776).

Admissions before litigation pending. — Admissions of a defendant in execution against the defendant's interest, before the pendency of litigation, are admissible in evidence in favor of either the claimant or the plaintiff in execution. Smith v. Cox, 20 Ga. 240 (1856). See also Horn v. Ross & Leitch, 20 Ga. 210, 65 Am. Dec. 621 (1856) (decided under former law); James v. Taylor, 93 Ga. 275, 20 S.E. 309 (1893) (decided under former Code 1882, § 3784); Rountree v. Gaulden, 128 Ga. 737, 58 S.E. 346 (1907) (decided under former Civil Code 1895, § 5189).

Admission for impeachment purposes. — Extrajudicial statement respecting the title to the property levied on, made by the defendant in fi. fa. in a claim case, is not inadmissible as being an admission, when the statement is offered and admitted in evidence solely for the purpose of impeaching the testimony of such defendant. Nesmith v. Nesmith, 37 Ga. App. 779, 142 S.E. 176 (1928) (decided under former Civil Code 1910, § 5776).

Declarations as to title. — Declarations by a defendant in fi. fa. against the defendant's title to property in the defendant's possession are not admissible in behalf of a claimant, if made after the judgment was obtained or while the litigation was pending and with reference thereto. James v. Taylor, 93 Ga. 275, 20 S.E. 309 (1893) (decided under former Code 1882, § 3784).

Declarations of the defendant in fi. fa. as to the ownership of the property levied on, made after the filing of the suit which resulted in the rendition of the judgment against the defendant, were admissions after the pendency of the litigation, and were excluded by the terms of the former statute. Smith v. Johnson, 13 Ga. App. 837, 80 S.E. 1051 (1913) (decided under former Civil Code 1910, § 5776).

Evidence as to a declaration made by the defendant in fi. fa. after the levy that the property levied on belonged to the claimant and that the defendant in fi. fa. bought the property merely as the claimant's agent, was improperly admitted, since it was a declaration made by the defendant in fi. fa. after the pendency of the litigation. Alford v. Sharber, 41 Ga. App. 707, 154 S.E. 463 (1930) (decided under former Civil Code 1910, § 5776).

Possession. — In the trial of a claim case, declarations of a defendant in execution made after the pendency of litigation and prior to the time of levy, but at a time when the defendant was not in possession of the property levied on, that the defendant owned such property, are not admissible as evidence and of no probative value even if admitted without objection. Nelson v. Brannon, 32 Ga. App. 455, 123 S.E. 735 (1924) (decided under former Civil Code 1910, § 5776); McSwain v. Estroff, 34 Ga. App. 183, 129 S.E. 16 (1925) (decided under former Civil Code 1910, § 5776).

Sale of property. — Declarations of the defendant in fi. fa. made after the suit

was brought which resulted in the judgment the plaintiff was then seeking to enforce, and shortly before that judgment was rendered, to the effect that the defendant had sold the lands in question to the claimant, were not admissible in the latter's favor. Tillman v. Fontaine, 98 Ga. 672, 27 S.E. 149 (1896) (decided under former Civil Code 1895, § 5189).

Recital in deed as to payment of purchase money. — While, in a deed from defendant in fi. fa. to claimant, the receipt or recital of the payment of purchase money may be evidence of payment, when the deed was made before the suit in which the judgment was obtained, was commenced, yet it is but prima facie evidence, and a charge that it is not evidence will not necessitate the grant of a new trial, if the other facts of the case required the verdict as found. Bonner v. Metcalf, 58 Ga. 236 (1877) (decided under former Code 1873, § 3784).

d. Examples

Tax digest as evidence. — In a claim case, the tax digest, showing the returns of the defendant in execution before the pendency of litigation, is admissible in evidence as an admission of the defendant. It is competent also to show that the claimant did not make any return of property for taxation during the year in which the judgment was rendered. McLendon v. Dunlap Hdwe. Co., 3 Ga. App. 206, 59 S.E. 718 (1907) (decided under former Civil Code 1895, § 5189).

Letters as evidence. — Letters written by the defendant in execution during the year in which the judgment was rendered, both before and after its date, to an overseer, giving directions as to the cultivation of the crop subsequently under levy and as to the management of the farm during that year, and relating to other like matters, were admissible in evidence for the plaintiff as acts of the defendant tending to show possession and control by the defendant. Tillman v. Fontaine, 98 Ga. 672, 27 S.E. 149 (1896) (decided under former Civil Code 1895, § 5189). See also Mixon v. Lacey, 26 Ga. App. 542, 107 S.E. 259 (1921) (decided under former Civil Code 1910, § 5776).

In an action by a customer who ate a muffin, which allegedly contained an industrial staple, against the franchisor of the restaurant and the company which allegedly manufactured the muffin mix, a letter from the franchisee's insurer to the customer's attorney, in which the attorney identified the alleged manufacturer of the muffin mix, was inadmissible hearsay as the franchisee's insurer was neither a party nor a privy of a party. Jackson v. Dunkin' Donuts, Inc., 211 Ga. App. 596, 440 S.E.2d 56 (1994) (decided under former O.C.G.A. § 24-3-31).

Telephone messages. — As telephone messages made following conversations between a party opponent and a testifying witness noted the contents of a conversation, not an act, transaction, occurrence, or event, the business records exception to the hearsay rule was inapplicable; for the contents of the party's telephone conversations to be admissible, the party would have to be given the opportunity to cross-examine the employees to whom the witness spoke with in regard to the potential for misrepresenting the statements. Bailey v. Edmundson, 280 Ga. 528, 630 S.E.2d 396 (2006) (decided under former O.C.G.A. § 24-3-31).

Recorded telephone conversations with an informant. — There was circumstantial evidence that a defendant was the participant in recorded phone conversations with an informant; therefore the conversations were admissible as admissions of a party opponent under former O.C.G.A. § 24-3-31, and the entirety of the calls were admissible under former O.C.G.A. § 24-3-38 (see now O.C.G.A. § 24-8-822). Kimble v. State, 301 Ga. App. 237, 687 S.E.2d 242 (2009) (decided under former O.C.G.A. § 24-3-31).

Admission of liability. — Upon the trial of a suit in which the plaintiff alleged that the plaintiff suffered personal injuries as a result of the negligent operation by the defendant of an automobile in which the plaintiff was traveling, which caused a collision between plaintiff's vehicle and another automobile, a statement afterwards made by the defendant to the plaintiff that the defendant wanted the plaintiff to have all the treatment and attention necessary and would pay for

Admissions and Confessions (Cont'd)
2. Admissions of Parties to Record (Cont'd)
d. Examples (Cont'd)

such, and would probably pay something extra to the plaintiff on account of the plaintiff's suffering, was relevant and admissible as tending to show admission of liability. Rentz v. Collins, 51 Ga. App. 782, 181 S.E. 678 (1935) (decided under former Code 1933, § 38-403).

Statements against interest. — Plaintiff's statement to the police officer at the scene of an accident that the plaintiff did not see the truck before the collision was admissible as a statement against interest. Cleveland v. Bryant, 236 Ga. App. 459, 512 S.E.2d 360 (1999) (decided under former O.C.G.A. § 24-3-31).

Because the injured party admitted, after the fact, to the coworker that the injured party did not place the hot coffee, that later spilled on the injured party's lap, on the floor because the injured party did not want anything to get on the coworker's new car, the statement was admissible under former O.C.G.A. § 24-3-31 as a party's admission. Bernath v. People Success, Inc., 274 Ga. App. 880, 619 S.E.2d 378 (2005) (decided under former O.C.G.A. § 24-3-31).

Undercover detective's testimony regarding a conversation the detective overheard between a defendant and a confidential informant (CI) as to a drug transaction was not inadmissible hearsay as the detective could identify both parties to the conversation and the statement by the defendant fell within the hearsay exception for a statement against interest. Escobar v. State, 296 Ga. App. 898, 676 S.E.2d 291 (2009) (decided under former O.C.G.A. § 24-3-31).

Trial court did not err in admitting the testimony of the defendant's mother that the defendant told the mother approximately two hours after the murder that the defendant would re-enlist in the army rather than killing people for free because the defendant's statement was readily admissible as an admission by a party under former O.C.G.A. § 24-3-31. Dukes v. State, 290 Ga. 486, 722 S.E.2d 701 (2012) (decided under former O.C.G.A. § 24-3-31).

Admissions against penal interest. — In a prosecution for burglary, evidence of defendant's admission that defendant had broken into a house on another occasion was admissible as an admission by defendant against the defendant's penal interest. Howard v. State, 227 Ga. App. 5, 488 S.E.2d 489 (1997) (decided under former O.C.G.A. § 24-3-31).

Defendant's adoption of statements in a probation officer's disciplinary reports that defendant violated Diversion Center rules was sufficient to render the documents competent proof of the facts recited as an admission against interest by a party. Kendrick v. State, 240 Ga. App. 530, 523 S.E.2d 414 (1999) (decided under former O.C.G.A. § 24-3-31).

Insurance. — Admissions against interest are such even though the admissions may contain a suggestion that the party making the admissions carry insurance, and the mere fact that insurance, or an insurance company, is mentioned as an inextricable part of the statement made by such party or conversation in which the party indulged, does not make the evidence inadmissible when offered by the opposite party, as the party making such statement has only the party to blame in referring to insurance, or to the insurance company, in making the admission against one's interest. Wade v. Drinkard, 76 Ga. App. 159, 45 S.E.2d 231 (1947) (decided under former Code 1933, § 38-403).

Admissions as to gift. — Evidence of admissions by the defendant as to gift of certain property, which was involved in controversy, to the defendant's children and grandchildren, was admissible. Poullain v. Poullain, 76 Ga. 420, 4 S.E. 92 (1886) (decided under former Code 1882, § 3784).

Statements by a property owner against the owner's interest as to the location of a line in dispute are admissible in evidence. Seaboard Air Line R.R. v. Taylor, 214 Ga. 212, 104 S.E.2d 106 (1958) (decided under former Code 1933, § 38-403).

Statement as to ownership of a colt. — Horse trainer's offered testimony that another trainer spoke with possessors of a colt, who admitted that the colt belonged

to the trainer, was a hearsay statement that was admissible under former O.C.G.A. § 24-3-31 as an admission of a party-opponent in the trainer's claim to possession and ownership of the colt; accordingly, a question of fact was raised on the trainer's claim which should have precluded summary judgment pursuant to O.C.G.A. § 9-11-56. Medlin v. Morganstern, 268 Ga. App. 116, 601 S.E.2d 359 (2004) (decided under former O.C.G.A. § 24-3-31).

Statements by a dog's owner. — Affidavit by the mother of a dog-bite victim that the dog's owner told her that "she knew something like this would happen" was admissible and was evidence sufficient to preclude summary judgment for defendants. Johnson v. Kvasny, 230 Ga. App. 162, 495 S.E.2d 651 (1998) (decided under former O.C.G.A. § 24-3-31).

Suit on insurance policy. — In a suit brought by a widow and child on a life insurance policy, insuring the life of the husband and father, and the plaintiffs were the joint beneficiaries under the policy, the admissions of the widow were competent evidence for the defendant on the question of misrepresentation made in the application for insurance. Southern Life Ins. Co. v. Wilkinson, 53 Ga. 535 (1874) (decided under former Code 1873, § 3784).

Employee's statement to an insurance adjuster was not admissible against employer as an admission of a party opponent because the individual was a "mere employee," and as such had no authority to bind the employer by the employee's statement. HCP III Woodstock, Inc. v. Healthcare Servs. Group, Inc., 254 Ga. App. 242, 562 S.E.2d 225 (2002) (decided under former O.C.G.A. § 24-3-31).

Advisory study prepared by private citizens together with public employees is not necessarily admissible as being a statement against the interest of the public entity authorizing the study. To be so considered, the entity must have been constrained by the force of the evidence to issue the report, rather than issuing the report as a result of mere deliberative recognition of the problems addressed in the report. United Waste, Ltd. v. Fulton County, 184 Ga. App. 694, 362 S.E.2d 476 (1987) (decided under former O.C.G.A. § 24-3-31).

3. Acquiescence or Silence as Admission

a. In General

Former statute was a principle founded on common sense and common honesty, and administered day by day in courts of justice, not only in settling questions of property, but in deciding upon matters involving liberty and life. Markham v. O'Connor, 52 Ga. 183, 21 Am. R. 249 (1874) (decided under former Code 1873, § 3790).

Comment on silence not permitted. — In criminal cases, a comment upon a defendant's silence or failure to come forward is far more prejudicial than probative. Thus, after December 12, 1991, such a comment will not be allowed even if the defendant has not received Miranda warnings and when the defendant takes the stand in the defendant's own defense. State v. Mallory, 261 Ga. 625, 409 S.E.2d 839 (1991), overruling Fraley v. State, 256 Ga. 178, 345 S.E.2d 590 (1986) (decided under former O.C.G.A. § 24-3-36). But see Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (1999) (decided under former O.C.G.A. § 24-3-36).

In a case in which ineffective assistance of counsel was claimed due to counsel's failure to object to a comment in the prosecutor's closing argument that the defendant could have given the defendant's version of the facts of a domestic dispute to the police, the appellate court improperly relied on exclusions to comments on a defendant's silence in Morrison v. State, 554 S.E.2d 190 (2001); the court overruled Morrison based on the bright-line rule in Mallory v. State, 409 S.E.2d 839 (1991), that, with reference to former O.C.G.A. § 24-3-36, that comment upon a defendant's silence or failure to come forward was far more prejudicial than probative. Reynolds v. State, 285 Ga. 70, 673 S.E.2d 854 (2009) (decided under former O.C.G.A. § 24-3-36).

Mallory did not apply. — As the interpretation of former O.C.G.A. § 24-3-36 in Mallory v. State, 409 S.E.2d 839 (1991), had only prospective application, it did

Admissions and Confessions (Cont'd)
3. Acquiescence or Silence as Admission (Cont'd)
a. In General (Cont'd)

not apply to the defendant's case, which was tried before Mallory was decided. Therefore, defense counsel's strategic decision not to object to the prosecutor's comment on the defendant's request for counsel was not prejudicial as a matter of law; in view of the overwhelming evidence of the defendant's guilt, the defendant did not establish a violation of the right to effective assistance of counsel. Patterson v. State, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010) (decided under former O.C.G.A. § 24-3-36).

Reason of admission. — Ground for admission of the statement of a third person in the presence of the accused is that the omission to controvert the statement affords a basis for an inference of the statement's truth. Such statement is admissible in evidence, to show that it calls for a reply, and to show the acquiescence of the accused. Thomas v. State, 143 Ga. 268, 84 S.E. 587 (1915) (decided under former Penal Code 1910, § 1029).

Estoppel. — When one under a duty to speak, fails to do so, one is thereafter estopped to deny what one's silence imports. Cheek v. J. Allen Couch & Son Funeral Home, 125 Ga. App. 438, 187 S.E.2d 907 (1972) (decided under former Code 1933, § 38-409).

Proof must be affirmative. — Saying of other persons are admissible against a party when it affirmatively appears that the party assented to the statements by the party's silence, or in some other way. Drumwright v. State, 29 Ga. 430 (1859) (decided under former law); Williamson v. State, 29 Ga. App. 283, 114 S.E. 919 (1922) (decided under former Penal Code 1910, § 1029); Ball v. State, 47 Ga. App. 844, 171 S.E. 726 (1933) (decided under former Code 1933, § 38-409).

b. Circumstances Requiring Response

Circumstances must require an answer. — It is only when the circumstances require an answer or denial that silence may amount to an admission. Graham v. State, 118 Ga. 807, 45 S.E. 616 (1903) (decided under former Penal Code 1895, § 1003).

Trial court did not err in granting summary judgment to manufacturer on the purchaser's breach of warranty claim regarding a copier that made more poor, unusable copies; although the purchaser wrote a letter to the manufacturer about the problems, the letter did not reference either express or implied warranties, or request any specific relief, and, thus, the manufacturer's lack of a reply could not be construed as an admission. McQueen v. Minolta Bus. Solutions, Inc., 275 Ga. App. 297, 620 S.E.2d 391 (2005) (decided under former O.C.G.A. § 24-3-36).

Accused must hear statements. — When it is sought to charge a prisoner by reason of sayings of the prisoner's spouse in regard to the crime for which the prisoner is tried, and acquiesced in by the prisoner's silence, such sayings must have been in the prisoner's immediate presence, where the prisoner could hear distinctly all that was said; otherwise the statements would be inadmissible. Jones v. State, 65 Ga. 147 (1880) (decided under former Code 1873, § 3790).

Before evidence can be admitted in a criminal case to show acquiescence of the accused, by silence, in statements made by the officer who arrested the accused to another officer, as to the sayings and conduct of the accused when arrested, it must affirmatively appear that the accused was present and heard the inculpatory statements made against the accused, and by silence, acquiesced in the statements. Simmons v. State, 115 Ga. 574, 41 S.E. 983 (1902) (decided under former Penal Code 1895, § 1003).

Admissions should be direct and call for contradiction. — Admissions of a party, which are to be inferred from the party's acquiescence in the verbal statements of others, made in the party's presence, ought to be regarded with great caution, and unless the evidence be of such direct declarations, and of that kind which naturally call for a contradiction, or some assertions made to the party with respect to the party's right, which by the party's silence the party acquiesces in, it

ought not to be received at all. Rolfe v. Rolfe, 10 Ga. 143 (1851) (decided under former law).

Proof of circumstances. — Before the sayings of a third person, made in the presence of one who is subsequently charged with the commission of a criminal offense, should be admitted in evidence against the accused, there should be proof affirmatively disclosing that the circumstances were such as to call upon the accused to make some response to what was said in the accused's presence. The circumstances must require an answer or denial, or other conduct, before silence will amount to an implied admission. Lumpkin v. State, 125 Ga. 24, 53 S.E. 810 (1906) (decided under former Penal Code 1895, § 1003).

Person under arrest. — If a statement tending to incriminate a person was made in the person's presence and the person remains silent, the mere fact that the person was under arrest or was in custody at the time will not render evidence of such statement and silence inadmissible as an implied admission. Creel v. State, 216 Ga. 233, 115 S.E.2d 552 (1960) (decided under former Code 1933, § 38-409).

Police interrogation was not such a circumstance as required an answer or denial so as to authorize charging the former statute in a criminal case. Howard v. State, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-409).

c. Procedural Considerations

Value of admission as evidence. — Failure to controvert an accusation is not an affirmative act on the part of the accused expressive of guilt of the crime charged. Its evidentiary value is that of an incriminating admission to be considered along with the other circumstances in inferring the guilt of the accused. Thomas v. State, 143 Ga. 268, 84 S.E. 587 (1915) (decided under former Penal Code 1910, § 1029).

Question for jury. — Question of whether the defendant in fact heard the statement in question was for the jury; and if the jury found under the fact that the defendant did hear the statement, it would be a further question for them to determine whether under the circumstances an answer or a denial or other conduct was required, and also whether the defendant's acquiescence or silence under such circumstances amounted to an admission. Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, § 38-409).

It is allowable to repeat an entire conversation, which occurred between the witness and a party, which consisted, amongst other things, of distinct charges made by the witness, and which were silently acquiesced in, or answered and justified. Morris v. Stokes, 21 Ga. 552 (1857) (decided under former law); Dixon v. Edwards, 48 Ga. 142 (1873) (decided under former Code 1873, § 3790).

Since it was not the statement of a third person which was admitted as substantive evidence, but only the fact of the accused's failure to deny the statement, the admissibility of such testimony was in no way affected by the fact that the incriminating statement was uttered by one who was incompetent to testify against defendant as a witness in a criminal prosecution. Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, § 38-409).

Scope of instructions. — In charging a jury the rule contained in the former statute, the court should not fail to instruct the jury, in connection with that rule, that the jury was to determine whether or not, under all the circumstances, an answer or denial was required. Hammond v. State, 156 Ga. 880, 120 S.E. 539 (1923) (decided under former Penal Code 1910, § 1029).

Trial court properly charged a jury regarding the former O.C.G.A. § 24-3-36 evidentiary presumption arising from a limited liability company's (LLC's) agent's failure to reply to a corporation's invoices because the LLC admitted receiving some of the corporation's goods and services, only disputing the amount due, and the failure to respond to an invoice was not a declaration against the LLC's interest pursuant to O.C.G.A. § 10-6-64; in addition, the charge was supported by former O.C.G.A. § 24-4-23 (see now O.C.G.A. § 24-14-25). Forrest

Admissions and Confessions (Cont'd)
3. Acquiescence or Silence as Admission (Cont'd)
c. Procedural Considerations (Cont'd)

Cambridge Apts., LLC v. Redi-Floors, Inc., 295 Ga. App. 840, 673 S.E.2d 318 (2009) (decided under former O.C.G.A. § 24-3-31).

It was reversible error to instruct the jury in a criminal case according to the former statute that silence or acquiescence by a person in police custody may amount to an admission of guilt. Howard v. State, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-409).

Evidence was sufficient to authorize instruction based on former O.C.G.A. § 24-3-36 in the following cases. — See Eberhart v. State, 88 Ga. App. 501, 76 S.E.2d 832 (1953) (decided under former Code 1933, § 38-409); Bloodworth v. State, 216 Ga. 572, 118 S.E.2d 374 (1961) (decided under former Code 1933, § 38-409).

Ineffective counsel not shown. — Although, under former O.C.G.A. § 24-3-36, the state's witness's testimony that a defendant did not respond to a detective's questions was more prejudicial to defendant than it was probative of defendant's guilt, defendant did not show how that testimony affected the outcome of the trial such that defense counsel was ineffective for not objecting to the testimony or requesting a special instruction. Bruce v. State, 268 Ga. App. 677, 603 S.E.2d 33 (2004) (decided under former O.C.G.A. § 24-3-36).

d. Illustrations and Applications

General denial by accused. — A prisoner's flat denial of any knowledge of or complicity in the offense is a disavowal of the act as the prisoner's act; and though the prisoner may not in detail deny each minor incriminating circumstance which may be charged against the prisoner, the prisoner's general denial is sufficient to exclude the idea of an implied admission. Ware v. State, 96 Ga. 349, 23 S.E. 410 (1895) (decided under former Penal Code 1895, § 1003).

Principle that acquiescence or silence, when the circumstances require an answer or denial, may amount to an admission, has no application to a criminal cause when a person accused by another with the commission of an offense, immediately denies all knowledge of, or complicity in, its commission, even though such denial be in general terms and does not in detail extend to each of the minor incriminating circumstances charged against the person. Westberry v. State, 174 Ga. 646, 163 S.E. 729 (1932) (decided under former Penal Code 1910, § 1029).

Witness's comment on defendant's pre-arrest silence not prejudicial. — With regard to convictions for aggravated assault and related crimes, defendant failed to show that trial counsel was ineffective for failing to object or move for a mistrial when a security officer commented on defendant's pre-arrest silence, namely that defendant did not speak up as to owning the type of vehicle used to perpetrate the crimes; even if testimony on defendant's pre-arrest silence had been objectionable, defendant failed to show any prejudice since other evidence showed that defendant drove to the police station in defendant's truck and consented to a search of that vehicle. Gibson v. State, 291 Ga. App. 183, 661 S.E.2d 850 (2008) (decided under former O.C.G.A. § 24-3-36).

Admission of agents or attorneys. — Admission by agents or attorneys are not admissible in criminal cases in the sense in which the admissions are admissible in civil cases. The admissions should not be treated as evidence against the accused, unless shown to have been authorized by the accused. Farmer v. State, 190 Ga. 41, 28 S.E. 26 (1896) (decided under former Penal Code 1895, § 1003).

Misstatement of opposing counsel. — Silence is estopped when attorney failed to deny misstatement of opposing counsel, in reply to a question of court, as to whether a certain allegation was denied by plea. Cuthbert Ice Co. v. York Mfg. Co., 20 Ga. App. 695, 93 S.E. 279 (1917) (decided under former Penal Code 1910, § 1029).

Acquiescence by agent. — Where a son informs his father that his employer would prosecute unless the father signed a mortgage to secure the son's shortage,

silence of the employer's agent, who was present, adopted the threat, and was duress. Small v. Williams, 87 Ga. 681, 13 S.E. 589 (1891) (decided under former Code 1882, § 3790).

Entries in bank pass book. — In a suit by a decedent's administrator against a bank for the recovery of a deposit claimed to be due the estate, a failure of the depositor to make objection to entries of the bank in the depositor's pass book could be accounted as an admission on the depositor's part as to the correctness of the statement. Cheney v. Bank of Bremen, 25 Ga. App. 114, 102 S.E. 903 (1920) (decided under former Civil Code 1910, § 5782).

Silence regarding terms of agreement. — Physician had a duty and obligation to respond to limitations on the physician's privileges set forth in an agreement with a hospital, and when the physician silently exercised the privileges for several years, the physician waived the physician's right to insist on compliance with other procedural requirements pertaining to the physician's termination. St. Mary's Hosp. v. Cohen, 216 Ga. App. 761, 456 S.E.2d 79 (1995) (decided under former O.C.G.A. § 24-3-36).

Silence regarding lease renewal. — Rule of estoppel by silence was not applicable with respect to a commercial tenant's exercise of an option to renew the lease for another term under former O.C.G.A. §§ 24-3-36 and 24-4-23 (see now O.C.G.A. §§ 24-8-801 and 24-14-423) since the tenant did not respond to the landlord's email which contained an offer to renew on different terms; such constituted a counteroffer. Pargar, LLC v. CP Summit Retail, LLC, 316 Ga. App. 668, 730 S.E.2d 136 (2012) (decided under former O.C.G.A. §§ 24-3-36 and 24-4-23).

Advertising person as partner. — An advertisement in a local newspaper, which contained the statement that a certain person was a member of a named partnership and which was paid for by such person, was admissible to show an ostensible partnership, though such person did not authorize the statement in the advertisement that the person was a partner. English v. Moore, 28 Ga. App. 265, 110 S.E. 737, later appeal, 29 Ga. App. 307, 114 S.E. 921 (1922) (decided under former Civil Code 1910, § 5782).

Admitting responsibility for personal injuries. — Statements made by one person in the presence of another to the effect that the latter was alone responsible for injuries the person had received, may, if silently acquiesced in by the person amount to an admission on the person's part, that such statements are true. Holston v. Southern Ry., 116 Ga. 656, 43 S.E. 29 (1902) (decided under former Civil Code 1895, § 5195).

Admission of coconspirator. — Evidence as to admissions of guilt involving the defendant, made by a coconspirator after the termination of the conspiracy, is admissible when it appears that the admissions were made in the presence of the defendant personally and were then freely and voluntarily declared by the defendant to be true. Gunter v. State, 19 Ga. App. 772, 92 S.E. 314 (1917) (decided under former Penal Code 1910, § 1029).

When the evidence is sufficient on the trial of a criminal case to authorize a finding that the defendant and another were engaged in a criminal conspiracy, and the alleged codefendant thereafter makes a confession in the presence of the defendant which involves both parties, the silence of the defendant under such circumstances may amount to an implied admission. Brown v. State, 121 Ga. App. 228, 173 S.E.2d 470 (1970) (decided under former Code 1933, § 38-409).

Codefendants. — When a joint statement was made and signed by all three defendants in the presence of each other, the statement of each was the statement of all, and so far as the writing contained statements by others than the defendant on trial, proof of such statements, together with the defendant's assent, constituted evidence of an admission by the defendant. Morris v. State, 177 Ga. 106, 169 S.E. 495 (1933) (decided under former Code 1933, § 38-409).

When the state shows affirmatively that one jointly indicted with a defendant made statements in the presence of the defendant charging the defendant with the commission of the crime, and the defendant either stood mute or failed to deny the charge, the evidence would change in

Admissions and Confessions (Cont'd)
3. Acquiescence or Silence as Admission (Cont'd)
d. Illustrations and Applications (Cont'd)

character from hearsay to that of an implied admission by the defendant. Long v. State, 205 Ga. 257, 53 S.E.2d 365 (1949) (decided under former Code 1933, § 38-409).

Statements of wife. — Evidence of a third party as to statements of a wife that her husband had just beaten her, made in the presence of the husband without denial on his part and under such circumstances that his silence amounted to an admission, is admissible on the trial of the husband for wife-beating, although the wife declines to testify at the trial against her husband. Joiner v. State, 119 Ga. 315, 46 S.E. 412 (1904) (decided under former Penal Code 1895, § 1003).

Incriminating statements by intoxicated person. — When a witness made certain incriminating statements as to defendants in their presence and which defendants did not deny, and it was shown that this man was drunk and maudlin, and that the defendants were greatly frightened by the man's conduct, such statements of the witness did not measure up to the requirements of the law necessary to show an implied confession by silence or acquiescence and it was error to admit such statements in evidence. Jones v. State, 2 Ga. App. 433, 58 S.E. 559 (1907) (decided under former Penal Code 1895, § 1003).

Ratification of paper. — Mere silence of a party when a paper is handed to that party is no evidence of the ratification of the transaction evidenced by the paper, when the person handling the paper is not one to whom dissent would be appropriately expressed. Berry v. Cooper, 33 Ga. 155 (1864) (decided under former law).

Silence during trial. — When a plaintiff or defendant introduces a witness in court, the acquiescence or silence of the party during the progress of the trial would not amount to an admission, the circumstances at that time not requiring an answer or denial. McElmurray v. Turner, 86 Ga. 215, 12 S.E. 359 (1890) (decided under former Code 1882, § 3790).

Declarations of bystanders. — Evidence as to a declaration of a bystander, accusing one then present of the commission of a criminal act, which declaration the accused person heard but failed to deny or explain, may tend to establish the accused's guilt, and is admissible on the accused's trial for such offense. Thurman v. State, 14 Ga. App. 534, 81 S.E. 796 (1914) (decided under former Penal Code 1910, § 1029); Love v. State, 69 Ga. App. 411, 25 S.E.2d 827 (1943) (decided under former Code 1933, § 38-409).

Doctor's conversation with a patient was not an admission by silence as the patient did not ask the doctor why the doctor failed to biopsy a breast lesion and no explanation was required; that the doctor stated that they should discuss the patient's concerns at a later time could not be construed as silence or acquiescence in the face of the patient's concerns. Davis v. Reid, 272 Ga. App. 312, 612 S.E.2d 112 (2005) (decided under former O.C.G.A. § 24-3-36).

Failure to deny inculpatory statements was held admissible in the following cases. — See Moye v. State, 66 Ga. 740 (1881) (decided under former Code 1873, § 3790); Davis v. State, 114 Ga. 104, 39 S.E. 906 (1901) (decided under former Penal Code 1895, § 1003); Clark v. State, 117 Ga. 254, 43 S.E. 853 (1903) (decided under former Penal Code 1895, § 1003); Watson v. State, 136 Ga. 236, 71 S.E. 122 (1911) (decided under former Penal Code 1910, § 1029); Nunn v. State, 143 Ga. 451, 85 S.E. 346 (1915) (decided under former Penal Code 1910, § 1029); Gates v. State, 20 Ga. App. 171, 92 S.E. 974 (1917) (decided under former Penal Code 1910, § 1029); Holt v. State, 28 Ga. App. 758, 113 S.E. 49 (1922) (decided under former Penal Code 1910, § 1029); Smiley v. State, 156 Ga. 60, 118 S.E. 713 (1923) (decided under former Penal Code 1910, § 1029); Walker v. State, 197 Ga. 221, 28 S.E.2d 656 (1944) (decided under former Code 1933, § 38-409); Clark v. Woodward, 76 Ga. App. 181, 45 S.E.2d 473 (1947) (decided under former Code 1933, § 38-409).

Letter memorializing a conversation, to which recipient failed to re-

spond, was admissible as an admission by silence. — Trial court did not err in allowing an attorney to read a letter memorializing a conversation between him and a decedent because the out-of-court statement of the decedent referenced in the letter was admissible as an admission by silence of the executor when the attorney mailed a package containing closing documents to the executor, including a receipt the decedent had executed, and the executor mailed a check to the attorney based on the erroneous assumption that the executor needed to do so in order to pay off the advance that had been received and was referenced in the receipt; the attorney mailed the letter to the executor, returned the check, and set forth the conversation with the decedent concerning the intent behind the receipt, and the executor's failure to respond could be construed as an acquiescence to the construction of the receipt set forth in the letter. Jerkins v. Jerkins, 300 Ga. App. 703, 686 S.E.2d 324 (2009) (decided under former O.C.G.A. § 24-3-36).

Settlement agreement. — Trial court erred in granting the insureds' motion to enforce a settlement agreement a parent and an administrator allegedly reached with an insurer because the insurer's tender was not sufficient to constitute acceptance of the settlement offer; the attorney for the mother and the administrator was not silent but stated the intent to consult with the parent and the administrator, the attorney committed to no deadline for responding, and the terms of the offer were in writing and equally known to all parties. Kitchens v. Ezell, 315 Ga. App. 444, 726 S.E.2d 461 (2012) (decided under former O.C.G.A. § 24-3-36).

Evidence was properly held inadmissible in the following case. — See Chedel v. Mooney, 158 Ga. 297, 123 S.E. 300 (1924) (decided under former Penal Code 1910, § 1029).

Trial court improperly instructed the jury that acquiescence or silence, when the circumstances required an answer, a denial, or other conduct, could amount to an admission because a charge in the language of former O.C.G.A. § 24-3-36 could be construed as a comment on the defendant's constitutional right to remain silent; however, the improper jury instruction was harmless beyond a reasonable doubt because the charge as a whole contained sufficient clarity so as not to mislead the jury concerning the exercise of the right to remain silent, there was no reference at trial that could be construed as a comment on the defendant's exercise of his right to remain silent, the evidence of guilt was overwhelming, and the erroneous charge in no way pointed directly at the substance of the defendant's defense. Ruiz v. State, 286 Ga. 146, 686 S.E.2d 253 (2009) (decided under former O.C.G.A. § 24-3-36).

4. Admissions of Agents

a. In General

General rule originated in necessity of case. — The well-settled rule of law, which makes an agent a competent witness either for or against the agent's principal, originated in the necessity of the case. Lowrys v. Candler, 64 Ga. 236 (1879) (decided under former Code 1873, § 2206).

Former Code 1933, § 4-315 had reference only to the admissibility of declarations as evidence. Grant v. Hart, 197 Ga. 662, 30 S.E.2d 271 (1944) (decided under former Code 1933, § 4-315).

Established rules as to declarations of deceased agents. — Words "or else the agent is dead" referred to entries made by an agent since deceased in the regular course of the business of the principal, or declarations made by a person since deceased against interest, or other instances when, under the established rules of evidence, the declarations of a deceased person might be admitted in evidence. Turner v. Turner, 123 Ga. 5, 50 S.E. 969 (1905) (decided under former Civil Code 1895, § 3034).

Admission by agent must come within one of exceptions. — Admission on the part of the agent which had the effect of imputing negligence to the principal when not coming within one of the exceptions stated in former Code 1933, §§ 4-315 and 38-406 and not made by authority of the principal and was erroneously admitted in evidence. Southern Ry.

Admissions and Confessions (Cont'd)
4. Admissions of Agents (Cont'd)
a. In General (Cont'd)

v. Allen, 118 Ga. App. 645, 165 S.E.2d 194 (1968) (decided under former Code 1933, § 4-315).

Trial court's exclusion of a report by an emergency vehicle operator's supervisor regarding a collision that occurred between the emergency vehicle and a driver's vehicle was proper in the driver's personal injury action arising therefrom pursuant to former O.C.G.A. §§ 10-6-64 and 24-3-33, as even if the statements contained in the report were part of the res gestae, the statements were inadmissible as admissions against interest because neither declarant was a party to the litigation; further, as the statements at issue were cumulative of other testimony that was admitted, the driver could not show prejudice by the trial court's exclusion thereof. Wynn v. City of Warner Robins, 279 Ga. App. 42, 630 S.E.2d 574 (2006) (decided under former O.C.G.A. § 10-6-64).

Declaration of an agent, to be admissible, must be a part of the res gestae. Turner v. Turner, 123 Ga. 5, 50 S.E. 969 (1905) (decided under former Civil Code 1895, § 3034).

If the admission is made dum fervet opus and accompanies the agent's act, or is so nearly connected therewith in time as to be free from all suspicion of device or afterthought, it is admissible in evidence as part of the res gestae. National Bldg. Ass'n v. Quin, 120 Ga. 358, 47 S.E. 962 (1904) (decided under former Civil Code 1895, § 3034); Southern Express Co. v. Cohen, 13 Ga. App. 174, 78 S.E. 1111 (1913) (decided under former Civil Code 1910, § 3606); Atlantic Coast Line R.R. v. Williams, 21 Ga. App. 453, 94 S.E. 584 (1917), overruled on another point, Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Civil Code 1910, § 3606); William-Hester Marble Co. v. Walton, 22 Ga. App. 433, 96 S.E. 269 (1918) (decided under former Civil Code 1910, § 3606); Willingham v. Benton, 25 Ga. App. 412, 103 S.E. 497 (1920) (decided under former Civil Code 1910, § 3606); Jolly v. Chattahoochee Fertilizer Co., 28 Ga. App. 194, 110 S.E. 639 (1922) (decided under former Civil Code 1910, § 3606).

Under former Code 1933, §§ 4-315 and 38-406, declarations of an agent as to business transacted by the agent, in order to be admissible against the principal, must have been made by the agent while representing the principal in the transaction in controversy, and must also have been a part of the negotiation, and constituting the res gestae. National Bldg. Ass'n v. Quin, 120 Ga. 358, 47 S.E. 962 (1904) (decided under former Civil Code 1895, § 3034).

Declarations of an agent, to affect the agent's principal, must be a part of the res gestae. Robert R. Sizer & Co. v. G. T. Melton & Sons, 129 Ga. 143, 58 S.E. 1055 (1907) (decided under former Civil Code 1895, § 3034).

To allow the introduction of an extrajudicial statement made by employee in evidence for the purpose of charging an employer with the plaintiff's damage, the statement must have been made as a part of the res gestae. A.K. Adams & Co. v. Homeyer, 87 Ga. App. 301, 73 S.E.2d 581 (1952) (decided under former Code 1933, § 4-315).

In a premises liability action, the declaration of an employee tending to admit negligence that would be imputable to the employer made four years after the fact was not a part of the res gestae and was not admissible in evidence as an admission against interest inasmuch as the employee was not a party to the litigation. Harris v. Inn of Lake City, 285 Ga. App. 521, 647 S.E.2d 277 (2007) (decided under former O.C.G.A. § 10-6-64).

Statements of one agent to another. — Statements of an agent of one company to the agent of another, exchanged in the course of the agent's employment, regarding the business of the two, was admissible pursuant to former O.C.G.A. §§ 10-6-64 and 24-3-33. Coffee Butler Serv., Inc. v. Sacha, 208 Ga. App. 4, 430 S.E.2d 149 (1993) (decided under former O.C.G.A. § 10-6-64).

Declarations of general agent and manager concerning business. — Declarations made by one shown by some testimony to have been a general agent

and manager of a particular business institution, concerning matters relating to that business, are admissible to bind the agent's principal during the continuance of the agency, though made in reference to a particular act of negotiation previously completed and not constituting a part of the res gestae thereof. Citizens Bank v. Timmons, 15 Ga. App. 815, 84 S.E. 232 (1915) (decided under former Civil Code 1910, § 3606).

Letter written by general agent. — Letter written by a general agent relating to matters apparently within the scope of the agent's agency is, when pertinent to the issue under investigation, competent evidence in the trial of an action against the principal. Louisville & Nashville R.R. v. Tift, 100 Ga. 86, 27 S.E. 765 (1896) (decided under former Civil Code 1895, § 3034); Chero-Cola Bottling Co. v. Southern Express Co., 29 Ga. App. 656, 116 S.E. 325 (1923) (decided under former Civil Code 1910, § 3606).

Memorandum for suit of general freight agent. — Defendant may introduce in evidence a memorandum made by the general freight agent of the plaintiff for the purpose of instituting suit against a third party, indicating the agent's understanding of a contract, the agent who made the memorandum having been authorized to do so in the prosecution of the plaintiff's claim and having acted within the scope of the agent's authority in making it. In this transaction, the agent was the alter ego of the plaintiff. Georgia R.R. v. Smith, 76 Ga. 634 (1886) (decided under former Code 1882, § 2206).

Proof of agency required. — Before the declarations of an agent are admissible, some proof of the agency should be submitted. J.B. Colt Co. v. Wheeler, 31 Ga. App. 427, 120 S.E. 792 (1923) (decided under former Civil Code 1910, § 3606); Waddington v. Stores Mut. Protective Ass'n, 52 Ga. App. 331, 183 S.E. 143 (1935) (decided under former Code 1933, § 4-315).

Declaration in scope of employment is declaration of principal. — Admission or declaration of an agent, when acting within the scope of the agent's authority, is to be considered as the admission or declaration of the agent's principal. Williams v. C. & G.H. Kelsey & Halsted, 6 Ga. 365 (1849) (decided under former law); Krogg v. Atlanta & W. Point R.R., 77 Ga. 202, 4 Am. St. R. 79 (1886) (decided under former Code 1882, § 2206); Cable Co. v. Walker, 127 Ga. 65, 56 S.E. 108 (1906) (decided under former Civil Code 1895, § 3034); Chero-Cola Bottling Co. v. Southern Express Co., 29 Ga. App. 656, 116 S.E. 325 (1923) (decided under former Civil Code 1910, § 3606); Waddington v. Stores Mut. Protective Ass'n, 52 Ga. App. 331, 183 S.E. 143 (1935) (decided under former Code 1933, § 4-315).

Admission made through an agent during the existence and in pursuance of the agent's power is no less evidence against the principal than if made by the principal in person. William-Hester Marble Co. v. Walton, 22 Ga. App. 433, 96 S.E. 269 (1918) (decided under former Civil Code 1910, § 3606).

Declaration is inadmissible if not made in business of principal. — Declaration of an agent was not competent evidence against the agent's principal if it did not appear that such declaration was made while engaged in the business of the master or principal. Newton Mfg. Co. v. White, 53 Ga. 396 (1874) (decided under former Code 1873, § 2206); Evans & Ragland v. Atlanta & W. Point R.R., 56 Ga. 498 (1876) (decided under former Code 1873, § 2206); National Bldg. Ass'n v. Quin, 120 Ga. 358, 47 S.E. 962 (1904) (decided under former Civil Code 1895, § 3034); Gainesville Midland Ry. v. Jackson, 1 Ga. App. 632, 57 S.E. 1007 (1907), overruled on another point, Seaboard A.L. Ry. v. Brewton, 25 Ga. App. 168, 102 S.E. 920 (1920) (decided under former Civil Code 1895, § 3034); Lott v. Banks, 21 Ga. App. 246, 94 S.E. 322 (1917) (decided under former Civil Code 1910, § 3606).

Under former Civil Code 1895, §§ 3034 and 5192, as declarations made by a shipping agent of a railroad company, to the effect that certain goods had been delivered at the point of destination, were not within the scope of such an agent's employment and relate to a past transaction, those declarations were not admissible in evidence against the company. The more especially was this true when it was ap-

Admissions and Confessions (Cont'd)
4. Admissions of Agents (Cont'd)
a. In General (Cont'd)

parent that the agent's information as to the matter of delivery must necessarily have been derived from hearsay. Southern Ry. v. Kinchen & Co., 103 Ga. 186, 29 S.E. 816 (1897) (decided under former Civil Code 1895, § 3034).

If, although it appeared that the person whose admissions were introduced was the agent of the defendant "from 1917 to 1924," there was nothing to show when such admissions were made or that the admissions were made during the existence of the agency and within the scope of the agent's authority, a verdict in the plaintiff's favor was without evidence to support the verdict as to such items. Ninth Dist. Agrl. & Mechanical School v. Wofford Power Co., 37 Ga. App. 271, 139 S.E. 916 (1927) (decided under former Civil Code 1910, § 3606).

Answers in another case by "vice-president and southern manager" were not admissible. — Mere fact that a lumber company sued out interrogatories for its "vice-president and southern manager" in one case would not render the answers admissible in another case as admissions of the company; testifying as a witness was not such a normal part of the lumber business that testimony given by "the vice-president and southern manager" as a witness was impliedly an admission of the lumber company. Robert R. Sizer & Co. v. G. T. Melton & Sons, 129 Ga. 143, 58 S.E. 1055 (1907) (decided under former Civil Code 1895, § 3034).

Only declaration by agent against principal was excluded. — There was nothing in the evidence rejected to make the evidence objectionable since the evidence was not in the nature of a declaration of an agent "against his principal." The agent was the party to the suit, and not the principal. Shippey Bros. & White v. Owens, 17 Ga. App. 127, 86 S.E. 407 (1915) (decided under former Civil Code 1910, § 3606).

Admission of past wrongful act by employee may not be used against employer. — Admission of a past wrongful act by a servant or employee, while evidence against the servant or employee, may not be used to charge the master or employer. A.K. Adams & Co. v. Homeyer, 87 Ga. App. 301, 73 S.E.2d 581 (1952) (decided under former Code 1933, § 4-315).

Rules apply to corporations. — Corporation can only make admissions through the corporation's agents, and the admissions of such agents, acting within the scope of the agent's powers and about the business of the agency, are admissible. Timeplan Loan & Inv. Corp. v. Moorehead, 221 Ga. 648, 146 S.E.2d 748 (1966) (decided under former Code 1933, § 4-315); White v. Front Page, Inc., 133 Ga. App. 749, 213 S.E.2d 32 (1975) (decided under former Code 1933, § 4-315); Gorlin v. Halpern, 184 Ga. App. 10, 360 S.E.2d 729 (1987), rev'd on other grounds, 258 Ga. 127, 365 S.E.2d 405 (1988) (decided under former O.C.G.A. § 10-6-64).

Agency must be shown. — Admissions of the alleged agent of a corporation are not admissible to bind the corporation unless the agency is shown. Ninth Dist. Agrl. & Mechanical School v. Wofford Power Co., 37 Ga. App. 271, 139 S.E. 916 (1927) (decided under former Civil Code 1910, § 3606).

Declarations as to injury made after accident held inadmissible. — On the trial of a suit against a railroad company for damages to the plaintiff (who was an employee of the company) caused by the negligence of the coemployees, it was error in the court to permit the plaintiff to testify before the jury that an assistant supervisor had told the plaintiff, after the injury was done, that the company felt itself under obligations to support the plaintiff and the plaintiff's family during the plaintiff's life. East Tenn., Va. & Ga. R.R. v. Duggan, 51 Ga. 212 (1874) (decided under former Code 1873, § 2206).

Reports to the general manager of a company touching a railway accident, and who was to blame therefor, made several days after the event, by the superintendent and the conductor, supported by the affidavit of the latter and of several other employees, are not admissible in evidence to affect the company, whether such reports were exacted and made under stand-

ing rules requiring them or under special orders for the particular occasion, no question of notice to the company being involved in the controversy. Carroll v. East Tenn., Va. & Ga. Ry., 82 Ga. 452, 10 S.E. 163, 6 L.R.A. 214 (1889) (decided under former Code 1882, § 2206).

Statements of the engineer three days after plaintiff was hurt as to the condition of the plaintiff's engine, not being part of the res gestae, were clearly inadmissible as declarations or admissions against the railroad company. Central R.R. & Banking Co. v. Maltsby, 90 Ga. 630, 16 S.E. 953 (1892) (decided under former Code 1882, § 2206).

Declaration of insurance agent as to notice of insured's condition held inadmissible. — Declaration of an insurance agent that the agent knew the insured had a heart condition and notified the company was not admissible because the admission covered a transaction which did not constitute a part of the res gestae of the negotiation of the sale of insurance to the insured. National Life & Accident Ins. Co. v. Hullender, 86 Ga. App. 438, 71 S.E.2d 754 (1952) (decided under former Code 1933, § 4-315).

Court decides whether declaration part of res gestae. — It is for the trial court to determine whether a given declaration constitutes a part of the res gestae, and nothing more appearing, it is not an abuse of the court's discretion to exclude a declaration by defendant's employee made some 15 or 20 minutes after the event to which it is alleged to relate. A.K. Adams & Co. v. Homeyer, 87 Ga. App. 301, 73 S.E.2d 581 (1952) (decided under former Code 1933, § 4-315).

Instruction held not erroneous. — Charge of the court that "if in the prosecution of the master's business, the agent makes any representation with reference to the master's business, then such statements are imputable to the master," reasonably construed, restricted the statements of the agent to such portions of the master's business as came within the scope of the agency, and was not error for the assigned reason that the charge did not contain such a restriction. Grant v. Hart, 197 Ga. 662, 30 S.E.2d 271 (1944) (decided under former Code 1933, § 4-315).

b. Proving Agency

Agent may testify as to agency despite death of principal. — Agent not a party to a suit is a competent witness to show the agent's agency, not disclosed at the time of the transaction in controversy, although the agent's principal may be dead, and although the effect of establishing the agency may be to make the estate liable instead of the agent individually. Lowrys v. Candler, 64 Ga. 236 (1879) (decided under former Code 1873, § 2206).

Agent's mere declarations as to agency are inadmissible. — While the sworn testimony of an agent is competent evidence of such agency, the mere declarations of such a person are not admissible to prove such agency. Augusta Roofing & Metalworks, Inc. v. Clemmons, 97 Ga. App. 576, 103 S.E.2d 583 (1958) (decided under former Code 1933, § 4-315).

Agent certainly cannot confer authority upon the agent, and evidence of the agent's own statements or admissions, therefore, is not admissible against the agent's principal for the purpose of establishing, enlarging, or renewing the agent's authority, nor can the agent's authority be established by showing that the agent acted as agent, or that the agent claimed to have the powers which the agent assumed to exercise. Waddington v. Stores Mut. Protective Ass'n, 52 Ga. App. 331, 183 S.E. 143 (1935) (decided under former Code 1933, § 4-315).

Other evidence tending to establish agency required. — When extraneous circumstances, independently of and without regard to the declarations of the alleged agent personally, clearly tend to establish the fact of an agency, the agent's declarations may be admitted and considered as a part of the res gestae of the transaction; but the declarations of an alleged agent, when standing alone, are never admissible to prove the agent's agency. Waddington v. Stores Mut. Protective Ass'n, 52 Ga. App. 331, 183 S.E. 143 (1935) (decided under former Code 1933, § 4-315).

Evidence of alleged agent's conduct as agent and benefit to principal. — Declarations of one alleged to be an agent or one assuming to be an agent would not, by themselves, be admissible to prove

Admissions and Confessions (Cont'd)
4. Admissions of Agents (Cont'd)
b. Proving Agency (Cont'd)

agency, yet when such declarations of the alleged agent are accompanied by other evidence as to the conduct of the person in the character of agent and an acceptance by the alleged principal of the fruits of the agency, such declarations are admissible in evidence as a part of the res gestae, and as such may be considered in the establishment of the agency. Lawhon v. Henshaw, 63 Ga. App. 683, 11 S.E.2d 846 (1940) (decided under former Code 1933, § 4-315).

Agent's declarations are part of res gestae. — Declaration of an agent is not competent to prove the agency unless the declaration accompanies the transaction or is a part of the res gestae and there is other evidence, direct or circumstantial, which tends to prove the agency, in which event such declaration is admissible in corroboration. King v. Bonnerman, 93 Ga. App. 210, 91 S.E.2d 196 (1956), commented on in 18 Ga. B.J. 492 (1956) (decided under former Code 1933, § 4-315).

Declaration held not part of res gestae. — Statement of a city clerk that the city accepted responsibility for an accident on a sidewalk was not part of the res gestae and was not admissible evidence creating a genuine issue of material fact as to the city's duty to maintain the sidewalk. Williams v. City of Social Circle, 225 Ga. App. 746, 484 S.E.2d 687 (1997) (decided under former O.C.G.A. § 10-6-64).

Declarations of Conspirators

1. In General

Coconspirator's exception to the hearsay rule was codified at former O.C.G.A. § 24-3-5. Hunter v. State, 179 Ga. App. 368, 347 S.E.2d 2 (1986) (decided under former O.C.G.A. § 24-3-5).

Defendant responsible for incidental, but unanticipated, acts. — Because there was evidence that two or more individuals had conspired to accomplish a common design and one or more of the conspirators had done an act which was an incidental and probable consequence of the original design and which the acting conspirator(s) deemed to be expedient to the accomplishment of the common design, the intent and act of the acting conspirator(s) could be imputed to the other active conspirators even though the act may not have been a part of the original design. Therefore, when the common design was to burglarize the victim's house, that the defendant may not have anticipated defendant's coconspirators committing the burglary on the day in question did not remove defendant from the conspiracy, nor did it relieve defendant from responsibility for the incidental and probable acts that defendant's coconspirators felt were expedient to the accomplishment of the common design. Thus, it was not error to present evidence concerning acts of murder committed by the coconspirators that occurred after the coconspirators entered the victim's home. Bruce v. State, 263 Ga. 273, 430 S.E.2d 745 (1993) (decided under former O.C.G.A. § 24-3-5).

Statement must be that of defendant. — If a hearsay statement was not made by the defendant and could not be imputed to defendant, it could not be admitted to show defendant's motive or intent. Hart v. State, 174 Ga. App. 134, 329 S.E.2d 178 (1985) (decided under former O.C.G.A. § 24-3-5).

Use of translator. — Use of a translator between the defendant and a witness did not render the witness's testimony about the substance of the translation inadmissible, pursuant to the language conduit rule, as no evidence was presented to the trial court to show that the translator had a motive to distort the translation; moreover, since the translator was a coconspirator, to the extent statements were made directly to the witness in English to further the conspiracy, the witness could testify regarding those statements under the coconspirator exception to the hearsay rule, former O.C.G.A. § 24-3-5. Lopez v. State, 281 Ga. App. 623, 636 S.E.2d 770 (2006) (decided under former O.C.G.A. § 24-3-5).

Intercepted conversation between coconspirators in the back seat of a patrol car was admissible in the trial of one of the coconspirators because the

other took the stand and was subject to cross-examination, and because the conversation took place when the coconspirators were actively attempting concealment. Burgeson v. State, 267 Ga. 102, 475 S.E.2d 580 (1996) (decided under former O.C.G.A. § 24-3-5).

Coconspirator not available for cross-examination. — Testimony by an undercover police officer as to a statement made by a coconspirator during the pendency of the criminal project was not inadmissible simply because the coconspirator was not available for cross-examination since, after the fact of conspiracy is proved, the declarations of any one of the conspirators during the pendency of the project is admissible against all. Clark v. State, 236 Ga. App. 153, 510 S.E.2d 907 (1999) (decided under former O.C.G.A. § 24-3-5).

2. Application

Former statute was applicable in civil as well as criminal cases. Hames v. Shaver, 229 Ga. 412, 191 S.E.2d 861 (1972) (decided under former Code 1933, § 38-306).

Former statute did not render a conspirator incompetent to testify as to facts until the fact of the conspiracy be proved by independent evidence; it simply prohibited a conspirator from testifying as to declarations made by one conspirator outside the presence of, and upon the trial of, another conspirator. Birt v. State, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976) (decided under former Code 1933, § 38-306); Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32 (1983) (decided under former O.C.G.A. § 24-3-5); Whitton v. State, 178 Ga. App. 862, 344 S.E.2d 703 (1986) (decided under former O.C.G.A. § 24-3-5).

Former O.C.G.A. § 24-3-5 did not exclude the testimony of a coconspirator, only the admission of coconspirator's declarations to third persons. Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32 (1983) (decided under former O.C.G.A. § 24-3-5).

Declarations of coconspirator admissible. — Codefendant's incriminating statements made shortly after the crime occurred, made prior to arrest, and which were noncustodial statements made to acquaintances of codefendant and defendant rather than to police officers, can be characterized as the declaration of a conspirator rather than as a confession and would be admissible against defendant when the requirements of former O.C.G.A. § 24-3-5 have been met. Brown v. State, 262 Ga. 223, 416 S.E.2d 508 (1992) (decided under former O.C.G.A. § 24-3-5).

Testimony by officers regarding an incriminating statement made by one of three coconspirators was admissible even though the officers could not identify the speaker and the admission of the statement did not mandate severance of the parties for trial nor a limiting instruction to the jury that such a "confession" by one codefendant could not be considered against the others. Reid v. State, 210 Ga. App. 783, 437 S.E.2d 646 (1993) (decided under former O.C.G.A. § 24-3-5).

Coconspirator's statement's were admissible against defendant since circumstantial evidence established a conspiracy to kill defendant's wife. Walker v. State, 213 Ga. App. 407, 444 S.E.2d 824 (1994) (decided under former O.C.G.A. § 24-3-5).

Even though a coconspirator may have terminated participation in the conspiracy when, at the request of the police, the coconspirator voluntarily placed a recorded call to another coconspirator, statements made by the latter implicating the defendant in murder and armed robbery were admissible since the second coconspirator was still conspiring to conceal the crime, and statements of the former, offered for the limited purpose of putting the second coconspirator's responses in context, were admissible as original evidence under former O.C.G.A. § 24-3-2. Bundrage v. State, 265 Ga. 813, 462 S.E.2d 719 (1995) (decided under former O.C.G.A. § 24-3-5).

After finding that the evidence was sufficient to establish a prima facie case of conspiracy, the trial court properly ruled that a coconspirator's statements were admissible against defendant. Robertson v. State, 268 Ga. 772, 493 S.E.2d 697 (1997), cert. denied, 523 U.S. 1140, 118 S. Ct. 1845, 140 L. Ed. 2d 1095 (1998) (decided under former O.C.G.A. § 24-3-5).

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When the evidence established a prima facie case of conspiracy, codefendant's surreptitiously recorded statements, in which the codefendant implicated defendant in the charged offenses, were admissible. Avery v. State, 269 Ga. 584, 502 S.E.2d 230 (1998) (decided under former O.C.G.A. § 24-3-5).

Statements made by the codefendant to an informant in a recorded call were admissible under former O.C.G.A. § 24-3-5 because at the time of the call the conspiracy was still pending between defendant and the coconspirator to commit the trafficking offense for which they were eventually arrested. Perez v. State, 254 Ga. App. 872, 564 S.E.2d 208 (2002) (decided under former O.C.G.A. § 24-3-5).

Coconspirator's statements were admissible under former O.C.G.A. § 24-3-5 as the statements contained sufficient indicia of reliability to ensure that defendant's Sixth Amendment rights were not violated and afforded the jury a satisfactory basis for evaluating the truth of the statements. Duckett v. State, 259 Ga. App. 814, 578 S.E.2d 524 (2003) (decided under former O.C.G.A. § 24-3-5).

When defendant and the codefendant were charged with murder and related offenses, the denial of defendant's motion to sever defendant's trial from that of the codefendant was not an abuse of discretion because, inter alia, incriminating statements that the codefendant made to police would have been admissible against defendant in a separate trial as the statements of a coconspirator under former O.C.G.A. § 24-3-5. Styles v. State, 279 Ga. 134, 610 S.E.2d 23 (2005) (decided under former O.C.G.A. § 24-3-5).

Witness's statement regarding conversations between defendant and an accomplice were admissible as a conspiracy between defendant and the accomplice because: (1) two masked bandits committed three armed robberies; (2) defendant and the accomplice attempted to use the credit and debit cards obtained in the robberies immediately after the robberies; (3) masks and a gun used in the robberies were found in defendant's car; and (4) defendant told defendant's half-sister that the defendant and the accomplice had committed the robberies. Dillard v. State, 272 Ga. App. 523, 612 S.E.2d 804 (2005) (decided under former O.C.G.A. § 24-3-5).

Denial of defendant's severance motion was not an abuse of discretion because there was no likelihood of confusion as the defendant and the codefendant acted in concert and their defenses were not antagonistic, substantially similar evidence was presented against them, and the codefendant's statements would have been admissible in a separate trial as statements of a coconspirator. Shelton v. State, 279 Ga. 161, 611 S.E.2d 11 (2005) (decided under former O.C.G.A. § 24-3-5).

After defendant and defendant's brother agreed on a plan to murder a victim, and after the crime occurred but before defendant's arrest, the brother told a girlfriend that the brother had "taken care" of the victim, the statement was properly admitted as a declaration of a coconspirator, rather than as a confession. Copprue v. State, 279 Ga. 771, 621 S.E.2d 457 (2005) (decided under former O.C.G.A. § 24-3-5).

Because a codefendant's statements were non-custodial and were made in furtherance of a conspiracy, the trial court did not abuse the court's discretion in finding that the statements were admissible under former O.C.G.A. § 24-3-5 and did not violate Bruton; consequently, defendant failed to demonstrate that counsel's failure to request a severance constituted ineffective assistance. Hankerson v. State, 275 Ga. App. 545, 621 S.E.2d 772 (2005) (decided under former O.C.G.A. § 24-3-5).

Court of Appeals of Georgia held that the coconspirators' testimony was properly allowed by the trial court as most of the testimony at issue was admissible on grounds other than as declarations of coconspirators, and the state made a prima facie showing of the existence of a conspiracy without relying on the coconspirators' declarations. English v. State, 288 Ga. App. 436, 654 S.E.2d 150 (2007) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err in denying the defendant's motion to exclude testimony recounting the out-of-court statements of

the codefendant, which were made to friends during the concealment phase of the conspiracy between the defendant and the codefendant, because, on balance, the statements bore sufficient indicia of reliability to be admissible; although the trial court erred by applying a presumption of reliability, its decision to admit the statements was not erroneous because the statements were admissible since they were not testimonial in nature, many of the statements were made in the defendant's presence, and none of the statements sought to deny the codefendant's guilt. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010) (decided under former O.C.G.A. § 24-3-5).

Trial court did not abuse the court's discretion in denying the defendant's motion to sever because there was no danger of confusion when only two defendants were on trial in connection with the same occurrence, and there was no evidence admissible against the defendant that was not admissible against the codefendant; the fact that the codefendant elicited a witness's testimony concerning a coconspirator's out-of-court declarations as coconspirator did not show prejudice, and the witness's testimony was admissible under former O.C.G.A. § 24-3-5. White v. State, 308 Ga. App. 38, 706 S.E.2d 570 (2011) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err in admitting a witness's testimony as to out-of-court declarations by a coconspirator under the exception to the hearsay rule codified at former O.C.G.A. § 24-3-5 because the evidence was sufficient to authorize the jury to find that there was a conspiracy between the defendant and the coconspirator to rob the victim and the victim's companions; evidence independent of the coconspirator's declarations to the witness authorized the jury to infer that the defendant and the coconspirator had entered into a conspiracy to rob the victim because there was evidence that the defendant and the coconspirator were companions, and the defendant and coconspirator were together at the scene on the day of the shooting. White v. State, 308 Ga. App. 38, 706 S.E.2d 570 (2011) (decided under former O.C.G.A. § 24-3-5).

Because the defendant admitted entry into a home, the defendant's statement to a witness, and the victim's in-court identification of the defendant supported the defendant's conviction of armed robbery and burglary under O.C.G.A. §§ 16-7-1(a) and 16-8-41(a), the jury could find that a conspiracy existed without regard to a coconspirator's statements under former O.C.G.A. § 24-3-5. Lewis v. State, 311 Ga. App. 54, 714 S.E.2d 732 (2011) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err in admitting the testimony of a state's witness regarding statements made by a codefendant because the testimony was admissible under the conspiracy exception contained in former O.C.G.A. § 24-3-5 since the witness heard the coconspirators' incriminating statements about the crimes during the pendency of the conspiracy, the witness could testify as to what the coconspirators said; the defendant's own admissions and confessions introduced in evidence showed that the defendant had committed the armed robberies and provided the details regarding the defendant's participation in the crimes. Edwards v. State, 312 Ga. App. 141, 717 S.E.2d 722 (2011), cert. denied, No. S12C0363, 2012 Ga. LEXIS 221 (Ga. 2012) (decided under former O.C.G.A. § 24-3-5).

Since there was evidence that the defendant and the co-indictees engaged in a conspiracy to rob the victim, the trial court did not abuse the court's discretion in admitting the co-conspirator's statement. Foster v. State, 290 Ga. 599, 723 S.E.2d 663 (2012) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err in permitting into evidence testimony that the defendant was involved in two murders because the crux of the testimony was a co-indictee's inculpation of the defendant; as such statements were made to the defendant's cousin shortly after the murders but before the criminal enterprise was at an end, the co-indictee's declarations were admissible into evidence against the defendant under former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801). Bailey v. State, 291 Ga. 144, 728 S.E.2d 214 (2012) (decided under former O.C.G.A. § 24-3-5).

Trial court's admission of a coconspira-

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tor's statements that were made in the presence of an accomplice's mother before the state proved the fact of the conspiracy did not constitute reversible error because inasmuch as a conspiracy could be shown by proof of an agreement between two or more persons to commit a crime, the accomplice's testimony was sufficient to make a prima facie case of conspiracy. James v. State, 316 Ga. App. 406, 730 S.E.2d 20 (2012) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err in allowing a witness to testify that a coindictee told the witness that the defendant and the coindictee had committed robberies because even without evidence of an express agreement between the defendant and the coindictee, there was sufficient evidence of the coindictee's involvement in a conspiracy with the defendant to commit the robberies so as to authorize the admission of the witness's evidence. Lewis v. State, 291 Ga. 273, 731 S.E.2d 51 (2012) (decided under former O.C.G.A. § 24-3-5).

Recorded statement of coconspirator properly admitted. — Trial court did not err by allowing the state to introduce a coconspirator's recorded statement against a defendant, which the defendant claimed incriminated the defendant, as the coconspirator testified and was subject to cross-examination. Overton v. State, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009) (decided under former O.C.G.A. § 24-3-5).

Codefendant's statements that were recorded in telephone calls between the codefendant and an accomplice were admissible against the defendant as statements of a coconspirator. Moon v. State, 288 Ga. 508, 705 S.E.2d 649 (2011) (decided under former O.C.G.A. § 24-3-5).

When the state is proceeding on a theory of conspiracy, acts and statements of one conspirator in furtherance of the conspiracy are admissible against all other conspirators. Knowles v. State, 159 Ga. App. 239, 283 S.E.2d 51 (1981) (decided under former Code 1933, § 38-306).

Qualification of rule. — Statutory rule is qualified by the fact that each is responsible for the acts of the others only insofar as such acts are naturally or necessarily done pursuant to or in furtherance of the conspiracy. Handley v. State, 115 Ga. 584, 41 S.E. 992 (1902) (decided under former Penal Code 1895, § 999); Hill v. Reynolds, 19 Ga. App. 334, 91 S.E. 434 (1917) (decided under former Penal Code 1910, § 1025).

Exculpatory evidence of conspirator not admissible. — Under former O.C.G.A. § 24-3-5, the declaration of a coconspirator during the pendency of a criminal project is admissible against all coconspirators; however, it may only be used against a conspirator and is not a means by which a conspirator may introduce exculpatory evidence. Dunbar v. State, 205 Ga. App. 867, 424 S.E.2d 43, cert. denied, 205 Ga. App. 899, 424 S.E.2d 43 (1992) (decided under former O.C.G.A. § 24-3-5).

Statements made during concealment phase of conspiracy admissible. — Statements made by a coconspirator to police were admissible as made during the concealment phase of the conspiracy, even though made before evidence establishing conspiracy had been introduced. Morgan v. State, 206 Ga. App. 132, 424 S.E.2d 92 (1992) (decided under former O.C.G.A. § 24-3-5).

Properly authenticated letters written by one of the three defendants charged in a conspiracy involving an armed robbery and related offense were properly admitted under the exception to the rule against hearsay evidence that statements made by a coconspirator during the concealment phase of the conspiracy were admissible against all other coconspirators. Williamson v. State, 285 Ga. App. 779, 648 S.E.2d 118 (2007) (decided under former O.C.G.A. § 24-3-5).

Applies to acts. — Former statute applied to the acts of the conspirators as well as to the conspirators' declarations. Thompson v. State, 58 Ga. App. 593, 199 S.E. 568 (1938) (decided under former Code 1933, § 38-306).

Agency theory. — Conspirator's declaration in furtherance of the conspiracy may be used against another conspirator not present on the theory that the declarant is the agent of the other, and the

admissions of one are admissible against both. Park v. Huff, 506 F.2d 849 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40 (1975) (decided under former Code 1933, § 38-306).

Not applicable to direct testimony. — It was the declarations of coconspirators related by another witness that are dealt with in the former statute, and not the direct testimony of an alleged coconspirator on the trial. Sutton v. State, 237 Ga. 423, 228 S.E.2d 820 (1976) (decided under former Code 1933, § 38-306).

Indictment not required. — Former statute did not include any condition precedent of indictment of a coconspirator before the former statute became applicable. Baker v. State, 17 Ga. App. 279, 86 S.E. 530 (1915) (decided under former Penal Code 1910, § 1025); Cook v. State, 22 Ga. App. 770, 97 S.E.2d 264 (1918) (decided under former Penal Code 1910, § 1025); Porterfield v. State, 137 Ga. App. 449, 224 S.E.2d 94 (1976) (decided under former Code 1933, § 38-306); Baugher v. State, 212 Ga. App. 7, 440 S.E.2d 768 (1994) (decided under former O.C.G.A. § 24-3-5).

Membership in conspiratorial unit required. — When the statements of a defendant were recounted to a third person by an individual who was part of the conspiratorial unit, the statements were admissible. Mullins v. State, 147 Ga. App. 337, 248 S.E.2d 706 (1978), aff'd, 249 Ga. 411, 290 S.E.2d 472 (1982) (decided under former Code 1933, § 38-306); Knox v. State, 156 Ga. App. 777, 275 S.E.2d 371 (1980) (decided under former Code 1933, § 38-306).

Undisclosed conspirators. — Acts and declarations of undisclosed conspirators, looking to the concealment of identity and the suppression of evidence, are admissible against other conspirators. Mitchell v. State, 86 Ga. App. 292, 71 S.E.2d 756 (1952) (decided under former Code 1933, § 38-306).

Statements out of defendant's presence. — Conversation overheard between coindictees out of the presence of the defendant is admissible. Hutchins v. State, 229 Ga. 804, 194 S.E.2d 442 (1972) (decided under former Code 1933, § 38-306).

Once some evidence of a joint criminal undertaking has been presented, the out-of-court statements of one wrongdoer, are admissible against the other even though that other is separately tried, and even though the statements were made outside the other's presence. Davis v. State, 129 Ga. App. 796, 201 S.E.2d 345 (1973) (decided under former Code 1933, § 38-306).

Indicia of reliability required for admissibility are that the statements be non-narrative, that the declarant is shown by the evidence to know whereof the declarant speaks, that the witness is not apt to be proceeding on faulty recollection, and that the circumstances show that the declarant had no apparent reason to lie to the witness; it is not required that all of the indicia be present for the statement to be admissible. Timberlake v. State, 158 Ga. App. 125, 279 S.E.2d 283 (1981) (decided under former O.C.G.A. § 24-3-5).

When statement inadmissible. — Statement was inadmissible under former O.C.G.A. § 24-3-5 when the statement implicates the defendant and when the statement was not accompanied by an indicia of reliability such as the spontaneity of the statement and the fact that the statement was against the speaker's penal interest. Boswell v. State, 158 Ga. App. 727, 282 S.E.2d 196 (1981) (decided under former O.C.G.A. § 24-3-5).

Admission of a coconspirator's hearsay statement that defendant was the "triggerman" in a robbery violated the confrontation clause, and could not be deemed harmless error since the hearsay lacked sufficient indicia of reliability; the statement was not res gestae, was not given under oath, was not against penal interest, and was exculpatory. Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991), cert. denied, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992) (decided under former O.C.G.A. § 24-3-5).

Statement made five months before crime. — Witness's testimony as to coconspirator's statement offering money for the killing of coconspirator's ex-husband made some five months prior to the killing was admissible even though witness/coconspirator expressed disinterest in the offer at that time. Blalock v. State, 250 Ga.

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441, 298 S.E.2d 477 (1983) (decided under former O.C.G.A. § 24-3-5).

Wire tap conversations of other conspirators to which appellants had not been parties were admissible under former O.C.G.A. § 24-3-5. Gilstrap v. State, 162 Ga. App. 841, 292 S.E.2d 495 (1982) (decided under former O.C.G.A. § 24-3-5).

Tapes and transcripts admissible when testimony admissible. — Trial court did not err in admitting in evidence two tapes of a coconspirator's conversations with defendants and the transcripts thereof because the transcripts were the result of a confession made by the coconspirator, after one coconspirator heard defendants' statements and could have testified to what they said. The coconspirator's voluntary participation in the recording of the conversations does not alter their basic admissibility as the lawful electronic interception of the conversations only created a recording of what the coconspirator could have related as a witness. Ramsey v. State, 165 Ga. App. 854, 303 S.E.2d 32 (1983) (decided under former O.C.G.A. § 24-3-5).

Statements attributable to coconspirator who refused to testify properly admitted as declarations of coconspirator during course of conspiracy. Owens v. State, 251 Ga. 313, 305 S.E.2d 102 (1983) (decided under former O.C.G.A. § 24-3-5).

Separate trials. — Statutory rule is true even though the person against whom the declaration is introduced is being tried separately from the person making the declaration. Coleman v. State, 141 Ga. 731, 82 S.E. 228 (1914) (decided under former Penal Code 1910, § 1025); Tate v. State, 41 Ga. App. 300, 152 S.E. 609 (1930) (decided under former Penal Code 1910, § 1025); Driggers v. State, 51 Ga. App. 370, 180 S.E. 619 (1935) (decided under former Code 1933, § 38-306); Wortham v. State, 184 Ga. 674, 192 S.E. 720 (1937) (decided under former Code 1933, § 38-306); West v. State, 85 Ga. App. 220, 68 S.E.2d 611 (1952) (decided under former Code 1933, § 38-306).

Testimony admissible as coconspirator's statement made during pendency of conspiracy. Lawrence v. State, 187 Ga. App. 211, 369 S.E.2d 531 (1988) (decided under former O.C.G.A. § 24-3-5).

When objected-to statements were made during the pendency of and in furtherance of a conspiracy, they were not admitted as similar transactions or for the sole purpose of showing bad character, but were relevant and material to the issues in the case. Kitchens v. State, 235 Ga. App. 349, 509 S.E.2d 391 (1998) (decided under former O.C.G.A. § 24-3-5).

Declarations were properly admitted in the following cases. — See Campbell v. State, 202 Ga. 705, 44 S.E.2d 903 (1947) (decided under former Code 1933, § 38-306); Hardy v. State, 245 Ga. 272, 264 S.E.2d 209 (1980) (decided under former Code 1933, § 38-306); Gay v. State, 249 Ga. 747, 294 S.E.2d 476 (1982) (decided under former O.C.G.A. § 24-3-5); Manuel v. State, 245 Ga. App. 565, 538 S.E.2d 472 (2000) (decided under former O.C.G.A. § 24-3-5).

Note-passing inmate was properly permitted to relate to the jury statements made by other inmates when the inmates were discussing what to do about the possibility the victim was going to tell the authorities about their effort to escape as the coconspiratorial statements were made during the pendency of the conspiracy and the statements were presumed to be sufficiently reliable to satisfy the confrontation clause's requirement of trustworthiness; the admission of the statements was not at odds with Crawford v. Washington, 541 U.S. 36 (2004), because statements admissible pursuant to the hearsay exception permitting the use of statements made in furtherance of a conspiracy were not testimonial. McKinney v. State, 281 Ga. 92, 635 S.E.2d 153 (2006) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err by admitting the recorded statement of a witness under circumstances in which, at trial, the witness recanted the statement, claiming the statement was fabricated under pressure from police; in the statement, the witness stated that the defendant bragged about the crime, reporting that the defendant shot the victim and predicting that the eyewitnesses were too intoxicated to be able to identify them. The statement cor-

roborated other details, related to the witness by the codefendants regarding the crime itself and the subsequent attempts to dispose of instrumentalities of the crime, and the statement was properly admitted as evidence of statements made by coconspirators during the pendency of the criminal project. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913 (2009) (decided under former O.C.G.A. § 24-3-5).

Writings were admissible. — See Bragg v. State, 52 Ga. App. 69, 182 S.E. 403 (1935) (letter written by one coconspirator to other relating to crime) (decided under former Code 1933, § 38-306); Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (1979) (written directions to witness from coconspirator) (decided under former Code 1933, § 38-306); Farley v. State, 155 Ga. App. 188, 270 S.E.2d 361 (1980) (trial transcript) (decided under former Code 1933, § 38-306).

Error to allow into deliberations. — All writings introduced in evidence in lieu of testimony from the witness stand, such as interrogatories, depositions, dying declarations, and confessions of guilt of a defendant or of an alleged coconspirator, which depend entirely for their value on the credibility of the maker, should not be in the possession of the jury during their deliberations, thus, when defendants' and alleged coconspirators' signed statements are delivered to the jury, over timely objections, a new trial must be granted. Royals v. State, 208 Ga. 78, 65 S.E.2d 158 (1951) (decided under former Code 1933, § 38-306).

No ineffective counsel since statements by coconspirator admissible. — Defendant failed to show that trial counsel was ineffective in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV, as statements made by a coconspirator were admissible under former O.C.G.A. § 24-3-5, and the failure of counsel to raise a non-meritorious hearsay objection did not constitute ineffective legal representation. Jones v. State, 279 Ga. 854, 622 S.E.2d 1 (2005) (decided under former O.C.G.A. § 24-3-5).

No ineffective assistance of counsel. — Defendant did not receive ineffective assistance of counsel due to counsel's failure to object to hearsay testimony of a note-passing inmate as the hearsay statements fell within the exception permitting hearsay statements made by coconspirators during the pendency of the conspiracy; the failure to object did not constitute deficient performance. McKinney v. State, 281 Ga. 92, 635 S.E.2d 153 (2006) (decided under former O.C.G.A. § 24-3-5).

3. Conspiracy Defined

a. In General

Conspiracy consists in a corrupt agreement between two or more persons to do an unlawful act, the existence of which agreement may be established by direct proof, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose. Kennemore v. State, 222 Ga. 362, 149 S.E.2d 791 (1966) (decided under former Code 1933, § 38-306).

Conspiracy is a corrupt agreement between two or more persons to do an unlawful act. Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968) (decided under former Code 1933, § 38-306).

To have a conspiracy, there must be an agreement between two or more persons to commit a crime. Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82 (1983) (decided under former O.C.G.A. § 24-3-5).

Motive to commit crime. — Criminal project referred to in former statute included the creation of the original motive to commit the crime, the plan to commit the crime and the carrying out of the plan. The motive and the plan could be created first in the mind of only one of the coconspirators and prior to the formation of the conspiracy itself. Knight v. State, 239 Ga. 594, 238 S.E.2d 390 (1977) (decided under former Code 1933, § 38-306).

Common design. — Common design which is the essence of conspiracy may be made to appear when the parties steadily pursue the same object, whether acting separately or together by common or different means, ever leading to the same unlawful result. Park v. Huff, 506 F.2d 849 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40 (1975) (decided under former Code 1933, § 38-306).

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b. Proof of Conspiracy

Conspiracy may be proved by circumstantial as well as by direct evidence. Darden v. State, 172 Ga. 590, 158 S.E. 414 (1931) (decided under former Penal Code 1910, § 1025); Wortham v. State, 184 Ga. 674, 192 S.E. 720 (1937) (decided under former Code 1933, § 38-306); Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968) (decided under former Code 1933, § 38-306); Sentell v. State, 227 Ga. 153, 179 S.E.2d 234 (1971) (decided under former Code 1933, § 38-306).

Existence of a conspiracy may be established by direct proof, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose. Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968) (decided under former Code 1933, § 38-306); Weatherington v. State, 139 Ga. App. 795, 229 S.E.2d 676 (1976) (decided under former Code 1933, § 38-306).

Existence of a common design or purpose between two or more persons to commit an unlawful act may be shown by direct or circumstantial evidence. Harris v. State, 255 Ga. 500, 340 S.E.2d 4 (1986) (decided under former O.C.G.A. § 24-3-5).

State must make a prima facie showing of a conspiracy by aliunde proof. Weatherington v. State, 139 Ga. App. 795, 229 S.E.2d 676 (1976) (decided under former Code 1933, § 38-306).

Conspiracy itself must be proved by evidence aliunde such declarations, and the declarations are not admissible unless the conspiracy is prima facie shown by such aliunde evidence. Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968) (decided under former Code 1933, § 38-306); Sentell v. State, 227 Ga. 153, 179 S.E.2d 234 (1971) (decided under former Code 1933, § 38-306); Park v. Huff, 506 F.2d 849 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40 (1975) (decided under former Code 1933, § 38-306).

In order to establish a conspiracy it is not necessary that the aliunde proof shall itself warrant a verdict, slight evidence connecting the defendant with the crime will be sufficient. Weatherington v. State, 139 Ga. App. 795, 229 S.E.2d 676 (1976) (decided under former Code 1933, § 38-306).

And prove existence beyond a reasonable doubt. — In order to properly admit the declaration of an alleged coconspirator made during a criminal project, there must be sufficient evidence aliunde the declaration to establish the conspiracy at least prima facie and prove the declaration's existence beyond a reasonable doubt. Wortham v. State, 184 Ga. 674, 192 S.E. 720 (1937) (decided under former Code 1933, § 38-306); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979) (decided under former Code 1933, § 38-306).

While the rule is well established that the conspiracy itself cannot be shown from the acts and declarations of one coconspirator in the absence of the others (this rule being necessary to prevent the finding of the fact of the conspiracy from such acts and declarations alone), yet the acts and declarations made in carrying out the conspiracy are relevant. Bragg v. State, 52 Ga. App. 69, 182 S.E. 403 (1935) (decided under former Code 1933, § 38-306).

Participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence. Park v. Huff, 506 F.2d 849 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40 (1975) (decided under former Code 1933, § 38-306).

Declarations of coconspirator admissible. — State had to make a prima facie showing of the existence of a conspiracy, without regard to the declarations of the coconspirators, in order to admit their out-of-court declarations; trial judge could admit testimony by coconspirators before the conspiracy had been proved, provided the conspiracy's existence was ultimately shown at trial. Belmar v. State, 252 Ga. App. 264, 555 S.E.2d 902 (2001) (decided under former O.C.G.A. § 24-3-5).

Hearsay statements made by each de-

fendant implicating their coconspirators in the crimes were properly admitted against all the defendants as coconspirator's statements under former O.C.G.A. § 24-3-5; a conspiracy among the defendants was shown to have existed, as the evidence indicated that the victim's house was a drug house, that the first defendant's car was seen on the scene around the time of the murder, and that the second defendant later possessed drugs and money in a hotel room shortly after the crimes, and although the defendants all made incriminating statements in jail, the statements were made during the concealment phase as the defendants were still hiding their identities from the police. Brooks v. State, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 549 U.S. 1215, 127 S. Ct. 1266, 167 L. Ed. 2d 91 (2007) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err by permitting a witness to testify regarding a conversation the witness participated in which took place on the day after the crime in which the defendant and the codefendants made certain admissions concerning the crimes at issue; hearsay statements of coconspirators were admissible when the state at some point before the close of evidence established a prima facie case of conspiracy independent of the coconspirator statement. The state presented ample evidence in the form of testimony from two witnesses present with the defendant and the codefendants in the hours immediately prior to the crimes that the three, together with one of the witnesses, planned to commit a robbery that night, and the statement was clearly within the concealment phase of the conspiracy. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913 (2009) (decided under former O.C.G.A. § 24-3-5).

Trial court did not err by admitting incriminating statements a codefendant made to witnesses because the codefendant's statements were made during the pendency of the conspiracy and were admissible against the defendant under the coconspirator exception to the hearsay rule, former O.C.G.A. § 24-3-5; the admission of the codefendant's statements to lay witnesses during the concealment phase of the conspiracy did not violate the confrontation clause because the codefendant's statements were not testimonial. Allen v. State, 288 Ga. 263, 702 S.E.2d 869 (2010) (decided under former O.C.G.A. § 24-3-5).

Statements made by defendant's nephew during the time the nephew, defendant, and another man conspired to traffic in cocaine were admissible against the defendant in defendant's trial for trafficking in cocaine as the state first proved the existence of the conspiracy and defendant's involvement in the conspiracy. Smith v. State, 253 Ga. App. 131, 558 S.E.2d 455 (2001) (decided under former O.C.G.A. § 24-3-5).

When evidence independent of the testimony of the coconspirators is not sufficient to show a conspiracy, it was error to admit in evidence testimony as to declarations of the alleged conspirators to charge the jury upon the subject of conspiracy and to overrule the grounds of those motions for new trial involving conspiracy. Caldwell v. State, 227 Ga. 703, 182 S.E.2d 789 (1971) (decided under former Code 1933, § 38-306).

Evidence insufficient. — Evidence of conspiracy between the defendant and a codefendant was not sufficient to render admissible against the former evidence of declarations by the latter. Johnson v. State, 186 Ga. 324, 197 S.E. 786 (1938) (decided under former Code 1933, § 38-306).

Trial court did not err by denying a defendant's motion for a new trial with regard to the defendant's convictions for armed robbery and possession of a firearm based on the trial court erroneously admitting the testimony of a witness, who was a long-time acquaintance of the co-indictee that the co-indictee had bragged about committing the robbery with the defendant as, although the state failed to establish a prima facie case of conspiracy, the admission was harmless in view of the victims' consistent eyewitness testimony implicating the defendant in the robbery and defendant's admission of the intention to rob the store. Fisher v. State, 295 Ga. App. 501, 672 S.E.2d 476 (2009) (decided under former O.C.G.A. § 24-3-5).

Evidence was sufficient to show

Declarations of Conspirators (Cont'd)
3. Conspiracy Defined (Cont'd)
b. Proof of Conspiracy (Cont'd)

conspiracy in the following cases. — See Patterson v. State, 199 Ga. 773, 35 S.E.2d 504 (1945) (decided under former Code 1933, § 38-306); Cowart v. State, 92 Ga. App. 253, 88 S.E.2d 208 (1955) (decided under former Code 1933, § 38-306); Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210 (1984), cert. denied, 469 U.S. 873, 105 S. Ct. 230, 83 L. Ed. 2d 159 (1984) (decided under former O.C.G.A. § 24-3-5); Dalton v. State, 237 Ga. App. 217, 513 S.E.2d 745 (1999) (decided under former O.C.G.A. § 24-3-5); Freeman v. State, 273 Ga. 137, 539 S.E.2d 127 (2000) (decided under former O.C.G.A. § 24-3-5).

Because the state proved that two masked bandits committed three armed robberies, that defendant and an accomplice attempted to use the credit and debit cards obtained in the robberies immediately after the robberies, that masks and a gun used in the robberies were found in defendant's car, and that defendant told defendant's half-sister that defendant and the accomplice had committed the robberies, the evidence was sufficient to establish the fact of a conspiracy between defendant and the accomplice sufficient to admit declarations by the accomplice at defendant's criminal trial. Dillard v. State, 272 Ga. App. 523, 612 S.E.2d 804 (2005) (decided under former O.C.G.A. § 24-3-5).

Testimony of two witnesses as to statements made by coconspirators was evidence independent of statements made to an inmate witness, and was sufficient to support a jury's finding of a conspiracy; therefore, a trial court did not err in allowing the inmate witness to testify as to statements made by one of the perpetrators of the crime to the inmate witness while both were incarcerated. Dickerson v. State, 280 Ga. App. 29, 633 S.E.2d 367 (2006) (decided under former O.C.G.A. § 24-3-5).

Evidence adduced at trial provided sufficient circumstantial evidence of a conspiracy to possess methamphetamine with intent to distribute such that it was proper to allow a coconspirator's hearsay statements implicating the defendant in a conspiracy to distribute methamphetamine and other narcotics, including evidence that the parties lived in the same house and that the coconspirator put narcotics in the defendant's pocket as police raided the house. Dockery v. State, 308 Ga. App. 502, 707 S.E.2d 889 (2011) (decided under former O.C.G.A. § 24-3-5).

4. Pendency of Criminal Project

a. In General

Though crime previously committed. — Statement by the defendant coconspirator made after the actual commission of the crime, but while the conspiracy continued is admissible. Evans v. State, 222 Ga. 392, 150 S.E.2d 240, cert. denied, 385 U.S. 953, 87 S. Ct. 336, 17 L. Ed. 2d 231 (1966) (decided under former Code 1933, § 38-306); Scott v. State, 151 Ga. App. 495, 260 S.E.2d 401 (1979) (decided under former Code 1933, § 38-306).

Conspiracy must not have ended. — "Acts, doings and sayings of the coconspirators" made before or after the crime are admissible as original evidence against all defendants so long as they are made before the evidence shows that the conspiracy has ended. Price v. State, 239 Ga. 439, 238 S.E.2d 24 (1977) (decided under former Code 1933, § 38-306).

Pendency of the criminal project includes the accomplishment of the crime itself plus concealment of the crime or the identity of the perpetrators. Crowder v. State, 237 Ga. 141, 227 S.E.2d 230 (1976) (decided under former Code 1933, § 38-306); Welch v. State, 237 Ga. 665, 229 S.E.2d 390 (1976) (decided under former Code 1933, § 38-306); Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (1979) (decided under former Code 1933, § 38-306); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979) (decided under former Code 1933, § 38-306); Scott v. State, 151 Ga. App. 495, 260 S.E.2d 401 (1979) (decided under former Code 1933, § 38-306); Smith v. State, 244 Ga. 814, 262 S.E.2d 116 (1979) (decided under former Code 1933, § 38-306).

Rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues the parties to

such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other. Evans v. State, 222 Ga. 392, 150 S.E.2d 240, cert. denied, 385 U.S. 953, 87 S. Ct. 336, 17 L. Ed. 2d 231 (1966) (decided under former Code 1933, § 38-306); Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) (decided under former Code 1933, § 38-306); Munsford v. State, 235 Ga. 38, 218 S.E.2d 792 (1975) (decided under former Code 1933, § 38-306); Mills v. State, 236 Ga. 365, 223 S.E.2d 725 (1976) (decided under former Code 1933, § 38-306); Moore v. State, 240 Ga. 807, 243 S.E.2d 1, cert. denied, 439 U.S. 903, 99 S. Ct. 268, 58 L. Ed. 2d 249 (1978) (decided under former Code 1933, § 38-306); Hardy v. State, 245 Ga. 272, 264 S.E.2d 209, vacated, 449 U.S. 988, 101 S. Ct. 523, 66 L. Ed. 2d 285 (1980) (remanded for further consideration in light of Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980)) (decided under former Code 1933, § 38-306).

Declarations during concealment admissible. — So long as the concealment phase of the conspiracy continues, declarations of either of the conspirators are admissible against the other. Timberlake v. State, 158 Ga. App. 125, 279 S.E.2d 283 (1981) (decided under former O.C.G.A. § 24-3-5).

Statements made by the person with whom the defendant conspired to commit murder, made during the concealment phase of that conspiracy, were admissible against the defendant. Cromer v. State, 253 Ga. 352, 320 S.E.2d 751 (1984) (decided under former O.C.G.A. § 24-3-5).

Agreement not to discuss case ever again. — Conspiracy continues during the concealment phase, after crime has been committed, and when evidence was presented that defendants agreed not to discuss case ever again and crime went unsolved for over two years, concealment phase lasted throughout that time. Fortner v. State, 248 Ga. 107, 281 S.E.2d 533 (1981) (decided under former O.C.G.A. § 24-3-5).

Declarations made during conspiracy, including concealment stage, admissible. — Under former O.C.G.A. § 24-3-5, the declarations of a conspirator, made during the course of a conspiracy, including the concealment stage, are admissible against coconspirators. Wilbanks v. State, 251 Ga. App. 248, 554 S.E.2d 248 (2001) (decided under former O.C.G.A. § 24-3-5).

Statements by defendant's coconspirator to a third person regarding defendant's actions during the criminal project and during the concealment phase bore sufficient indicia of reliability to be admissible in defendant's criminal trial, pursuant to former O.C.G.A. § 24-3-5, and any objection on the grounds of the confrontation clause under U.S. Const., amend. 6 or on hearsay grounds would have lacked merit; accordingly, defendant's counsel was not ineffective for failing to object to the admission thereof. Redwine v. State, 280 Ga. 58, 623 S.E.2d 485 (2005) (decided under former O.C.G.A. § 24-3-5).

At the time a coconspirator made statements to friends, the coconspirator had not confessed to police or been arrested, and in those statements, was concealing the coconspirator's role in the conspiracy. The trial court therefore did not abuse the court's discretion by allowing the coconspirator's statements into evidence against the defendant. Keating v. State, 309 Ga. App. 804, 711 S.E.2d 327 (2011) (decided under former O.C.G.A. § 24-3-5).

Indicia of reliability which are determinative of whether a statement may be placed before the jury require that the statement by the declarant be non-narrative; that the declarant is shown by the evidence to know whereof the declarant speaks; that the witness is not apt to be proceeding on faulty recollection; and that the circumstances show that the declarant had no apparent reason to lie to the witness. Not all of the indicia need be present to support admissibility of the statement. Waters v. State, 174 Ga. App. 916, 331 S.E.2d 893 (1985) (decided under former O.C.G.A. § 24-3-5).

Coconspirator's offer to share theft proceeds. — Trial court properly admitted the testimony of coconspirator's sister recounting another coconspirator's offer to share the theft proceeds with her if she would keep silent about the matter. Truitt v. State, 174 Ga. App. 687, 331 S.E.2d 64 (1985) (decided under former O.C.G.A. § 24-3-5).

Declarations of Conspirators (Cont'd)
4. Pendency of Criminal Project (Cont'd)
a. In General (Cont'd)

Accomplices. — Acts, sayings, and conduct of one accomplice during the pendency of a conspiracy, not alone in its perpetration but also in its subsequent concealment, are admissible against another accomplice. Carter v. State, 106 Ga. 372, 32 S.E. 345, 71 Am. St. R. 262 (1899) (decided under former Penal Code 1895, § 999); Bragg v. State, 52 Ga. App. 69, 182 S.E. 403 (1935) (decided under former Code 1933, § 38-306); Thompson v. State, 58 Ga. App. 593, 199 S.E. 568 (1938) (decided under former Code 1933, § 38-306); Mitchell v. State, 86 Ga. App. 292, 71 S.E.2d 756 (1952) (decided under former Code 1933, § 38-306); Hutchins v. State, 229 Ga. 804, 194 S.E.2d 442 (1972) (decided under former Code 1933, § 38-306).

b. Termination of Conspiracy

Only the admissions made pending the conspiracy or fraudulent scheme should be considered, and not those made after the conspiracy was terminated or the fraudulent scheme executed. Turner v. State, 43 Ga. App. 799, 160 S.E. 509 (1931) (decided under former Penal Code 1910, § 1025).

Whether conspiracy ended crucial question. — Crucial question in determining whether the statement of one conspirator may be used as evidence of guilt against another conspirator is whether the conspiracy had ended at the time the statement was made. Munsford v. State, 235 Ga. 38, 218 S.E.2d 792 (1975) (decided under former Code 1933, § 38-306).

Conspiracy deemed continuing until ultimate purpose accomplished. — If the conspiracy contemplates actions beyond an initial criminal act such as concealment, the conspiracy is deemed in progress until its ultimate purpose is accomplished, and admissions made by one conspirator while attempting to conceal the case may be admissible against the other conspirators. Knight v. State, 239 Ga. 594, 238 S.E.2d 390 (1977) (decided under former Code 1933, § 38-306).

In legal contemplation, the enterprise may not be at an end so long as the concealment of the crime or the identity of all the conspirators has not been disclosed. Mitchell v. State, 86 Ga. App. 292, 71 S.E.2d 756 (1952) (decided under former Code 1933, § 38-306).

Arrest alone does not necessarily end. — Conspiracy or the concealment phase of the conspiracy does not necessarily end just because one or more participants have been arrested and jailed. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979) (decided under former Code 1933, § 38-306).

Conspiracy does not necessarily end simply because one or more of the conspirators have been arrested. Chews v. State, 187 Ga. App. 600, 371 S.E.2d 124 (1988) (decided under former O.C.G.A. § 24-3-5).

Even though one codefendant had been arrested when a tape recording of a conversation between that codefendant and another was made, the tape was admissible since the arrest did not end the conspiracy and the substance of the recorded conversation indicated that the concealment phase of the conspiracy was ongoing. Cromwell v. State, 218 Ga. App. 481, 462 S.E.2d 388 (1995) (decided under former O.C.G.A. § 24-3-5).

Evidence admissible from concealment phase. — As the conspiracy between the two brothers to conceal their roles in two murders had not terminated when one brother wrote a letter incriminating the other, that letter was clearly admissible against the second brother because the letter concerned the murders and was written during the concealment phase of their conspiracy as to those crimes. Arevalo v. State, 275 Ga. 392, 567 S.E.2d 303 (2002), cert. denied, 538 U.S. 962, 123 S. Ct. 1749, 155 L. Ed. 2d 515 (2003) (decided under former O.C.G.A. § 24-3-5).

Statements made by a defendant's accomplice that implicated the defendant in crimes that included a murder and an armed robbery were admissible against the defendant under the coconspirator exception to the hearsay rule because the statements were made during the concealment phase of the conspiracy prior to the

accomplice making a confession that the accomplice had committed the murder. Jackson v. State, 292 Ga. App. 312, 665 S.E.2d 20 (2008) (decided under former O.C.G.A. § 24-3-5).

Incriminating statements to police end conspiracy. — Statement made to police by a conspirator, whether inculpatory or exculpatory as to the declarant, which statement incriminates the other conspirator as a party to the crime, constitutes termination of the conspiracy. Thus, such statement by a conspirator is not made during the pendency of the criminal project and is not admissible. Crowder v. State, 237 Ga. 141, 227 S.E.2d 230 (1976) (decided under former Code 1933, § 38-306); Hannah v. State, 144 Ga. App. 677, 242 S.E.2d 334 (1978) (decided under former Code 1933, § 38-306).

When first defendant made a statement to police and implicated second defendant, defendants' conspiracy ended and the statement was only admissible against first defendant; thus, the statement's admission as against a second defendant constituted a Bruton violation and under the circumstances warranted a reversal of the second defendant's convictions. Meadows v. State, 264 Ga. App. 160, 590 S.E.2d 173 (2003) (decided under former O.C.G.A. § 24-3-5).

Statement to an investigator by the defendant's alleged coconspirator that the coconspirator drove the defendant to a restaurant that the defendant robbed was not admissible against the defendant under former O.C.G.A. § 24-3-5, as it was not made during the pendency of the conspiracy, but in fact constituted a termination of the conspiracy. Verdree v. State, 299 Ga. App. 673, 683 S.E.2d 632 (2009) (decided under former O.C.G.A. § 24-3-5).

Confession made to police by a conspirator, in which other conspirators were identified and their participation was described, was not made during the pendency of the criminal project but was made after the enterprise was ended. Such confession therefore was not admissible under former Code 1933, § 38-306 and was inadmissible at the trial of conspirator under former Code 1933, § 38-414. Crowder v. State, 237 Ga. 141, 227 S.E.2d 230 (1976) (decided under former Code 1933, § 38-306); Welch v. State, 237 Ga. 665, 229 S.E.2d 390 (1976) (decided under former Code 1933, § 38-306); Corson v. State, 144 Ga. App. 559, 241 S.E.2d 454 (1978) (decided under former Code 1933, § 38-306); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979) (decided under former Code 1933, § 38-306); Livingston v. State, 268 Ga. 205, 486 S.E.2d 845 (1997) (decided under former O.C.G.A. § 24-3-5).

Statements after conspiracy terminated admissible only against declarant. — Declarations or conduct of one joint conspirator, made after the enterprise is ended, are inadmissible except against the person making them, and against others must be rejected as narrative merely of past occurrence. Hicks v. State, 11 Ga. App. 265, 75 S.E. 12 (1912) (decided under former Penal Code 1910, § 1025); Wall v. State, 153 Ga. 309, 112 S.E. 142 (1922) (decided under former Penal Code 1910, § 1025).

Evidence as to admissions of guilt involving the defendant, made by a coconspirator after the termination of the conspiracy, was admissible since it appeared that the admissions were made in the presence of the defendant personally and were then freely and voluntarily declared by the defendant to be true. Gunter v. State, 19 Ga. App. 772, 92 S.E. 314 (1917) (decided under former Penal Code 1910, § 1025).

Conspiracy was found to be terminated in the following case. — See Green v. State, 115 Ga. App. 685, 155 S.E.2d 655 (1967) (arrest) (decided under former Code 1933, § 38-306).

Admission of codefendant's statement to investigator was reversible error because the statement was not made during the pendency of the criminal project, the conspiracy terminated when the statement was made to the investigator and thus, the statement was inadmissible as an exception to the hearsay rule. Sharber v. State, 268 Ga. App. 365, 601 S.E.2d 732 (2004) (decided under former O.C.G.A. § 24-3-5).

5. Procedure

a. Order of Proof

Conspiracy must be proved first. — Only after the fact of the conspiracy has

Declarations of Conspirators (Cont'd)
5. Procedure (Cont'd)
a. Order of Proof (Cont'd)

been proven may the declarations by any one of the conspirators during the pendency of the criminal project be admissible against all. Stinson v. State, 151 Ga. App. 533, 260 S.E.2d 407 (1979) (decided under former Code 1933, § 38-306).

When there was sufficient evidence introduced prior to disputed testimony to make out prima facie case of conspiracy, court did not err in admitting declarations of coconspirator. Salmon v. State, 249 Ga. 785, 294 S.E.2d 500 (1982) (decided under former O.C.G.A. § 24-3-5); Blue v. State, 212 Ga. App. 847, 433 S.E.2d 635 (1994) (decided under former O.C.G.A. § 24-3-5).

But rule not inflexible. — While it may generally be the better practice to require a prima facie case of conspiracy first to be made, before admitting evidence of the acts and declarations of one of the alleged conspirators, there is no inflexible rule to that effect. Coleman v. State, 141 Ga. 731, 82 S.E. 228 (1914) (decided under former Penal Code 1910, § 1029); Hutchins v. State, 229 Ga. 804, 194 S.E.2d 442 (1972) (decided under former Code 1933, § 38-306); Fallings v. State, 232 Ga. 798, 209 S.E.2d 151 (1974) (decided under former Code 1933, § 38-306).

Coconspirator's statement allowed into evidence, notwithstanding the contention that the fact of conspiracy was not proved before the admission of the statement, since the evidence adduced at trial, independent of the coconspirator's statement, was sufficient to prove a conspiracy. Isaac v. State, 269 Ga. 875, 505 S.E.2d 480 (1998) (decided under former O.C.G.A. § 24-3-5).

Evidence admitted conditioned on proof of conspiracy. — Incriminating statements of coconspirator were properly admitted since it was allowed on the condition that a conspiracy be shown by all of the evidence, since order of proof is in the discretion of the judge and there is no error in admitting such declarations if a prima facie case of conspiracy is proved by the state. Blalock v. State, 250 Ga. 441, 298 S.E.2d 477 (1983) (decided under former O.C.G.A. § 24-3-5).

Evidence becomes competent after showing of conspiracy. — Though evidence is objectionable because conspiracy was not proved, if it be afterwards shown, it renders the evidence competent. Barrow v. State, 121 Ga. 187, 48 S.E. 905 (1904) (decided under former Penal Code 1895, § 999); Tate v. State, 41 Ga. App. 300, 152 S.E. 609 (1930) (decided under former Penal Code 1910, § 1025).

Hearsay evidence admissible. — Admission of hearsay testimony by coconspirators was proper based on the prosecutor's representation that the state would introduce defendant's statement, which had been ruled admissible and which revealed that coindictees were together prior to and participated in the murder. The statement satisfied the requirement of a prima facie case without regard to the hearsay testimony itself. Waldrip v. State, 267 Ga. 739, 482 S.E.2d 299 (1997), cert. denied, 522 U.S. 917, 118 S. Ct. 305, 139 L. Ed. 2d 235 (1997) (decided under former O.C.G.A. § 24-3-5).

It is within the discretion of the trial judge to allow the admission of testimony by coconspirators before the existence of the conspiracy is disclosed, provided that such existence is afterwards shown during the trial. Tate v. State, 41 Ga. App. 300, 152 S.E. 609 (1930) (decided under former Penal Code 1910, § 1025); Jenkins v. State, 73 Ga. App. 515, 37 S.E.2d 230 (1946) (decided under former Code 1933, § 38-306); Denison v. State, 258 Ga. 690, 373 S.E.2d 503 (1988) (decided under former O.C.G.A. § 24-3-5).

Trial judge has sound discretion as to the order of proof, and if a prima facie case of conspiracy is shown from the whole evidence, the admitting of a declaration by an alleged coconspirator is not error. Wortham v. State, 184 Ga. 674, 192 S.E. 720 (1937) (decided under former Code 1933, § 38-306); Hutchins v. State, 229 Ga. 804, 194 S.E.2d 442 (1972) (decided under former Code 1933, § 38-306); Fallings v. State, 232 Ga. 798, 209 S.E.2d 151 (1974) (decided under former Code 1933, § 38-306); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979) (decided under former Code 1933, § 38-306).

Error is harmless. — While it is error to admit declarations of coconspirators

before the fact of conspiracy is proved, the error becomes harmless when subsequently during the trial the conspiracy is clearly established by the direct and circumstantial evidence adduced. Driggers v. State, 51 Ga. App. 370, 180 S.E. 619 (1935) (decided under former Code 1933, § 38-306).

Early admission of declarations not grounds for new trial. — While it is the better practice to require proof of the conspiracy before admitting such declarations, the admission of the evidence in a different order will not be ground for a new trial. McDaniel v. State, 103 Ga. 268, 30 S.E. 29 (1898) (decided under former Penal Code 1895, § 999); Tate v. State, 41 Ga. App. 300, 152 S.E. 609 (1930) (decided under former Penal Code 1910, § 1025).

No error shown by reference to conspiracy during opening statement. — With regard to a defendant's trial and conviction for malice murder arising from the severe physical abuse of the defendant's five-year-old nephew, the defendant failed to meet the burden of proving that trial counsel was ineffective for failing to object to the comments made by the state during open statements with regard to the defendant and the defendant's mother beating the victim all the time and that the pair carried out the actions together. Peterson v. State, 282 Ga. 286, 647 S.E.2d 592 (2007) (decided under former O.C.G.A. § 24-3-5).

b. Duty of Jury

Determination of conspiracy. — It is for the jury to determine from the whole evidence whether a conspiracy has been shown, and if they find that none has been established, it is their duty not to consider the acts and declarations of the supposed coconspirator. Coleman v. State, 141 Ga. 731, 82 S.E. 228 (1914) (decided under former Penal Code 1910, § 1025); Nelson v. State, 51 Ga. App. 207, 180 S.E. 16 (1935) (decided under former Code 1933, § 38-306); Wortham v. State, 184 Ga. 674, 192 S.E. 720 (1937) (decided under former Code 1933, § 38-306); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979) (decided under former Code 1933, § 38-306).

Question of existence of a conspiracy is ultimately for the jury to determine. Harris v. State, 255 Ga. 500, 340 S.E.2d 4 (1986) (decided under former O.C.G.A. § 24-3-5).

Necessary findings. — Before the jury can consider such declaration, it must find (1) that a conspiracy was in existence (2) when the statement was made. Parker v. State, 145 Ga. App. 205, 243 S.E.2d 580 (1978) (decided under former Code 1933, § 38-306).

c. Instructions

Erroneous instructions. — It was error, likely to have been very prejudicial, to charge a jury in effect that the state's contention of conspiracy would be established if the jury believed beyond a reasonable doubt that there was a conspiracy or common purpose between "any two" of the three defendants, not necessarily including the defendant on trial. Wortham v. State, 184 Ga. 674, 192 S.E. 720 (1937) (decided under former Code 1933, § 38-306).

Proper instruction. — Trial court did not err when the court gave the instruction to the jury that informed the jury of the circumstances under which the alleged declarations of an alleged coconspirator made out of the presence of the defendant are to be disregarded, and the instruction immediately followed the trial court's instruction that any admissions made by one or more of the conspirators during and in furtherance of the alleged conspiracy could be considered by the jury against all the conspirators if the existence of the conspiracy had been shown beyond a reasonable doubt by evidence other than the declarations of alleged coconspirators; the instruction correctly stated the law and did not impermissibly shift the burden of proof to the defendant by failing to include "not" in the pattern charge, so as to read "not satisfied beyond a reasonable doubt that a conspiracy exists." Castillo v. State, 281 Ga. 579, 642 S.E.2d 8 (2007) (decided under former O.C.G.A. § 24-3-5).

Trial court properly refused to give the defendant's request to charge that, in determining whether a conspiracy existed, the jury could not consider the declarations of the alleged accomplice. Castell v. State, 250 Ga. 776, 301 S.E.2d

Declarations of Conspirators (Cont'd)
5. Procedure (Cont'd)
c. Instructions (Cont'd)

234 (1983) (decided under former O.C.G.A. § 24-3-5).

6. Unavailability of Declarant

State need not prove declarant's unavailability as a prerequisite to admission of the declarant's declarations made during pendency of criminal project. Gay v. State, 249 Ga. 747, 294 S.E.2d 476 (1982) (decided under former O.C.G.A. § 24-3-5).

Non-testifying codefendant's admission properly admitted. — Admission of incriminating statements made by the defendant's coconspirator to an informant to the effect that defendant agreed to sell methamphetamine to the informant, and arranging details of the transaction, was proper, despite the fact that the coconspirator did not appear at trial and was not available for cross-examination, because the statements were made during the pendency of the criminal project, the coconspirator was not asserting past facts and had personal knowledge of the identities and roles of the participants, the possibility that the statements were founded on faulty memory was decidedly remote in that the referenced occurrences were taking place almost simultaneously with the statements, and, believing that the coconspirator was setting up a lucrative drug deal with a sympathetic customer, the coconspirator had no reason to lie about the defendant's involvement in the crime. Bowden v. State, 279 Ga. App. 173, 630 S.E.2d 792 (2006) (decided under former O.C.G.A. § 24-3-5).

Inadmissible Hearsay

Questions propounded by counsel were not proper under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) since the questions simply did not constitute an attempt to ascertain an explanation of the witness's course of conduct. Jones v. State, 247 Ga. 268, 275 S.E.2d 67, cert. denied, 454 U.S. 817, 102 S. Ct. 94, 70 L. Ed. 2d 85 (1981) (decided under former O.C.G.A. § 24-3-2).

Evidence of defendant's character. — Testimony which places defendant's character in evidence without defendant having first done so personally cannot be admitted under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801). Anderson v. State, 252 Ga. 103, 312 S.E.2d 113 (1984) (decided under former O.C.G.A. § 24-3-2).

Victim's reputation for violence. — Murder victim's reputation for violence may be offered by the accused upon making a prima facie showing that the victim was the aggressor and was assaulting the accused, who acted to defend oneself. Woods v. State, 269 Ga. 60, 495 S.E.2d 282 (1998) (decided under former O.C.G.A. § 24-3-2).

Evidence that a murder charge against a witness had been dropped after the witness took a lie detector test was inadmissible since the defense did not place the state's conduct in dismissing the murder charge in issue. Furthermore, the admission constituted harmful error because it created an inference that the witness had passed the polygraph examination and bolstered the credibility of the witness. Wilson v. State, 254 Ga. 473, 330 S.E.2d 364 (1985) (decided under former O.C.G.A. § 24-3-2).

Murder defendant's testimony that victim had knifed another person. — Although murder defendant's testimony that the victim had knifed another person would have been admissible under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) as an attempt to explain the murder as the result of the defendant's reasonable fear of the victim, the testimony was properly excluded as an attempt to prove the victim's character by a specific act. Echols v. State, 174 Ga. App. 829, 331 S.E.2d 619 (1985) (decided under former O.C.G.A. § 24-3-2).

Affidavits of conversations from third parties. — In an action by lessors against guarantors, the affidavit of an attorney representing the guarantors, recalling a conversation the attorney had with an officer of the lessee, was not admissible because the affidavit's evidentiary value depended on the credibility of the affiant, not on the credibility

of the attorney. Athens Int'l, Inc. v. Venture Capital Properties, Inc., 230 Ga. App. 286, 495 S.E.2d 900 (1998) (decided under former O.C.G.A. § 24-3-2).

Uncommunicated threat of victim. — Although evidence of a death threat against a defendant may fall within the exception under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) when offered, not for the truth of the matter asserted, but to show the victim's state of mind, this hearsay exception did not apply since the evidence did not support defendant's contention that the uncommunicated threat showed the victim's state of mind. Massey v. State, 272 Ga. 50, 525 S.E.2d 694 (2000) (decided under former O.C.G.A. § 24-3-2).

Evidence of a death threat against a defendant. — Exception under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801) may have allowed evidence of a death threat against a defendant when the evidence was offered, not for the truth of the matter asserted, but rather to show the victim's state of mind. However, such evidence was admissible only in the circumstances in which there was a conflict in the evidence as to who instigated a fight, to corroborate evidence of communicated threats, or to establish the attitude of the deceased. Render v. State, 288 Ga. 420, 704 S.E.2d 767 (2011) (decided under former O.C.G.A. § 24-3-2).

Prior difficulty evidence. — Supreme Court of Georgia overruled Perry v. State, 255 Ga. 490, 339 S.E.2d 922 (1986), to the extent it held that a victim's conversations with a witness were admissible to explain the defendant's conduct under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801), even if they were unknown to the defendant. Moreover, to the extent Perry held that the victim's conduct was a matter concerning which the truth had to be found and that the victim's statements were admissible to explain that conduct, it was also overruled. Character v. State, 285 Ga. 112, 674 S.E.2d 280 (2009) (decided under former O.C.G.A. § 24-3-2).

With regard to two defendants' convictions for malice murder, aggravated assault, and other crimes, the trial court did not abuse the court's discretion by allowing the admission of prior difficulty evidence and concluding that those statements were admissible under the necessity exception to the hearsay rule because the statements, which involved the aggravated assault victim testifying about one defendant robbing one of the murder victims of money won in a dice game and that the same defendant had tried to start an argument with the aggravated assault victim at a nightclub the same night the crimes took place, were not testimonial since the statements were not offered for the truth of the matter asserted. Further, even if the statements were not admissible under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801), the trial court properly admitted the statements under the necessity exception to the hearsay rule as the aggravated assault victim and the murder victim at issue were long-time friends who placed great confidence in each other and it was established that the murder victim confided in the aggravated assault victim in times of trouble. Character v. State, 285 Ga. 112, 674 S.E.2d 280 (2009) (decided under former O.C.G.A. § 24-3-2).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 38-301 are included in the annotations for this Code section.

Computer print-outs. — Although computer print-out sheets are generally classified as hearsay and to be admissible into evidence, computer print-outs must fall within an exception to the well-known hearsay rule, subject to the discretion of the court, computer print-out sheets or records stored in an electronic computer may be admissible into evidence when such are permanent records made in the regular course of business. 1973 Op. Att'y Gen. No. 73-91 (decided under former Code 1933, § 38-301).

RESEARCH REFERENCES

Am. Jur. 2d. — 3 Am. Jur. 2d, Agency, § 347. 29 Am. Jur. 2d, Evidence, §§ 668, 671. 29A Am. Jur. 2d, Evidence, §§ 715 et seq., 767, 769, 770, 814, 819 et seq., 828, 871 et seq.

C.J.S. — 3 C.J.S., Agency, § 550 et seq. 31A C.J.S., Evidence, §§ 282 et seq., 376 et seq., 405 et seq., 439 et seq., 476.

ALR. — Competency of agent, with whom transaction by person since deceased was had, to testify adversely to estate, 21 ALR 928; 54 ALR 264.

Confession by one who has been subjected to or threatened with physical suffering, 24 ALR 703.

Character and sufficiency of evidence to show that letter was mailed, 25 ALR 9; 86 ALR 541.

Admissibility in favor of writer of unanswered letter not part of mutual correspondence, 55 ALR 460.

Extrajudicial admissions by principal as evidence against surety, 60 ALR 1500.

Evidence as to threats made to keep witness away from criminal trial, 62 ALR 136.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.

Admissibility of declarations by one involved in an accident in relation to his employment by or agency for other person, 67 ALR 170; 150 ALR 623.

Concession, admission, or statement by defendant's attorney in criminal case as obviating necessity of introducing evidence on the point, 70 ALR 94.

Admissions of partner as to past transactions or events as evidence against firm or other partner, 73 ALR 447.

Admissibility of statements of alleged agent for the purpose of showing that other party dealt with him as agent and not as principal, as distinguished from the purpose of showing the existence or extent of agency, 80 ALR 604.

Admissibility of inculpatory statements made in the presence of accused, and not denied or contradicted by him, 80 ALR 1235; 115 ALR 1510.

Admissibility of statements or declarations of plaintiff's spouse in an action for alienation of affections for the purpose of showing his or her mental state, 82 ALR 825.

Admissibility of declarations of grantor or transferrer on issue as to whether conveyance or transfer was in fraud of creditors, 83 ALR 1446.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 ALR 1310.

Admissibility of admissions against title to tangible personal property made by one subsequent to executing chattel mortgage thereon, 106 ALR 1296.

Admissibility on issue of negligence or contributory negligence of statements warning one of danger, 125 ALR 645.

Extrajudicial statements by witness who is subject to cross-examination as evidence of facts to which they relate, 133 ALR 1454.

Admissibility of oral or written statement by deceased as to fact or terms of an antenuptial or postnuptial agreement which cannot be found, 140 ALR 1133.

Extrajudicial declarations of agent as admissible in action against principal for personal injuries for purpose of showing knowledge of relevant fact or condition at or prior to time of injury, 141 ALR 704.

Admissibility of evidence of complaint or details of complaint by alleged victim of rape or other similar offense as affected by fact that she is not a witness or is incompetent to testify because of age or other reason, 157 ALR 1359.

Silence upon hearing statement by spouse as evidence of admission in civil case, 158 ALR 465.

Extrajudicial declaration of commission of criminal act as admissible in evidence where declarant is a witness or available to testify, 167 ALR 394.

Binding effect of party's own unfavorable testimony, 169 ALR 798.

Competence, as against principal, of statements by agent to prove scope, as distinguished from fact, of agency, 3 ALR2d 598.

Admissibility of evidence that defendant in negligence action has paid third persons on claims arising from the same transaction or incident as plaintiff's claim, 20 ALR2d 304.

Admissibility, in prosecution for bribery or accepting bribes, of evidence tending to show the commission of other bribery or acceptance of bribe, 20 ALR2d 1012.

Admissibility and probative value of admissions of fault by agent on issue of principal's secondary liability, where both are sued, 27 ALR3d 966.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary, 28 ALR2d 857.

Admissibility, in prosecution for illegal sale of intoxicating liquor, of other sales, 40 ALR2d 817.

Admissibility of records or report of welfare department or agency relating to payment to or financial condition of particular person, 42 ALR2d 752.

Admissibility of advertisements, brochures, catalogs, and the like as containing admissions by a litigant contrary to a position taken by him, 44 ALR2d 1027.

Admissibility of subsequent declarations of settlor to aid interpretation of trust, 51 ALR2d 820.

Admissibility and weight of party's admissions as to tort occurring during his absence, 54 ALR2d 1069.

Admissibility of evidence of reputation or declaration as to matter of public interest, 58 ALR2d 615.

Admissibility of evidence of party's silence, as implied or tacit admission, when a statement is made by another in his presence regarding circumstances of an accident, 70 ALR2d 1099.

Admissibility on behalf of accused in homicide case of evidence that killing was committed at victim's request, 71 ALR2d 617.

Admissibility, on behalf of one of multiple defendants in accident case, of admission against interest made out of plaintiff's presence by another defendant to a fourth person, 73 ALR2d 1180.

Admissibility and weight of surveys or polls of public or consumers' opinion, recognition, preference, or the like, 76 ALR2d 619; 98 ALR Fed. 20.

Admissibility of inculpatory statements made in presence of accused to which he refuses to reply on advice of counsel, 77 ALR2d 463.

Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection, 79 ALR2d 890.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 ALR2d 1224.

Nonverbal reaction to accusation, other than silence alone, as constituting adoptive admission under hearsay rule, 87 ALR3d 706.

Admissibility on behalf of accused of evidence of similar acts or transactions tending to rebut fraudulent intent, 90 ALR2d 903.

Admissibility in civil action, apart from res gestae, of lay testimony as to another's expressions of pain, 90 ALR2d 1071.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 ALR3d 671.

Impeachment of witness with respect to intoxication, 8 ALR3d 749.

Admissibility in evidence, in automobile negligence action, of charts showing braking distance, reaction times, etc., 9 ALR3d 976.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant, 10 ALR3d 359.

Admissibility of hearsay evidence as to comparable sales of other land as basis for expert's opinion as to land value, 12 ALR3d 1064.

Admissibility of evidence of habit, customary behavior, or reputation as to care of pedestrian on question of his care at time of collision with motor vehicle giving rise to his injury or death, 28 ALR3d 1293.

Grand jury: admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or conviction, 37 ALR3d 612.

Admissibility of physician's testimony as to patients' statements or declaration, other than res gestae, during medical examination, 37 ALR3d 778.

Necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of coconspirators, 46 ALR3d 1148.

Admissibility of newspaper article as evidence of the truth of the facts stated therein, 55 ALR3d 663.

Sufficiency of identification of participants as prerequisite to admissibility of telephone conversation in evidence, 79 ALR3d 79.

Admissibility of evidence to establish oral antenuptial agreement, 81 ALR3d 453.

Admissibility of hypnotic evidence at criminal trial, 92 ALR3d 442; 77 ALR4th 927.

Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege, 92 ALR3d 1138.

Evidence: admissibility of memorandum of telephone conversation, 94 ALR3d 975.

Denial of recollection as inconsistent with prior statement so as to render statement admissible, 99 ALR3d 934.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludible as hearsay--state cases, 89 ALR4th 456.

Admissibility of tape recording or transcript of "911" emergency telephone call, 3 ALR5th 784.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 ALR5th 672.

Sufficiency of hearsay evidence in probation revocation hearings, 21 ALR6th 771.

Construction and application of uniform rule of evidence 803(17), providing hearsay exception for market reports, and commercial publications, 54 ALR6th 593.

What constitutes similar motive for purposes of Rule 804(b)(1) of Federal Rules of Evidence, excepting such testimony from hearsay rule if party against whom such testimony is offered had opportunity and "similar motive" to develop testimony, 138 ALR Fed 367.

When is witness "unavailable" for purposes of admission of evidence under Rule 804 of Federal Rules of Evidence, providing hearsay exception where declarant is unavailable, 174 ALR Fed. 1.

Admissibility of party's own statement under Rule 801(d)(2)(a) of the Federal Rules of Evidence, 191 ALR Fed. 27.

Construction and application of Fed. Rules Evid. Rule 804(b)(6), 28 U.S.C.A., hearsay exception based on unavailable witness's wrongfully procured absence, 193 ALR Fed. 703.

24-8-802. Hearsay rule.

Hearsay shall not be admissible except as provided by this article; provided, however, that if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible. (Code 1981, § 24-8-802, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — The rule against hearsay, Fed. R. Evid. 802.

Law reviews. — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-301, and former O.C.G.A. § 24-3-1 are included in the annotations for this Code section. The reader is advised to also consult the annotations following Code Section 24-8-801, which may also be applicable to this Code section.

Underlying reasons for rule. — Chief reasons for the exclusion of hearsay evidence are the want of a sanction of an oath, and of any opportunity to cross-examine the witness. Foster v. Brooks, 6 Ga. 287 (1849) (decided under former law); Bennett v. State, 49 Ga. App. 804, 176 S.E. 148 (1934) (decided under former Code 1933, § 38-301); Peacon v. Peacon, 197 Ga. 748, 30 S.E.2d 640 (1944) (decided under former Code 1933, § 38-301).

There is a distinction between illegal testimony and secondary evidence in that hearsay testimony (illegal testimony) has no probative force whatsoever, and its only effect is to prejudice the minds of the jury against the party against whom such hearsay evidence is introduced, while the only objection to secondary evidence is that it is received without first laying the preliminary foundation; such evidence stands on a different footing, and if admitted without objection it is nevertheless competent, for by allowing such evidence without objecting at the time it is sought to be introduced the party waives the party's right to have the best evidence of such fact sought to be proved, and cannot subsequently insist that the court should withdraw such secondary evidence from the consideration of the jury. Rushin v. State, 63 Ga. App. 646, 11 S.E.2d 844 (1940) (decided under former Code 1933, § 38-301).

Hearsay testimony is wholly without probative value, and its introduction without objection does not give it any weight or force whatever in establishing a fact. Higgins v. Trentham, 186 Ga. 264, 197 S.E. 862 (1938) (decided under former Code 1933, § 38-301); Crawley v. Selby, 208 Ga. 503, 67 S.E.2d 775 (1951) (decided under former Code 1933, § 38-301); Collins v. State, 146 Ga. App. 857, 247 S.E.2d 602 (1978) (decided under former Code 1933, § 38-301); Finch v. Caldwell, 155 Ga. App. 813, 273 S.E.2d 216 (1980) (decided under former Code 1933, § 38-301).

Any error in admitting a hearsay statement was harmless by defendant's subsequently being called as a witness. Hufstetler v. State, 171 Ga. App. 106, 319 S.E.2d 869 (1984) (decided under former O.C.G.A. § 24-3-1).

Assuming that the trial court erred in excluding a witness's testimony that the witness observed an interaction between the defendant and the victim's mother, there was no ground for reversal because any such error was harmless; aside from the fact that the meaning of the mother's response was unclear, other evidence was presented that on a prior occasion the mother had harmed the victim. Amador v. State, 310 Ga. App. 280, 713 S.E.2d 423 (2011) (decided under former O.C.G.A. § 24-3-1).

Hearsay was inadmissible, but harmless error. — Testimony was inadmissible hearsay because the former police detective did not actually test the blood but was simply repeating information the detective read in the lab report, and while the court may have abused the court's discretion by allowing the detective to testify as to the results of the blood test, any error was harmless given the overwhelming evidence of defendant's guilt. Green v. State, 249 Ga. App. 546, 547 S.E.2d 569 (2001) (decided under former O.C.G.A. § 24-3-1).

Trial court erred in admitting testimony of a police officer about what the murder victim told the officer shortly after defendant shot into the bedroom in which the victim was sleeping, which was one of defendant's prior bad acts that the state tried to get admitted under the necessity exception to the hearsay rule. Such testimonial hearsay in a criminal prosecution was admissible when the declarant was unavailable only if the defendant had a

General Consideration (Cont'd)

prior opportunity to cross-examine the declarant about the hearsay statement, and defendant had no such opportunity, but because the statement did not contribute to defendant's conviction, admission of it was harmless error. Moody v. State, 277 Ga. 676, 594 S.E.2d 350 (2004) (decided under former O.C.G.A. § 24-3-1).

Jury instructions. — If there was no request to charge the purpose for which testimony could be considered under former O.C.G.A. § 24-3-2 (see now O.C.G.A. §§ 24-8-801 and 24-8-802), failure to so instruct the jury did not constitute reversible error. Payne v. State, 163 Ga. App. 276, 293 S.E.2d 483 (1982) (decided under former O.C.G.A. § 24-3-1).

Defendant failed to preserve for review the argument that the trial court erred in allowing a witness to testify about the victim's statement because although the codefendant's counsel vigorously opposed the state's request to elicit the hearsay statements, the defendant's counsel failed to object, join in the codefendant's objection, or argue in any way regarding the issue. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661 (2012) (decided under former O.C.G.A. § 24-3-1).

Application

1. Admissible Hearsay

Indicia of reliability required for admissibility are that the statements be nonnarrative, that the declarant is shown by the evidence to know whereof the declarant speaks, that the witness is not apt to be proceeding on faulty recollection, and that the circumstances show that the declarant had no apparent reason to lie to the witness; it is not required that all of the indicia be present for the statement to be admissible. Timberlake v. State, 158 Ga. App. 125, 279 S.E.2d 283 (1981) (decided under former O.C.G.A. § 24-3-1).

"Spontaneous declaration" is admissible hearsay testimony. — Statement which is a spontaneous reaction to a startling event is admissible hearsay testimony. House v. State, 252 Ga. 409, 314 S.E.2d 195 (1984) (decided under former O.C.G.A. § 24-3-1); Daker v. State, 243 Ga. App. 848, 533 S.E.2d 393 (2000), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717 (2002), cert. denied, 534 U.S. 1093, 122 S. Ct. 838, 151 L. Ed. 2d 717 (2002) (decided under former O.C.G.A. § 24-3-1).

Hearsay evidence is admissible for impeachment, though inadmissible for other purposes. Seaboard Coast Line R.R. v. Smalley, 127 Ga. App. 652, 194 S.E.2d 612 (1972) (decided under former Code 1933, § 38-301).

Hearsay testimony is admissible to prove the location of a county line. Poulos v. State, 49 Ga. App. 20, 174 S.E. 253 (1934) (decided under former Code 1933, § 38-301).

Market price can be shown by hearsay. McKenzie v. Perdue, 67 Ga. App. 202, 19 S.E.2d 765, rev'd on other grounds, 194 Ga. 356, 21 S.E.2d 705 (1942) (decided under former Code 1933, § 38-301).

Double hearsay proper. — Double hearsay was properly admitted about what a witness heard an individual say because the individual's credibility had been placed at issue by way of an attack on the witness's motive. Dillard v. State, 272 Ga. App. 523, 612 S.E.2d 804 (2005) (decided under former O.C.G.A. § 24-3-1).

Hearsay evidence admissible at transfer hearing in juvenile cases. — Given that the right of confrontation was a trial right, there was no reason to apply that right to a transfer hearing involving a juvenile; therefore, hearsay evidence was admissible at such hearings. In the Interest of T. F., 295 Ga. App. 417, 671 S.E.2d 887 (2008) (decided under former O.C.G.A. § 24-3-1).

2. Hearsay Found

Opinion as to reason for death. — In an action seeking to prevent a husband from receiving benefits under his wife's life insurance policy and from inheriting her estate on grounds that he allegedly killed his wife, the detective's testimony that an IRS agent said that in the agent's opinion her death was related to a federal tax fraud investigation and attorney's testimony that the IRS agent told the detective that the federal government was concerned that her death was linked to the investigation, were inadmissible hearsay.

A memorandum in which the detective wrote that IRS agents stated it was their opinion that she died as a result of a conspiracy involving two corporations was also hearsay. Krause v. Vance, 207 Ga. App. 615, 428 S.E.2d 595 (1993) (decided under former O.C.G.A. § 24-3-1).

Anonymous statement. — Trial court erred in admitting the testimony of a witness who stated that after the shooting and while talking to police officers investigating the crimes, the witness heard a member of the crowd which had gathered around the victim's residence yell at the witness to tell police that defendant was the shooter. Lindsey v. State, 271 Ga. 657, 522 S.E.2d 459 (1999) (decided under former O.C.G.A. § 24-3-1).

While the trial court erred in admitting hearsay testimony regarding: (1) "leaders of the community" informing police that defendant had been selling drugs; (2) people fearing defendant and being unwilling to cooperate with police; (3) police using a drug dog to search defendant's car based on information they received about defendant transporting drugs; and (4) one of the confidential informants being unable to testify due to the informant's being sick on the day of trial, this error was harmless in light of the overwhelming evidence of defendant's guilt. Banks v. State, 270 Ga. App. 221, 606 S.E.2d 34 (2004) (decided under former O.C.G.A. § 24-3-1).

Investigating officer's statement inadmissible. — In a prosecution for simple battery, the testimony of the investigating officer as to a statement by one codefendant was not admissible when two additional adult eyewitnesses were present at the defendants' home on the night of the incident. Harrison v. State, 238 Ga. App. 485, 518 S.E.2d 755 (1999) (decided under former O.C.G.A. § 24-3-1).

In a juvenile's adjudication as delinquent for theft by taking the juvenile's sister's car, although the juvenile admitted taking the car, the state failed to prove venue and failed to prove that the taking was unlawful as required by O.C.G.A. § 16-8-2. The officer's testimony that the sister said the taking was without the sister's permission was inadmissible hearsay and was insufficient to support the adjudication even though the evidence was admitted without objection. In the Interest of E.C., 311 Ga. App. 549, 716 S.E.2d 601 (2011) (decided under former O.C.G.A. § 24-3-1).

Police investigator's hearsay statements admissible. — Because defendant was provided a full opportunity for confrontation regarding the victim's prior out-of-court statements, the trial court did not err in admitting a police investigator's hearsay evidence. Gartrell v. State, 272 Ga. App. 726, 613 S.E.2d 226 (2005) (decided under former O.C.G.A. § 24-3-1).

Detective's statement meant to bolster witness testimony. — Trial court erred in permitting the detective to testify about what five witnesses told the detective, after the five witnesses testified against defendant, and in then comparing their statements to what defendant had said on the same subject in defendant's statements to police, which demonstrated inconsistencies between defendant's statements and those made by the five witnesses; the statements of the five witnesses were prior consistent statements that were inadmissible hearsay because they were offered solely to bolster their testimony in the eyes of the jury since the veracity of their testimony had not been challenged when they testified earlier in the case before the detective testified. Baugh v. State, 276 Ga. 736, 585 S.E.2d 616 (2003) (decided under former O.C.G.A. § 24-3-1).

Trial court erred in overruling the defendant's hearsay objection because an officer's testimony about what the victim's motel neighbor said to the officer, which came before that witness took the stand, was not a prior consistent statement but was hearsay; however, the error was harmless because any improper bolstering of the victim's neighbor's testimony by the officer's hearsay testimony had no real effect on the defendant's convictions since the victim's neighbor did testify, and that testimony repeated and expanded on the prior statements the officer had recounted. Johnson v. State, 289 Ga. 498, 713 S.E.2d 376 (2011) (decided under former O.C.G.A. § 24-3-1).

Exclusion of videotape of defendant's statement. — Trial court did not err in excluding a videotape of a state-

Application (Cont'd)
2. Hearsay Found (Cont'd)

ment defendant gave to a detective at the time of defendant's arrest as the statement was not offered to rebut a charge of recent fabrication, improper influence, or improper motive and was pure hearsay. Watson v. State, 278 Ga. 763, 604 S.E.2d 804 (2004) (decided under former O.C.G.A. § 24-3-1).

Evidence of 9-1-1 call. — In a DUI case, it was error for the trial court to overrule the defendant's objection to a police officer's testimony as to what a 9-1-1 caller had said to the officer, but the error was harmless; the hearsay was cumulative because the officer's testimony that the defendant was asleep behind the wheel mirrored that of the caller. Hopkins v. State, 283 Ga. App. 654, 642 S.E.2d 356 (2007) (decided under former O.C.G.A. § 24-3-1).

Contract issues. — Partial summary judgment pursuant to O.C.G.A. § 9-11-56 was properly granted to a labor supplier in a construction company's counterclaim alleging tortuous interference with its contractual relations, based on an allegedly illegal lien filed by the supplier against a property, since no factual basis was found for the counterclaim and, accordingly, it was dismissed; it was noted that the affidavit of the administrative manager of the company contained irrelevant matter which was properly excluded under former O.C.G.A. § 24-2-1 (see now O.C.G.A. § 24-4-401), as it related to the supplier's failure to sign a lien waiver and it had no logical bearing to the material fact in issue and, further, it was found to be inadmissible hearsay under former O.C.G.A. § 24-3-1(a) (see now O.C.G.A. §§ 24-8-801 and 24-8-802). Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418 (2003) (decided under former O.C.G.A. § 24-3-1).

Trial court properly struck a paragraph in an estate executrix's affidavit in opposition to the decedent's nephew's motion for summary judgment, arising from an action regarding estate assets and joint venture agreements, as the executrix's assertions regarding a handwritten note by the husband constituted parol evidence which could not be used to alter the meaning of the unambiguous language of the agreements, and necessity was not shown for admission of the hearsay evidence, pursuant to O.C.G.A. §§ 13-2-2(1), 24-3-1(b) (see now O.C.G.A. § 24-8-807), 24-6-1 (see now O.C.G.A. § 24-3-1), and 24-6-2 (see now O.C.G.A. § 24-3-2); accordingly, the handwritten notation that the properties at issue were to be sold for "market value" could not change the contractual language that indicated that the properties would be sold for a predetermined price. Zaglin v. Atlanta Army Navy Store, Inc., 275 Ga. App. 855, 622 S.E.2d 73 (2005) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in granting a homeowners' association summary judgment on a resident's promissory estoppel claim because the resident failed to come forward with any evidence creating an issue of fact on the resident's claim; the resident stated that a member of the association promised the resident that the association would store the resident's airboat but that claim rested on statements allegedly made to the resident by the member, which were hearsay. Campbell v. Landings Ass'n, 311 Ga. App. 476, 716 S.E.2d 543 (2011) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in granting a homeowners' association summary judgment on a resident's breach of contract claim because the resident failed to show the elements of an enforceable contract pursuant to O.C.G.A. § 13-3-1; any oral contract between the resident and a member of the association depended upon the statements of the member, who was not deposed and did not offer any affidavit, those statements, therefore, were hearsay proving nothing for the purposes of summary judgment. Campbell v. Landings Ass'n, 311 Ga. App. 476, 716 S.E.2d 543 (2011) (decided under former O.C.G.A. § 24-3-1).

Trial court erred by granting a creditor summary judgment in the creditor's action against a debtor to recover the balance due on a credit card account because the actual amount due the creditor was not sufficiently proved; an employee's statement in an affidavit that the credi-

tor's predecessor indicated to the creditor that the balance was $10,029 was not sufficient to show the actual balance due the creditor because the statement was mere hearsay under former O.C.G.A. § 24-3-1(a) (see now O.C.G.A. §§ 24-8-801 and 24-8-802) and not subject to an exception, and the employee's statement that it was the creditor's understanding from the creditor's attorney that no payments had been made since the account was turned over and the principal sum of $10,029 was due was also inadmissible because such hearsay had no probative value whatsoever. Jackson v. Cavalry Portfolio Services, LLC, 314 Ga. App. 175, 723 S.E.2d 475 (2012) (decided under former O.C.G.A. § 24-3-1).

Statement from insured on critical issues. — In an insurance case in which a jury found in favor of an insurer, which had denied property insurance coverage after a house fire to two insureds based on suspected arson, for retrial purposes, it was error to allow the insurer to elicit hearsay testimony from one of the insureds on the critical issue of whether the exterior doors of the insureds' home were locked when the firefighters arrived because the testimony was elicited to prove that the exterior doors were locked at the time of the fire. Bantz v. Allstate Ins. Co., 263 Ga. App. 855, 589 S.E.2d 621 (2003) (decided under former O.C.G.A. § 24-3-1).

When an account statement summarized the invoices therein, but also listed a fee for which no supporting business record was presented, that entry was hearsay and could not be considered in determining the amount owed by the defendant. Walter R. Thomas Assocs. v. Media Dynamite, Inc., 284 Ga. App. 413, 643 S.E.2d 883 (2007) (decided under former O.C.G.A. § 24-3-1).

Accident reconstruction expert report. — In a negligence action, based on a husband's visit to the accident scene where the wife was injured, despite having no formal training in accident reconstruction, the husband could testify as to the personal knowledge gained from that excursion; but, an accident reconstruction expert's report, which both parties referred to in the narrative portion of the police report, was inadmissible hearsay under the circumstances presented. Morton v. Horace Mann Ins. Co., 282 Ga. App. 734, 639 S.E.2d 352 (2006), cert. denied, No. S07C0570, 2007 Ga. LEXIS 201 (Ga. 2007) (decided under former O.C.G.A. § 24-3-1).

Summary of a summary of a detailed report regarding a pesticide chemical was hearsay evidence and should not have been admitted in a trial filed by a personal injury plaintiff as portions of a laboratory report that contained the opinions or conclusions of a third party not before the court were inadmissible until a proper foundation was laid from the person who entered such opinions or conclusions and that person had to qualify as an expert and relate the facts upon which the entry was based; hence, the trial court also erred in allowing a defense witness to testify as to the report who was not qualified as an expert by the court. Chancey v. Peachtree Pest Control Co., 288 Ga. App. 767, 655 S.E.2d 228 (2007), cert. denied, No. S08C0642, 2008 Ga. LEXIS 459 (Ga. 2008) (decided under former O.C.G.A. § 24-3-1).

Summary of terminated caseworker's files was hearsay evidence and should not have been introduced into evidence; without the summary, the state lacked clear and convincing evidence to show that parental rights should be terminated. In re A.A., 252 Ga. App. 167, 555 S.E.2d 827 (2001) (decided under former O.C.G.A. § 24-3-1).

Proof of agency. — Because there was no evidence that a principal authorized someone to act as the principal's agent, agency could not have been proven by declarations of the alleged agent, and a summary judgment affidavit describing statements made by a payee's attorney which had allegedly accelerated a note was properly excluded since the only evidence that the attorney was the payee's agent was the affidavit itself. McManus v. Turner, 266 Ga. App. 5, 596 S.E.2d 201 (2004) (decided under former O.C.G.A. § 24-3-1).

Double hearsay inadmissible in property action. — Trial court did not err in granting a property owner's motion in limine to exclude evidence that a father of a record title holder's descendant told

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the descendant that the father told the owner's brother that the brother could not build a house on property because the evidence was double hearsay and inadmissible. DeFoor v. DeFoor, 290 Ga. 540, 722 S.E.2d 697 (2012) (decided under former O.C.G.A. § 24-3-1).

Hearsay not admitted. — Statements to a police officer by the victim in a prosecution for battery which were made three-and-one-half hours after the incident and which bore no mark of spontaneity or other such state of mind, undeniably free of conscious device or afterthought, were not part of the res gestae; as pure hearsay, the statements were inadmissible since the state did not show "necessity," to wit, that the declarant was unavailable and that the state made reasonable efforts to secure the presence of the declarant. Wilbourne v. State, 214 Ga. App. 371, 448 S.E.2d 37 (1994) (decided under former O.C.G.A. § 24-3-1).

Evidence properly excluded. — When the defendant did not tender the copies of the convictions which the defendant desired to have introduced to impeach witnesses, but only made a proffer of the testimony of the clerk's representative, the state's objection based on the failure to produce the best evidence was properly sustained. The testimony of the deputy clerk as to the content of the records was not only not the best evidence, it was also hearsay. Lipscomb v. State, 194 Ga. App. 657, 391 S.E.2d 773 (1990) (decided under former O.C.G.A. § 24-3-1).

Even assuming that the trial court erred in refusing to admit an employee of a power company to testify that she saw on her computer screen a particular entry reflecting that a work order had issued for the defendant's address because there had been a disruption in electrical service to the defendant's home the night before the victims were killed and that it had been reported to the power company that the electric meter had been disconnected, it did not constitute reversible error since there was other evidence that the electric meter had been removed from the house the night before the victims were killed, and the power company's data did not identify the persons who had removed the meter. Coleman v. State, 286 Ga. 291, 687 S.E.2d 427 (2009) (decided under former O.C.G.A. § 24-3-1).

Approval of construction hearsay and inadmissible. — When defendant's statement that plans for dock construction were submitted was based on defendant's own personal knowledge, but defendant's statement regarding approval was hearsay, based on information from a source who told defendant about such approval, the trial court erred in considering this evidence. Clauss v. Plantation Equity Group, Inc., 236 Ga. App. 522, 512 S.E.2d 10 (1999) (decided under former O.C.G.A. § 24-3-1).

Parol evidence rule prevented establishment of a trust based on communications that occurred prior to the agreements. — With respect to a Chapter 11 bankruptcy in which the debtor, a business that served as an intermediary for clients desiring to effect exchanges of real property qualifying for tax-deferred treatment under 26 U.S.C. § 1031, held funds in bank accounts that resulted from certain real estate sales, two real estate exchange investors were not entitled to turnover of proceeds from sales of their real estate, as opposed to having their claims payable on the same basis as the other unpaid exchangers, because the written agreements between the investors and the debtor specifically and unequivocally defined the circumstances under which the debtor acquired cash proceeds and the use and disposition of the proceeds, but did not create an express trust under O.C.G.A. § 53-12-20. The parol evidence rule prevented the investors from trying to establish a trust based on communications that occurred prior to the agreements, which contained merger clauses. McCamy v. Kerr (In re Real Estate Exch. Servs.), No. 08-85871-PWB, 2009 Bankr. LEXIS 3731 (Bankr. N.D. Ga. Oct. 9, 2009) (decided under former O.C.G.A. § 24-3-1).

3. Hearsay Not Found

That portion of the birth certificate which relates to the date of birth and the sex of the child, and certain facts concern-

ing the name, race, place of residence, and other facts concerning the child's mother, is not obtained by the physician through hearsay and is clearly admissible. Posey v. State, 46 Ga. App. 290, 167 S.E. 340 (1932) (decided under former Civil Code 1910, § 5762).

Evidence not offered to prove truth of matter asserted. — Challenged testimony was not inadmissible hearsay because: (1) neither the identification testimony by the victim, nor a detective regarding the alleged hearsay in obtaining the defendant's name, violated the defendant's rights to confrontation and cross-examination as neither witness actually repeated any alleged hearsay; (2) the evidence did not create a credibility problem that could only be cured by cross-examination, and the state did not offer the evidence to establish the truth of the matter asserted; and (3) the testimony explained why the police included the defendant's photograph in the line-up. Jennings v. State, 285 Ga. App. 774, 648 S.E.2d 105 (2007), cert. denied, No. S07C1576, 2007 Ga. LEXIS 667 (Ga. 2007) (decided under former O.C.G.A. § 24-3-1).

Homeowner countersued a contractor for fraud. Testimony by a subcontractor that the contractor's project supervisor told the subcontractor to increase the bid because the homeowner was "loaded" was not hearsay, because the testimony was not admitted to show the truth of the matters asserted, and the testimony was a circumstance relevant to the fraud claim. Lumpkin v. Deventer N. Am., Inc., 295 Ga. App. 312, 672 S.E.2d 405 (2008) (decided under former O.C.G.A. § 24-3-1).

Locksmith receipt indicating that defendant had a key made for a vehicle was not inadmissible hearsay evidence in the defendant's prosecution for, inter alia, trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1) because the receipt was not offered as proof of what was asserted therein but as evidence that a piece of paper with the defendant's name on it was found in the same residence where cocaine and firearms were located, thereby linking the defendant circumstantially to the residence and the contraband; thus, the receipt was original evidence. Weems v. State, 295 Ga. App. 680, 673 S.E.2d 50 (2009) (decided under former O.C.G.A. § 24-3-1).

As an officer's testimony about a dispatcher's statement that two Hispanic males were involved in a firearm discharge was not offered for the truth of the dispatcher's statement, but to explain the officer's subsequent conduct, the testimony was not hearsay. Herieia v. State, 297 Ga. App. 872, 678 S.E.2d 548 (2009) (decided under former O.C.G.A. § 24-3-1).

Probate court did not abuse the court's discretion by admitting double hearsay from a witness who, when asked what the testator told the witness that the propounder had said about the caveator, responded, "that the caveator had taken his money and went to Florida and was not coming back" because the second level of alleged hearsay, what the propounder said to the testator about the caveator, was not hearsay, since it was not introduced for the truth of the matter asserted but rather for the effect it had on the testator; the caveator's theory of the case was that the statement by the propounder to the testator was not true, and the evidence was introduced to show where the testator got the misinformation. McDaniel v. McDaniel, 288 Ga. 711, 707 S.E.2d 60 (2011) (decided under former O.C.G.A. § 24-3-1).

Evidence that defendant was told age of victims. — Counsel was not ineffective for failing to object to testimony that defendant was told that the declarant "didn't want any guy to take off with [the declarant's] 16-year-old daughter"; the testimony was not hearsay as the testimony was admitted to show that defendant was told that the girls were only 16. Ford v. State, 274 Ga. App. 695, 617 S.E.2d 262 (2005) (decided under former O.C.G.A. § 24-3-1).

Anything seen or heard by a witness in the presence of a defendant is admissible and does not constitute hearsay. Grindle v. State, 151 Ga. App. 164, 259 S.E.2d 166 (1979) (decided under former Code 1933, § 38-301).

Receipt removed from burglarized house. — In a burglary case, the trial court did not err in allowing a receipt from one of the burglarized homes to be admit-

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ted into evidence and in allowing the occupant of the home to testify about the receipt; the receipt and the testimony were not offered to demonstrate who purchased the item or any of the circumstances surrounding that purchase, but to show that the defendant removed the receipt from the home, and the testimony did not constitute hearsay. Perez v. State, 284 Ga. App. 212, 643 S.E.2d 792 (2007) (decided under former O.C.G.A. § 24-3-1).

Cumulative evidence of properly admitted proof of title. — In a dispute over two subdivision lots, the trial court did not err in admitting evidence that was cumulative to properly admitted evidence showing a legal property owner's record title, and the evidence was not hearsay, as alleged by a claimant who sought title to the property by prescription; further, the evidence was relevant to the issue of whether a claimant's adverse possession ripened into title by prescription. Smith v. Stacey, 281 Ga. 601, 642 S.E.2d 28 (2007) (decided under former O.C.G.A. § 24-3-1).

When a witness testified as to what the witness told another person, the statement was not hearsay. Holloman v. State, 167 Ga. App. 683, 307 S.E.2d 266 (1983) (decided under former O.C.G.A. § 24-3-1).

When facts testified to are proved without contravention by witness whose knowledge of the facts is immediate and personal, this is not hearsay, and the admission of like statements made by another, even if hearsay, does not under these circumstances constitute reversible error. Johnson v. State, 158 Ga. App. 183, 279 S.E.2d 483 (1981) (decided under former O.C.G.A. § 24-3-1).

Testimony of phone conversation with officer. — Trial court did not admit hearsay testimony by allowing a police officer to testify as to a conversation the officer had with defendant over the phone and to authenticate defendant's voice as being the voice of the person defendant talked to over the phone; voluntary, noncustodial, incriminating statements of defendants are admissible through the testimony of anyone who heard them. Ingram v. State, 268 Ga. App. 149, 601 S.E.2d 736 (2004) (decided under former O.C.G.A. § 24-3-1).

Testimony not hearsay that was based on officer's observation of cell phone calls. — Testimony by an investigating officer that after confiscating a co-defendant's cell phone, the officer used the recently called function and discovered that the phone had been used to call a taxi service just prior to the robbery of a taxi driver was properly admitted as the evidence was not hearsay under former O.C.G.A. § 24-3-1 (see now O.C.G.A. §§ 24-8-801 and 24-8-802) because the evidence was based on the officer's own veracity and competence. Troutman v. State, 297 Ga. App. 196, 676 S.E.2d 836 (2009) (decided under former O.C.G.A. § 24-3-1).

Testimony of police sergeant's own actions was not hearsay. — With regard to a defendant's murder conviction, the trial court did not err by overruling a hearsay objection to testimony by a police sergeant regarding investigative work performed on the case since the sergeant participated in the investigation through desk work; using information gained by the police obtained telephone records and subscriber information to identify potential suspects; and testified on the stand to the steps the sergeant personally took that led to the identification of the defendant as a suspect. The testimony of the sergeant was not hearsay as the sergeant did not relay information told by other persons and the testimony was nothing more than a recitation of the sergeant's own actions. Henley v. State, 285 Ga. 500, 678 S.E.2d 884, cert. denied, 130 S. Ct. 800, 175 L. Ed. 2d 559, 2009 U.S. LEXIS 8805 (2009) (decided under former O.C.G.A. § 24-3-1).

Investigator's testimony was original evidence. — Although defendant contended that the waiver certificate was hearsay under former O.C.G.A. § 24-3-1 (see now O.C.G.A. §§ 24-8-801 and 24-8-802) and improperly placed the defendant's character in issue, testimony was considered hearsay only if the witness was testifying to another party's statement in order to prove or demonstrate the truth of that statement; otherwise it was a

verbal act and thus original evidence rather than hearsay. Therefore, defendant's hearsay objection was meritless because the investigator wrote the statement as well as read the statement into evidence, and thus, the statement was original evidence. Bynum v. State, 300 Ga. App. 163, 684 S.E.2d 330 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. 2010) (decided under former O.C.G.A. § 24-3-1).

Testimony of security agent as to value of shoplifted items. — Defendant was properly convicted of felony theft by shoplifting because a jury was permitted to consider a security agent's testimony regarding the value of the items stolen since the agent had personal knowledge of the prices of the subject merchandise from a cash register readout. Bell v. State, 262 Ga. App. 788, 586 S.E.2d 455 (2003) (decided under former O.C.G.A. § 24-3-1).

Testimony of investigating officer that "co-indictee's name is Lawrence" was not hearsay, but was a statement of undisputed fact, identifying for the jury that person to whom the officer was then talking. Jackson v. State, 209 Ga. App. 53, 432 S.E.2d 649 (1993) (decided under former O.C.G.A. § 24-3-1).

Testimony of caseworker in parental termination case. — In a termination of parental rights case, a parent failed to show that the testimony of the sole witness, a caseworker, was hearsay; although another employee worked on the case before the witness, the witness was the caseworker at the time of the hearing, and the record did not show that the witness lacked personal knowledge of the facts the witness testified to, most of which were memorialized in the trial court's previous orders, which were admitted without objection at the termination hearing. In the Interest of M.D.L., 285 Ga. App. 357, 646 S.E.2d 331 (2007) (decided under former O.C.G.A. § 24-3-1).

Investigating officer's testimony about original lead. — Investigating officer's testimony that the officer investigated defendant based on information the officer received from an unnamed source did not constitute hearsay because the officer did not divulge the content of that information. Jenkins v. State, 268 Ga. 468, 491 S.E.2d 54 (1997), cert. denied, 523 U.S. 1029, 118 S. Ct. 1318, 140 L. Ed. 2d 481 (1998) (decided under former O.C.G.A. § 24-3-1).

Debtor's opinion testimony as to value. — Debtor's testimony, standing alone, was insufficient under O.C.G.A. § 24-9-66 to establish the fair and reasonable value of the debtor's car at the time the car was repossessed because the trial court was authorized to conclude that the debtor's "opinion" testimony about the value of the car two years earlier was based entirely upon hearsay and that, absent any evidence to show that the hearsay was reliable, the debtor failed to demonstrate a sufficient foundation for the debtor's conclusions; the debtor had no education or experience in the value of vehicles and the debtor presented no evidence of the price the debtor paid for the car, the condition of the car at the time the car was repossessed, the potential market for such cars, or other relevant factors to be considered in reaching a conclusion about the car's value. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011) (decided under former O.C.G.A. § 24-3-1).

Questions summarizing prior testimony. — Prosecution's questioning of a state's witness, summarizing incriminating testimony of previous state's witnesses for the witness, who was then asked whether that witness had, in fact, heard that testimony, was not objectionable on the ground that it sought to elicit hearsay, where the previous witnesses' testimony was offered under oath and was subject to cross-examination. King v. State, 185 Ga. App. 698, 365 S.E.2d 852, cert. denied, 185 Ga. App. 910, 365 S.E.2d 852 (1988) (decided under former O.C.G.A. § 24-3-1).

Admission of transcript from earlier conviction. — When defendant in a prosecution for rape and aggravated sodomy pled guilty to a prior charge of aggravated sexual assault, admission of a transcript of the prior victim's testimony given at a hearing to compel the witness to testify was proper under the necessity exception to hearsay evidence. McBee v. State, 228 Ga. App. 16, 491 S.E.2d 97 (1997) (decided under former O.C.G.A. § 24-3-1).

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Deposition testimony of driver and passenger involved in traffic accident was not hearsay in a suit wherein occupants of another vehicle sought damages from the driver of a truck parked in the emergency lane of a highway. Reid v. Midwest Transp., 270 Ga. App. 557, 607 S.E.2d 170 (2004) (decided under former O.C.G.A. § 24-3-1).

An official publication of the New York Stock Exchange, purporting to show the monthly average prices of cotton, which was introduced without objection in a hearing before an auditor and acted on by the auditor and the parties as if the quotations were correct, cannot, on a hearing by the judge of exceptions of fact to the auditor's report, be excluded on the ground that it was hearsay evidence. McKenzie v. Perdue, 67 Ga. App. 202, 19 S.E.2d 765, rev'd on other grounds, 194 Ga. 356, 21 S.E.2d 705 (1942) (decided under former Code 1933, § 38-301).

Prior consistent statement. — Because the veracity of a witness's trial testimony was placed in issue, the witness's prior testimony was properly admitted as a prior consistent statement. Jackson v. State, 271 Ga. App. 278, 609 S.E.2d 207 (2005) (decided under former O.C.G.A. § 24-3-1).

Victim's statement to a doctor was properly admitted as a prior consistent statement as the victim testified at trial and was cross-examined by the defendant; the defendant had asserted in opening statement and the defendant implied during cross-examination that because the victim's parent would have been upset if the parent believed the victim were having consensual sex, the victim falsely testified that the defendant forced the victim to engage in sex, which testimony was designed to preserve the victim's relationship with the parent, and to continue the victim's receipt of food and shelter from the parent. Smith v. State, 282 Ga. App. 339, 638 S.E.2d 791 (2006) (decided under former O.C.G.A. § 24-3-1).

When a victim testified that the victim could not remember all of the details of a robbery, which occurred six years before the trial, it was not error to introduce the victim's prior consistent statement. The victim was a forgetful witness who testified at trial and who was cross-examined by the defendant. Williams v. State, 291 Ga. App. 279, 661 S.E.2d 658 (2008) (decided under former O.C.G.A. § 24-3-1).

After the victim's mother testified that the defendant admitted to the mother that the defendant molested the victim, the trial court did not err in allowing an investigator to testify that the mother had told the investigator the same thing because the mother testified at trial and was cross-examined, and the defendant placed the mother's veracity in issue during cross-examination by attempting to show that the mother had an improper motive for testifying against the defendant, a motive that developed after the mother made the prior consistent statement to the investigator. Davis v. State, 303 Ga. App. 799, 694 S.E.2d 381 (2010) (decided under former O.C.G.A. § 24-3-1).

Admission of an investigator's summary of a victim's prior consistent statement was not reversible error because the record contained other unchallenged testimony by witnesses other than the victim conveying the content of the victim's prior statement and that the victim's prior statement was consistent with the victim's trial testimony; it was not likely that the subsequent admission of the victim's statement itself contributed to the guilty verdict, and by the time the statement was read, any bolstering effect of the repetitive nature of the prior statement had occurred without objection. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err by admitting prior consistent statements of the victim and the defendant's son in videotaped interviews that also included comments by the interviewer because nothing in the record demonstrated that the portion of the videotape that the trial court ruled would not be presented for the jury was played for the jury, and the defendant's counsel made no objection after the videotape was played. Wade v. State, 305 Ga. App. 382, 700 S.E.2d 827 (2010), cert. denied, U.S. , 131 S. Ct. 3066, 180

L. Ed. 2d 893 (2011) (decided under former O.C.G.A. § 24-3-1).

Testimony concerning surveillance videotape. — To the extent that In re C.G., 261 Ga. App. 814 (2003) finds that a surveillance videotape merely depicting nonverbal conduct constitutes a hearsay statement, it is hereby disapproved. Hammock v. State, 311 Ga. App. 344, 715 S.E.2d 709 (2011) (decided under former O.C.G.A. § 24-3-1).

Testimony concerning a surveillance videotape was not hearsay because the witnesses did not offer any testimony about what someone else said or wrote outside of court, but rather, the witnesses testified about the witnesses' personal observations of the conduct that appeared on the videotape; because the testimony did not ask the jury to assume the truth of out-of-court statements made by others, and instead, the value of the testimony rested on the witnesses' own veracity and competence, the testimony was not hearsay. Hammock v. State, 311 Ga. App. 344, 715 S.E.2d 709 (2011) (decided under former O.C.G.A. § 24-3-1).

Identification of defendant in photo array. — In a prosecution for armed robbery and related offenses, the trial court properly allowed hearsay evidence of identification. It was not error to allow a police officer to testify as to who the victims identified in the photo arrays as a law enforcement officer could testify to a pre-trial identification if the person who actually made the identification testified at trial and was subject to cross-examination. Monfort v. State, 281 Ga. App. 29, 635 S.E.2d 336 (2006) (decided under former O.C.G.A. § 24-3-1).

Evidence rested upon veracity of witness, not other person. — In a trial for theft by taking, it was error to preclude a witness from giving testimony that potentially would have corroborated the defendant's explanation for the defendant's possession of a stolen trailer on the ground that the testimony was hearsay under former O.C.G.A. § 24-3-1(a) (see now O.C.G.A. §§ 24-8-801 and 24-8-802). The value of the evidence rested upon the veracity of the witness, not the veracity of the person referred to by the witness; furthermore, the error was not harmless, as the unsatisfactoriness of the defendant's explanation for possessing the trailer was central to the conviction. Boivin v. State, 298 Ga. App. 411, 680 S.E.2d 415 (2009) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in refusing to grant a mistrial on the ground that an eyewitness's testimony was based on hearsay because to the extent the testimony exposed prior difficulties between the codefendants and the victim, the testimony was cumulative of other testimony that the defendant and the codefendant threatened the victim the day before the shooting; the other evidence implicating the defendant in the shooting made it highly probable that the hearsay testimony did not contribute to the verdict. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661 (2012) (decided under former O.C.G.A. § 24-3-1).

4. Examples Not Within Rule

Ownership of clothing. — If a person testifies that certain articles of clothing exhibited to the person are similar to those worn by a suspect in a murder case, whom the accused is attempting to identify as the guilty party, it is proper to exclude hearsay testimony identifying the ownership of the clothing as being that of the suspect; this evidence does not come within the exception to the hearsay evidence rule. Bryant v. State, 197 Ga. 641, 30 S.E.2d 259 (1944) (decided under former Code 1933, § 38-301).

Objections

1. Specificity of Objections

General rule requires that an objection to testimony point out in detail why the testimony is subject to the objection made. Jones v. State, 154 Ga. App. 806, 270 S.E.2d 201 (1980) (decided under former Code 1933, § 38-301).

When general objection fails. — When an objection is made to evidence as a whole or en bloc, a part of which is not subject to the objection, the entire general objection fails. Jones v. State, 154 Ga. App. 806, 270 S.E.2d 201 (1980) (decided under former Code 1933, § 38-301).

Objections (Cont'd)

2. Admission over Objection

Illegal admission over objection requires new trial. — If, by the introduction of hearsay evidence, it is probable that the jury might have been led to believe that the jury could consider it as sufficient to establish the fact stated, then if that fact be material, and timely objection be urged, a new trial should result. Glisson v. State, 57 Ga. App. 169, 194 S.E. 877 (1938) (decided under former Code 1933, § 38-301).

Illegal admission over proper objection of hearsay evidence not embraced within any of the exceptions, relating to a vital issue, as to which the other evidence is in conflict, which admission is prejudicial to the losing party, is cause for a new trial. Fuller v. State, 196 Ga. 237, 26 S.E.2d 281 (1943) (decided under former Code 1933, § 38-301).

Inadmissible hearsay which is received over objection does not require a new trial if it appears that the evidence could not have affected the verdict because other evidence by a witness with immediate and personal knowledge is sufficient to establish the fact in question. Glass v. State, 235 Ga. 17, 218 S.E.2d 776 (1975) (decided under former Code 1933, § 38-301).

Necessity exception satisfied to warrant admission of hearsay. — With regard to a defendant's convictions for malice murder and other crimes, the trial court did not err in admitting hearsay testimony of a witness who testified about prior difficulties between the defendant and the victim, over the hearsay objection of trial counsel, under the necessity exception to the hearsay rule; considering the totality of the circumstances, the trial court did not abuse the court's discretion in permitting the testimony under the necessity exception since the witness in question testified that the victim and the witness were roommates for a while, were teammates on a college track team, and had become close enough in the course of their friendship to have shared intimate details of their lives and relationships, including the witness's observations of bruises on the victim, which the victim told the witness were inflicted by the defendant. Culmer v. State, 282 Ga. 330, 647 S.E.2d 30 (2007) (decided under former O.C.G.A. § 24-3-1).

24-8-803. Hearsay rule exceptions; availability of declarant immaterial.

The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter;

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless such statements relate to the execution, revocation, identification, or terms of the declarant's will and not including a statement of belief as to the intent of another person;

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but shall not itself be received as an exhibit unless offered by an adverse party;

(6) **Records of regularly conducted activity.** Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with paragraph (11) or (12) of Code Section 24-9-902 or by any other statute permitting certification. The term "business" as used in this paragraph includes any business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports shall be admissible under paragraph (8) of this Code section and shall not be admissible under this paragraph;

(7) **Absence of entry in records kept in accordance with paragraph (6) of this Code section.** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) of this Code section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness;

(8) **Public records and reports.** Except as otherwise provided by law, public records, reports, statements, or data compilations, in any form, of public offices, setting forth:

(A) The activities of the public office;

(B) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, against the accused in criminal proceedings, matters observed by police officers and other law enforcement personnel in connection with an investigation; or

(C) In civil proceedings and against the state in criminal proceedings, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness;

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law;

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office, evidence in the form of a certification in accordance with Code Section 24-9-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry;

(11) **Records of religious organizations.** Statements of birth, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization;

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified and purporting to have been issued at the time of the act or within a reasonable time thereafter;

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like;

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an

applicable law authorizes the recording of documents of that kind in such office;

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document;

(16) **Statements in ancient documents.** Statements in a document in existence 20 years or more the authenticity of which is established;

(17) **Market reports and commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in the witness's particular occupation;

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits;

(19) **Reputation concerning personal or family history.** Reputation among members of a person's family by blood, adoption, or marriage or among a person's associates or in the community concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person's personal or family history;

(20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community and reputation as to events of general history important to the community or state or nation in which such lands are located;

(21) **Reputation as to character.** Reputation of a person's character among associates or in the community;

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment, but not including, when

offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but shall not affect admissibility; or

(23) **Judgment as to personal, family, or general history or boundaries.** Judgments as proof of matters of personal, family, or general history or boundaries essential to the judgment, if the same would be provable by evidence of reputation. (Code 1981, § 24-8-803, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Classification of confidential and privileged materials from department and county boards of health, § 31-5-5. Certified copies of vital records, § 31-10-26. Acquiescence as establishing dividing line in real property, § 44-4-6. Transmittal of copy of exempted real property to other counties and recordation, § 44-13-11. Exceptions to the rule against hearsay—regardless of whether the declarant is available as a witness, Fed. R. Evid. 803.

Law reviews. — For article advocating admissibility of business entries, see 14 Ga. B.J. 7 (1951). For article analyzing Georgia business entries provisions, see 4 Mercer L. Rev. 313 (1953). For article discussing exceptions to the hearsay rule and advocating elimination of the res gestae exception, see 5 Mercer L. Rev. 257 (1954). For article, "Business Entries as Evidence," see 16 Ga. B.J. 383 (1954). For article, "Decisions Under the Georgia Business Records Act of 1952," see 21 Ga. B.J. 211 (1958). For article, "Evidence from Computers," see 8 Ga. L. Rev. 562 (1974). For article, "The Demise of the Corroboration Requirement — Its History in Georgia Rape Law," see 26 Emory L.J. 805 (1977). For article, "The Admissibility of Computer-Generated Evidence in Georgia," see 18 Ga. St. B.J. 137 (1982). For article, "The Need For a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984). For article, "An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception," see 33 Ga. L. Rev. 353 (1999). For article, "Evidence," see 53 Mercer L. Rev. 281 (2001). For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010). For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article, "Georgia's New Evidence Code: After the Celebration, a Serious Review of Anticipated Subjects of Litigation to be Brought on by the New Legislation," see 64 Mercer L. Rev. 1 (2012). For annual survey on evidence law, see 64 Mercer L. Rev. 137 (2012). For annual survey on insurance law, see 64 Mercer L. Rev. 151 (2012).

For note discussing res gestae, see 3 Ga. B.J. 69 (1940). For note, "Hypnosis in Court: A Memory Aid for Witnesses," see 1 Ga. L. Rev. 268 (1967).

For comment on Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370, 374 (1957), holding that the Georgia business records as evidence statute does not authorize the introduction into evidence of papers containing the opinion of experts or physicians when the party in whose interest the papers are offered is not allowed to examine their author, see 20 Ga. B.J. 381 (1958). For comment on Yarbrough v. Cantex Mfg. Co., 97 Ga. App. 392, 103 S.E.2d 130 (1958), see 22 Ga. B.J. 100 (1959). For comment on Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639 (1959), see 22 Ga. B.J. 380 (1960). For comment on Argonaut Ins. Co. v. Allen, 123 Ga. App. 741, 182 S.E.2d 508 (1971), upholding admission of psychiatric opinion based on subjective declarations of patient, see 8 Ga. St. B.J. 554 (1972).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1812, Cobb's 1851 Digest, p. 167, former Laws 1827, Cobb's 1851 Digest, p. 172, former Laws 1841, Cobb's 1851 Digest, p. 178, former Ga. L. 1855-56, p. 143, § 1, former Code 1863, §§ 1960, 2659, 2674, 3696, 3702, 3773, 3790, former Code 1868, §§ 1948, 2658, 2670, 3720, 3726, 3810, former Code 1873, §§ 1958, 2700, 2712, 3773, 3779, 3866, former Code 1882, §§ 1958, 2712, 3772, 3773, 3779, 3866, former Civil Code 1895, §§ 998, 2782, 3610, 3628, 5177, 5179, 5184, 5185, 5284, 5766, former Penal Code 1895, §§ 998, 1020, former Civil Code 1910, §§ 3261, 4190, 4210, 5764, 5766, 5771, 5772, 5873, former Penal Code 1910, §§ 1024, 1046, former Code 1933, §§ 29-112, 29-415, 38-303, 38-305, 38-311, 38-312, 38-313, 38-315, 38-1707, 67-110, 85-1602, 93-504, Ga. L. 1952, p. 177, §§ 1, 2, 3, Ga. L. 1953, Jan.-Feb. Sess., p. 602, § 19, and former O.C.G.A. §§ 24-3-3, 24-3-4, 24-3-9, 24-3-11, 24-3-12, 24-3-13, 24-3-14, 24-9-69, 44-2-23, 44-5-45, 44-14-38, 45-16-43, and 46-2-53 are included in the annotations for this Code section.

In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-9-924, which may also be applicable to this Code section.

Prerequisites to admission. — To bring a declaration within the exception of the res gestae, the declaration must grow out of the main fact; the declaration must serve to illustrate the fact, and the declaration must be made contemporaneously with the fact. When these things are true of declarations, the declarations are provable, not as the testimony of the declarant, but as partaking of the nature of facts. Mitchum v. State, 11 Ga. 615 (1852) (decided under former law).

Declarations of a party to be admitted as part of the res gestae must be at the time of the transaction the declarations are intended to explain, must be calculated to unfold its nature and quality, and must harmonize with it. Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69 (1915) (decided under Penal Code 1910, § 1024); Wallace v. State, 151 Ga. App. 177, 259 S.E.2d 172 (1979) (decided under former Code 1933, § 38-305).

To satisfy the standards of the former statute, the exclamation must be contemporaneous, voluntary, and made at a time which indicated the lack of deliberation and deception. Gaines v. State, 232 Ga. 727, 208 S.E.2d 798 (1974) (decided under former Code 1933, § 38-305).

Construction with Ga. Unif. Super. Ct. R. 31.3. — Proper res gestae evidence was admissible without having to follow the rules regarding prior similar transactions, as nothing in Ga. Unif. Super. Ct. R. 31.3(E) was intended to prohibit the state from introducing evidence of similar transactions or occurrences which were immediately related in time and place to the charge being tried, as part of a single, continuous transaction. White v. State, 282 Ga. App. 286, 638 S.E.2d 426 (2006) (decided under former O.C.G.A. § 24-3-3).

When an act is material, declarations accompanying the act are admissible as part of the res gestae. Atlanta & W. Point R.R. v. Truitt, 65 Ga. App. 320, 16 S.E.2d 273 (1941) (decided under former Code 1933, § 38-305).

Admitted as material facts. — Declarations as parts of the res gestae, made at the time of the transaction, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like any other material facts. Jones v. State, 62 Ga. App. 734, 9 S.E.2d 707 (1940) (decided under former Code 1933, § 38-305).

Self-serving declarations. — Declarations made by a party in the party's own favor, to be admissible as part of the res gestae, must be such as were contemplated by former statute. Rutland v. Hathorn, 36 Ga. 380 (1867) (decided under former Code 1863, § 3696).

Burden on person seeking to introduce res gestae evidence. — It was

incumbent on a party seeking to introduce hearsay evidence, as part of the res gestae to prove that the declarations testified to were so nearly connected with the transaction under investigation, in point of time, as to be free from any suspicion of device or afterthought. Taylor v. State, 120 Ga. 857, 48 S.E. 361 (1904) (decided under former Penal Code 1895, § 998); Pool v. Warren County, 123 Ga. 205, 51 S.E. 328 (1905) (decided under former Penal Code 1895, § 998); Smith v. State, 10 Ga. App. 840, 74 S.E. 447 (1912) (decided under former Penal Code 1910, § 1024).

Four current generally prevalent exceptions that used to fall under the label "res gestae" are declarations of present bodily condition, declarations of present mental state or emotion, excited utterances, and present sense impressions. Collins v. Francis, 728 F.2d 1322 (11th Cir.), cert. denied, 469 U.S. 963, 105 S. Ct. 361, 83 L. Ed. 2d 297 (1984) (decided under former O.C.G.A. § 24-3-3).

Denying defendant opportunity to impeach statements of child sodomy victim was harmless error since the child's declaration was not the sole evidence of the crime and the evidence did not show that the child had any measure of dealings with members of the community at large which would subject the child to the formation of public opinion about the child's veracity. Brantley v. State, 177 Ga. App. 13, 338 S.E.2d 694 (1985) (decided under former O.C.G.A. § 24-3-3).

Res Gestae; Present Sense Impression and Excited Utterance

1. Res Gestae Defined

It is impossible to define res gestae so as to adequately cover all the various and different uses to which it is put. Walker v. State, 137 Ga. 398, 73 S.E. 368 (1912) (decided under former Civil Code 1910, § 5766).

Idea of res gestae presupposes a main fact, or principal transaction. Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474 (1972) (decided under former Code 1933, § 38-305).

What is res gestae of a given transaction must depend upon its own peculiarities of character and circumstances. Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69 (1915) (decided under former Civil Code 1910, § 5766); Wallace v. State, 151 Ga. App. 171, 259 S.E.2d 172 (1979) (decided under former Code 1933, § 38-305).

Res gestae are events speaking for themselves, through the instinctive words and acts of participants, but are not the words and acts of participants when narrating the events. Jones v. State, 62 Ga. App. 734, 9 S.E.2d 707 (1940) (decided under former Code 1933, § 38-305).

Res gestae refers to oral declarations of a spontaneous nature which would otherwise be inadmissible hearsay evidence. Fountain v. State, 136 Ga. App. 229, 220 S.E.2d 705 (1975) (decided under former Code 1933, § 38-305).

Witnesses' testimony regarding what the girls said defendant told the girls to do was not impermissible "double hearsay", as defendant's directions to the girls about what the defendant wanted the girls to do were an integral part of the defendant's offenses and were thus admissible as part of res gestae. Gibby v. State, 213 Ga. App. 20, 443 S.E.2d 852 (1994) (decided under former O.C.G.A. § 24-3-3).

Res gestae is not limited to the codal restriction of "declarations." Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474 (1972) (decided under former Code 1933, § 38-305).

Res gestae also includes circumstances and acts. — Acts and circumstances forming a part of the continuation of the main transaction are admissible as res gestae. Floyd v. State, 143 Ga. 286, 84 S.E. 971 (1915) (decided under former Penal Code 1910, § 1024); Black v. State, 154 Ga. App. 441, 268 S.E.2d 724 (1980) (decided under former Code 1933, § 38-305).

Circumstances, acts, and declarations growing out of main fact, and contemporaneous with the main fact, and which serve to illustrate its character, are part of res gestae. Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69 (1915) (decided under former Civil Code 1910, § 5766); Waller v. State, 80 Ga. App. 488, 56 S.E.2d 491 (1949) (decided under former Code 1933, § 38-305); Townsend v. State, 127

Res Gestae; Present Sense Impression and Excited Utterance (Cont'd)
1. Res Gestae Defined (Cont'd)

Ga. App. 797, 195 S.E.2d 474 (1972) (decided under former Code 1933, § 38-305).

Rape conviction was upheld on appeal as the defendant was not entitled to a new trial based on defense counsel's failure to object to certain testimony from the victim about the defendant's history of selling drugs and failure to subpoena certain medical records; moreover, the defendant was properly denied a mistrial as the trial court issued a curative instruction regarding the alleged improper character evidence admitted, and thereafter polled the jury to ensure that jurors would in fact disregard that evidence. Mitchell v. State, 287 Ga. App. 517, 651 S.E.2d 821 (2007) (decided under former O.C.G.A. § 24-3-3).

Because the state was entitled to present evidence of the entire res gestae of the crime, other criminal acts committed by defendant on the same night as a robbery were relevant under former O.C.G.A. § 24-3-3 to show defendant's frame of mind in the time period immediately preceding and following the crimes. Waters v. State, 294 Ga. App. 442, 669 S.E.2d 450 (2008) (decided under former O.C.G.A. § 24-3-3).

2. Time Requirements

Verbal act doctrine. — Part of former statute which admitted "declarations accompanying an act" in evidence as a part of the res gestae was but a codification of the principal of the "verbal act doctrine." Glens Falls Indem. Co. v. Gottlieb, 80 Ga. App. 634, 56 S.E.2d 799 (1949) (decided under former Code 1933, § 38-305).

Statements must be part of occurrence. — Test of determining whether statements are a part of the res gestae is: were the declarations a part of the occurrence to which they relate, or were the declarations a mere narrative concerning something which had fully taken place, and had therefore become a thing of the past. Hunter v. State, 147 Ga. 823, 95 S.E. 668 (1918) (decided under former Civil Code 1910, § 5766); Hodge v. American Mut. Liab. Ins. Co., 57 Ga. App. 403, 195 S.E. 765 (1938) (decided under former Code 1933, § 38-305); Berry v. Dinsmore, 115 Ga. App. 256, 154 S.E.2d 653 (1967) (decided under former Code 1933, § 38-305); Augusta Coach Co. v. Lee, 115 Ga. App. 511, 154 S.E.2d 680 (1967) (decided under former Code 1933, § 38-305); Clark v. State, 142 Ga. App. 851, 237 S.E.2d 459 (1977) (decided under former Code 1933, § 38-305); Wallace v. State, 151 Ga. App. 171, 259 S.E.2d 172 (1979) (decided under former Code 1933, § 38-305); Doughty v. State, 175 Ga. App. 317, 333 S.E.2d 402 (1985) (decided under former O.C.G.A. § 24-3-3).

Trial court did not err in admitting, pursuant to the res gestae exception to the hearsay rule, the testimony of a police officer about the victim's oral statement to the officer and the victim's written statement that the victim made a few moments after making the oral statement, as both statements by the victim were made at a time when the victim was still under the influence of defendant's kidnapping of the victim and the victim's children; indeed, at the time the victim made the statements, the victim was still visibly shaken, and the victim's face was red, puffy, and swollen. White v. State, 265 Ga. App. 117, 592 S.E.2d 905 (2004) (decided under former O.C.G.A. § 24-3-3).

Res gestae must be contemporaneous with main transaction. — Declarations to be a part of the res gestae must be contemporaneous with the main fact the declarations are intended to explain. If the declarations are made after the transaction, and therefore not contemporaneous with it, such declarations are a mere narrative of the past occurrence. Thomas v. State, 67 Ga. 460 (1881) (decided under former Code 1873, § 3773); Sullivan v. State, 101 Ga. 800, 29 S.E. 16 (1897) (decided under former Civil Code 1895, § 998).

Res gestae of a transaction is what is done during the progress of the transaction, or so nearly upon the actual occurrence as fairly to be treated as contemporaneous with the transaction. Hall v. State, 48 Ga. 607 (1873) (decided under former Code 1873, § 3773); Lyles v. State, 130 Ga. 294, 60 S.E. 578 (1908) (decided under former Penal Code 1895, § 998); Walker v. State, 137 Ga. 398, 73 S.E. 368

(1912) (decided under former Penal Code 1910, § 998); Hunter v. State, 147 Ga. 823, 95 S.E. 668 (1918) (decided under former Penal Code 1910, § 998).

Testimony of a police officer regarding an eyewitness statement to the police at the scene that the defendant was driving in the left lane and that the plaintiff drove into the side of the truck after "not really stopping" in the median was admissible as part of the res gestae exception to the hearsay rule. Cleveland v. Bryant, 236 Ga. App. 459, 512 S.E.2d 360 (1999) (decided under former O.C.G.A. § 24-3-3).

Res gestae need not be precisely concurrent in time. — Declarations, to be a part of the res gestae must be contemporaneous with the main fact, but to be contemporaneous, the declarations are not required to be precisely concurrent in point of time. Mitchum v. State, 11 Ga. 615 (1852) (decided under former law).

Declarations to be part of the res gestae need not be precisely concurrent in point of time, if the declarations spring out of the transaction and are made so near to it as to preclude reasonably the idea of deliberation. Walker v. State, 139 Ga. 398, 73 S.E. 368 (1912) (decided under former Penal Code 1910, § 1024).

Declarations, to be a part of the res gestae, must be contemporaneous with the main fact but need not be precisely concurrent in point of time; it is sufficient if such declarations spring out of the transaction, if the declarations elucidate the transaction, if voluntary and if made at such time as reasonably to exclude the idea of design. Brown v. City of Fitzgerald, 177 Ga. App. 859, 341 S.E.2d 476 (1986) (decided under former O.C.G.A. § 24-3-3).

Occurrence not necessarily limited in time. — Main fact or transaction from which the res gestae springs is not necessarily limited as to time; it may be a length of time in the action. Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474 (1972) (decided under former Code 1933, § 38-305).

Admissible as part of continuous transaction. — Evidence relating to an attempted cocaine deal that failed to materialize was admissible since the attempted deal was part of a continuous transaction. Brewer v. State, 224 Ga. App. 656, 481 S.E.2d 608 (1997) (decided under former O.C.G.A. § 24-3-3).

Narratives of past occurrences are not admissible. — Principal point to be observed in all cases is whether the declarations offered in proof were contemporaneous with the main fact under consideration; for if the declarations are merely the narrative of a past occurrence, the declarations cannot be received in evidence. Bulter v. Stewart, 112 Ga. App. 293, 145 S.E.2d 47 (1965) (decided under former Code 1933, § 38-305).

No precise point of time can be fixed, a priori, when the res gestae ends. — Each case turns on its own circumstances. Indeed, the inquiry is rather into events, than into the precise time which has elapsed. Hall v. State, 48 Ga. 607 (1873) (decided under former Code 1873, § 3773); Lyles v. State, 130 Ga. 294, 60 S.E. 578 (1908) (decided under former Penal Code 1895, § 998); Walker v. State, 137 Ga. 398, 73 S.E. 368 (1912) (decided under former Penal Code 1910, § 1024); Hunter v. State, 147 Ga. 823, 95 S.E. 668 (1918) (decided under former Penal Code 1910, § 1024); O'Neal v. State, 172 Ga. 526, 158 S.E. 51 (1931) (decided under former Penal Code 1910, § 1024); Dye v. State, 218 Ga. 330, 127 S.E.2d 674 (1962) (decided under former Code 1933, § 38-305); Bunn v. State, 144 Ga. App. 879, 243 S.E.2d 105 (1978) (decided under former Code 1933, § 38-305); Wallace v. State, 151 Ga. App. 171, 259 S.E.2d 172 (1979) (decided under former Code 1933, § 38-305).

Mere question of lapse of time not controlling. — In determining whether declarations should be received as a part of the res gestae of an occurrence, the mere question of the lapse of time is not controlling. Berry v. Dinsmore, 115 Ga. App. 256, 154 S.E.2d 653 (1967) (decided under former Code 1933, § 38-305); Augusta Coach Co. v. Lee, 115 Ga. App. 511, 154 S.E.2d 689 (1967) (decided under former Code 1933, § 38-305).

Ultimate test is spontaneity and logical relation to main event. — Ultimate test of whether a statement is part of the res gestae is the statement's spontaneity and logical relation to the main event, that is, if it is a natural and prob-

Res Gestae; Present Sense Impression and Excited Utterance (Cont'd)
2. Time Requirements (Cont'd)

able consequence from the act contemporaneous with the main fact, but it need not be precisely concurrent in point of time. C.A.J. v. State, 127 Ga. App. 813, 195 S.E.2d 225 (1973) (decided under former Code 1933, § 38-305).

When declarations must be regarded as contemporaneous. — If the declarations appear to spring out of the transaction, if the declarations elucidate the transaction, if the declarations are voluntary and spontaneous, and if the declarations are made at a time so near to the transaction as reasonably to preclude the idea of deliberate design, then are the declarations to be regarded as contemporaneous. Southern Ry. v. Brown, 126 Ga. 1, 54 S.E. 911 (1906) (decided under former Civil Code 1895, § 5179); Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69 (1915) (decided under former Civil Code 1910, § 5766); Hodge v. American Mut. Liab. Ins. Co., 57 Ga. App. 403, 195 S.E. 765 (1938) (decided under former Code 1933, § 38-305); Aetna Life Ins. Co. v. Jones, 80 Ga. App. 472, 56 S.E.2d 305 (1949) (decided under former Code 1933, § 38-305); Clark v. State, 142 Ga. App. 851, 237 S.E.2d 459 (1977) (decided under former Code 1933, § 38-305); Wallace v. State, 151 Ga. App. 171, 259 S.E.2d 172 (1979) (decided under former Code 1933, § 38-305).

Statements made indefinite time after main fact were not res gestae. — Sayings were not admissible as a part of the res gestae if it appeared from the evidence that the statements were uttered at an indefinite time after the happening of the thing to which the statements related. Sims v. Macon & W.R.R., 28 Ga. 93 (1859) (decided under former law).

Trial court did not err by excluding testimony of a disabled child's mother that the child told the mother that a special education paraprofessional had sexually molested the child because the plaintiffs were unable to establish when the statements were made in relation to the alleged event. Harper v. Patterson, 270 Ga. App. 437, 606 S.E.2d 887 (2004) (decided under former O.C.G.A. § 24-3-3).

Statements three-and-one-half hours after incident inadmissible. — Statements to a police officer by the victim in a prosecution for battery which were made three-and-one-half hours after the incident and which bore no mark of spontaneity or other such state of mind undeniably free of conscious device or afterthought were not part of the res gestae; as pure hearsay, the statements were inadmissible since the state did not show "necessity," to wit, that the declarant was unavailable and that it made reasonable efforts to secure the presence of the declarant. Wilbourne v. State, 214 Ga. App. 371, 448 S.E.2d 37 (1994) (decided under former O.C.G.A. § 24-3-3).

Statements hours after incident admissible. — Two statements made by defendant's wife, one four hours after the incident and the second four hours later, were part of the res gestae since the statements were made while she was still laboring under the excitement and strain of the event. Park v. State, 230 Ga. App. 274, 495 S.E.2d 886 (1998) (decided under former O.C.G.A. § 24-3-3).

Statements at scene of arrest. — Statement made by the passenger in an automobile driven by defendant charged with driving under the influence of alcohol that defendant had consumed more alcohol than the passenger had, made after defendant was arrested and the police were inquiring about the passenger's ability to drive defendant's vehicle away from the scene, was not part of the res gestae of the act concerning which the statement was made. Priebe v. State, 250 Ga. App. 725, 553 S.E.2d 5 (2001) (decided under former O.C.G.A. § 24-3-3).

3. Spontaneity

Spontaneous declaration doctrine. — That part of the former statute which admitted declarations so nearly connected with the act as to be free from all suspicion of device or afterthought in evidence was but a statement of the spontaneous declaration doctrine which was an exception to the rule against hearsay. Glens Falls Indem. Co. v. Gottlieb, 80 Ga. App. 634, 56 S.E.2d 799 (1949) (decided under former Code 1933, § 38-305).

When the statement of a passenger in an accident victim's car was made almost immediately after the crash as a spontaneous reaction to a startling event, rather than as a result of reflective thought, the testifying as to that statement by a third party was precisely the kind of excited utterance contemplated by former O.C.G.A. § 24-3-3, and was admissible as part of the res gestae. Copeland v. State, 235 Ga. App. 682, 510 S.E.2d 124 (1998) (decided under former O.C.G.A. § 24-3-3).

Declarations must be free from suspicion of device or afterthought. — Proximity of time in which declarations were made to the main transaction is not the only test of their admissibility as part of the res gestae, but the declarations must also be free from all suspicion of device or afterthought. Augusta & Summerville R.R. v. Randall, 79 Ga. 304, 4 S.E. 674 (1887) (decided under former Code 1882, § 3773); Savannah, Fla. & W. Ry. v. Holland, 82 Ga. 257, 10 S.E. 200, 14 Am. St. R. 158 (1889) (decided under former Code 1882, § 3773); Shapiro Packing Co. v. Landrum, 109 Ga. App. 519, 136 S.E.2d 446 (1964) (decided under former Code 1933, § 38-305).

Trial court did not err in admitting testimony about statements defendant and defendant's cousin made to a witness at the time of the theft as defendant's arguments that admission of such evidence should not have been allowed because the statements were not "free from all suspicion of devise or afterthought" lacked merit since former O.C.G.A. § 24-3-3 referred to the statement at the time it was made, and not to the witness's testimony relating what was said. Wilson v. State, 258 Ga. App. 166, 573 S.E.2d 432 (2002) (decided under former O.C.G.A. § 24-3-3).

Narrative recollections inadmissible. — Only the spontaneous declarations which spring out of the event are admissible. Narrative statements of the history of the event, made after the declarant has had time to reflect on the occurrence, are not admissible. Williams v. State, 144 Ga. App. 130, 240 S.E.2d 890 (1977) (decided under former Code 1933, § 38-305).

Victim's narrative statement given to a police officer at a police station did not qualify as res gestae. Cartwright v. State, 242 Ga. App. 825, 531 S.E.2d 399 (2000) (decided under former O.C.G.A. § 24-3-3).

Narratives must be closely scrutinized. — When a statement is narrative rather than exclamatory, the circumstances must be closely scrutinized because a narrative is generally the result of afterthought. Clark v. State, 142 Ga. App. 851, 237 S.E.2d 459 (1977) (decided under former Code 1933, § 38-305).

Mere fact that the statement was elicited by an inquiry did not necessarily deprive the statement of its spontaneity prerequisite for admission. United Motor Freight Term. Co. v. Hixon, 77 Ga. App. 506, 48 S.E.2d 769 (1948) (decided under former Code 1933, § 38-305).

Although statements lacked spontaneity because the statements were made in answer to a question, this fact alone did not render the statements inadmissible as part of the res gestae. Thomas v. State, 242 Ga. 712, 251 S.E.2d 294 (1978) (decided under former Code 1933, § 38-305).

Excited utterance. — Witness's testimony that the brother of a juvenile defendant told the witness, "My brother just shot someone," was not inadmissible hearsay; as the brother testified that the brother had not made such a statement, the testimony was admissible as an inconsistent statement, and it was also admissible as an excited utterance, as the statement was made by the brother after receiving a startling text message. In the Interest of B.S., 284 Ga. App. 680, 644 S.E.2d 527 (2007) (decided under former O.C.G.A. § 24-3-3).

Statements by bystanders that a defendant threw something as the defendant fled from the police were admissible under the excited utterance/res gestae exception to the hearsay rule as the statements were made during a sufficiently startling event—the defendant running by the defendant as the police were in pursuit—and the statements were made without premeditation or afterthought but with sufficient personal knowledge. Williams v. State, 292 Ga. App. 892, 666 S.E.2d 18 (2008) (decided under former O.C.G.A. § 24-3-3).

Res Gestae; Present Sense Impression and Excited Utterance (Cont'd)

4. Declarant

Declarant need not be party to suit. — It is not required that the res gestae statement be excluded solely because the declarant is not a party to the suit or because the declaration was not made between a witness and a party. Piedmont Life Ins. Co. v. Lea, 140 Ga. App. 400, 231 S.E.2d 147 (1976) (decided under former Code 1933, § 38-305).

Former Code 1933, §§ 38-305 and 38-414 (see former O.C.G.A. §§ 24-3-3 and 24-3-52) were applicable only when there was testimony by a third party as to a declaration, admission, or confession of a coconspirator and had no application when no such testimony was offered, but the accomplice merely testified against the defendant on the trial of the case. Banks v. State, 113 Ga. App. 661, 149 S.E.2d 415 (1966) (decided under former Code 1933, § 38-305).

No unavailability requirement. — Trial court did not err in admitting the victim's oral statement to a police officer, through the police officer's testimony, or the victim's written statement made a few moments after the victim made the oral statement to the police officer pursuant to the res gestae exception to the hearsay rule as the statements were made while the victim was still under the influence of defendant's criminal act; also, the state was not required to show that the declarant was unavailable before the statements could be admitted. White v. State, 265 Ga. App. 117, 592 S.E.2d 905 (2004) (decided under former O.C.G.A. § 24-3-3).

Death of the person making the statements which form a part of the res gestae is no ground for the statements' exclusion from evidence. Augusta Factory v. Barnes, 72 Ga. 217, 53 Am. R. 838 (1884) (decided under former Code 1882, § 3773); Callahan v. State, 229 Ga. 737, 194 S.E.2d 431 (1972) (decided under former Code 1933, § 38-305).

Declarant not in control of faculties. — It is not error to admit the declarations of a victim who is not a person in control of the victim's faculties, even when such declarations and the victim's accompanying physical actions display severe disorientation, as well as confusion as to where the victim was, what was happening, and who was around the victim. Andrews v. State, 249 Ga. 223, 290 S.E.2d 71 (1982) (decided under former Code 1933, § 38-305).

5. Discretion of Court

Admission is discretionary because no rule applicable in all cases. — No definition of res gestae can be found so comprehensive as to embrace all cases. Hence, it is left to the sound discretion of the courts what the court shall admit to the jury along with the main facts as part of the res gestae. Mitchum v. State, 11 Ga. 615 (1852) (decided under former law); Augusta & Summerville R.R. v. Randall, 79 Ga. 304, 4 S.E. 674 (1887) (decided under former Code 1882, § 3773); Southern Ry. v. Brown, 126 Ga. 1, 54 S.E. 911 (1906) (decided under former Civil Code 1895, § 5179); Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69 (1915) (decided under former Civil Code 1910, § 5766); Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474 (1972) (decided under former Code 1933, § 38-305); Henry v. State, 176 Ga. App. 462, 336 S.E.2d 588 (1985) (decided under former Code 1933, § 38-305).

Admissibility of declarations as res gestae testimony does not depend upon any arbitrary time or general rule for all cases, but is left to the sound discretion of the court in determining from the time, circumstances, and statements in question, whether declarations meet requirements of being free from all suspicion of device or afterthought. Aetna Life Ins. Co. v. Jones, 80 Ga. App. 472, 56 S.E.2d 305 (1949) (decided under former Code 1933, § 38-305); Wallace v. State, 151 Ga. App. 171, 259 S.E.2d 172 (1979) (decided under former Code 1933, § 38-305); South Ga. Brokers, Inc. v. Fidelity Bankers Life Ins. Co., 153 Ga. App. 503, 265 S.E.2d 815 (1980) (decided under former Code 1933, § 38-305).

Admissibility of declarations as part of the res gestae is left to the sound discretion of the trial court, considering the time, circumstances, and statements in

question. Ward v. State, 186 Ga. App. 503, 368 S.E.2d 139 (1988) (decided under former O.C.G.A. § 24-3-3); Shortes v. State, 193 Ga. App. 859, 389 S.E.2d 354 (1989), cert. denied, 193 Ga. App. 911, 389 S.E.2d 354 (1989) (decided under former O.C.G.A. § 24-3-3).

Former statute concerned merely the admissibility of evidence, which was a question for the court, the weight to be given which was for the jury. Tiller v. State, 196 Ga. 508, 26 S.E.2d 883 (1943) (decided under former Code 1933, § 38-305); Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474 (1972) (decided under former Code 1933, § 38-305).

Whether statements claimed to be a part of the res gestae are really such is a question of law to be determined by the court. Shapiro Packing Co. v. Landrum, 109 Ga. App. 519, 136 S.E.2d 446 (1964) (decided under former Code 1933, § 38-305).

Determination of res gestae within court's sound discretion. — Question of a given declaration's being a part of the res gestae is for the determination of the trial court and within the court's sound discretion. Augusta Coach Co. v. Lee, 115 Ga. App. 511, 154 S.E.2d 689 (1967) (decided under former Code 1933, § 38-305); Thomas v. State, 242 Ga. 712, 251 S.E.2d 294 (1978) (decided under former Code 1933, § 38-305).

In a wrongful interference with business relations and slander suit, a trial court properly excluded evidence sought to be introduced by the suing insurance company that customers canceled policies because of misrepresentations made by the defending insurance company since the suing company and one of the company's agents failed to show, inter alia, that any purported statement by one of many policyholders located in 23 states over an extended period of time was contemporaneous with a main fact, which in the case, would have been any alleged tortious statement by an agent of the defending insurance company. Am. Southern Ins. Group, Inc. v. Goldstein, 291 Ga. App. 1, 660 S.E.2d 810 (2008), cert. denied, No. S08C1555, 2008 Ga. LEXIS 680 (Ga. 2008) (decided under former O.C.G.A. § 24-3-3).

With regard to defendant's conviction for armed robbery and other crimes, the trial court properly allowed an officer to testify to what an adult in an apartment kitchen saw as the immediacy and urgency of the statement by the upset adult, who had just witnessed several men enter another apartment, made to the officer approaching the scene within minutes of the emergency call, authorized the trial court in the court's discretion to admit the statement as res gestae. Jennings v. State, 292 Ga. App. 149, 664 S.E.2d 248 (2008) (decided under former O.C.G.A. § 24-3-3).

Courts must be allowed some latitude. — What is the res gestae of a given transaction must depend upon the transaction's own peculiarities of character and circumstances; courts must be allowed some latitude in this matter. Aetna Life Ins. Co. v. Jones, 80 Ga. App. 472, 56 S.E.2d 305 (1949) (decided under former Code 1933, § 38-305).

Trial judge's determination not disturbed unless clearly erroneous. — Trial judge's determination that evidence is admissible as part of the res gestae will not be disturbed unless the determination is clearly erroneous. Robinson v. State, 197 Ga. App. 600, 399 S.E.2d 94 (1990) (decided under former O.C.G.A. § 24-3-3).

Burglary conviction was upheld on appeal as: (1) sufficient evidence was presented that the defendant entered the victim's home without permission with the intent to commit a theft therein; and (2) the state properly presented res gestae evidence, even if such improperly placed the defendant's character in evidence. Meyers v. State, 281 Ga. App. 670, 637 S.E.2d 78 (2006) (decided under former O.C.G.A. § 24-3-3).

6. Application and Examples

a. Accounts

Settlements of accounts. — What parties say at the time of making up a settlement of accounts between the parties, as to the amount due from the one to the other, is a part of the res gestae, and admissible in evidence. Buttram v. Jackson, 32 Ga. 409 (1861) (decided under former law).

Res Gestae; Present Sense Impression and Excited Utterance (Cont'd)
6. Application and Examples (Cont'd)

b. Agents

Statements of agent are admissible against the agent's principal. — Statements of the defendant's agent to the plaintiff in the course of a business transaction are admissible in behalf of the defendant as a part of the res gestae. Jones v. Norris N. Smith Co., 31 Ga. App. 383, 120 S.E. 804 (1923) (decided under former Civil Code 1910, § 5766).

Agency must be established independently. — Where extraneous circumstances, independently of and without regard to the declarations of the alleged agent personally, clearly tend to establish the fact of agency, the agent's declarations may be admitted and considered as a part of the res gestae of the transaction; but the declarations of an alleged agent, when standing alone, are never admissible to prove agency. Waddington v. Stores Mut. Protective Ass'n, 52 Ga. App. 331, 183 S.E. 143 (1935) (decided under former Code 1933, § 38-305).

c. Assignments

Declarations of an assignor, made after the execution of the deed of assignment, were inadmissible for the purpose of annulling the assignment or of recovering property embraced in the deed because such declarations did not accompany the making of the deed, or were so nearly connected therewith as to form part of the res gestae. Wright v. Zeigler Bros., 70 Ga. 501 (1883) (decided under former Code 1882, § 3773).

d. Bystanders

An exclamation of a bystander which merely expresses an opinion or conclusion is inadmissible as res gestae. South Ga. Broker, Inc. v. Fidelity Bankers Life Ins. Co., 153 Ga. App. 503, 265 S.E.2d 815 (1980) (decided under former Code 1933, § 38-305).

Accident witness's statement admissible. — Statement of unidentified declarant fell within res gestae exception since three witnesses to an accident overheard the declarant state within 15 minutes of the event, that defendant was involved and was wearing a flowered shirt because the declaration was the natural result of the incident and clarified the incident, was voluntary and spontaneous and was made at a time so close to the incident that the idea of any deliberate design was reasonably precluded. Williams v. Melton, 733 F.2d 1492 (11th Cir.), cert. denied, 469 U.S. 1073, 105 S. Ct. 567, 83 L. Ed. 2d 508 (1984) (decided under former O.C.G.A. § 24-3-3).

Statement a witness heard bystander make at the scene of the crime, after the crime occurred, is not part of the res gestae. Jones v. State, 167 Ga. App. 847, 307 S.E.2d 735 (1983) (decided under former O.C.G.A. § 24-3-3).

Statements of bystanders held admissible as res gestae in the following cases. — See New Winder Lumber Co. v. Payne, 40 Ga. App. 188, 149 S.E. 85 (1929) (decided under former Civil Code 1910, § 5766); Bridges v. State, 242 Ga. 251, 248 S.E.2d 647 (1978) (decided under former Code 1933, § 38-305); Ewald v. State, 156 Ga. App. 68, 274 S.E.2d 31 (1980) (decided under former Code 1933, § 38-305); Super Disct. Mkts., Inc. v. Coney, 210 Ga. App. 659, 436 S.E.2d 803 (1993) (decided under former O.C.G.A. § 24-3-3); Gilbert v. State, 241 Ga. App. 57, 526 S.E.2d 88 (1999) (decided under former O.C.G.A. § 24-3-3); Espy v. State, 246 Ga. App. 1, 539 S.E.2d 513 (2000) (decided under former O.C.G.A. § 24-3-3); Couch v. State, 246 Ga. App. 106, 539 S.E.2d 609 (2000) (decided under former O.C.G.A. § 24-3-3).

In a speeding and eluding prosecution, under the res gestae exception to the hearsay rule, former O.C.G.A. § 24-3-3, an officer was properly allowed to testify that a bystander had asked the officer whether the officer was searching for a blue sports car and then pointed to a direction. Since no testimonial statement was involved, the defendant's rights to confrontation as interpreted by Crawford v. Washington, 541 U.S. 36 (2004), were not violated. Segel v. State, 293 Ga. App. 506, 667 S.E.2d 670 (2008) (decided under former O.C.G.A. § 24-3-3).

Statement of witness to murder properly admitted. — Hearsay state-

ment of a witness to a murder was properly admitted as an excited utterance under circumstances in which, when police arrived at the crime scene police saw the witness standing over the victim, sufficiently upset that the witness could not speak, and minutes later, the witness, who was described as still visibly distraught, upset, cursing, crying, almost like the witness was in shock, made statements identifying defendants as shooters to investigator and to other bystanders. Daniel v. State, 285 Ga. 406, 677 S.E.2d 120 (2009) (decided under former O.C.G.A. § 24-3-3).

Statements by bystanders held inadmissible as res gestae in the following cases. — See Everready Cab Co. v. Wilhite, 66 Ga. App. 815, 19 S.E.2d 343 (1942) (statement made prior to accident) (decided under former Code 1933, § 38-305); Camp v. Ledford, 103 Ga. App. 197, 119 S.E.2d 54 (1961) (unidentified doctor at scene of accident) (decided under former Code 1933, § 38-305).

9-1-1 call by victim's child. — Admission of a 9-1-1 call placed by the child of a battery victim was proper because, among other reasons, the call was placed moments after the child had witnessed the attack, and was thus part of the res gestae. Kuykendoll v. State, 278 Ga. App. 369, 629 S.E.2d 32 (2006) (decided under former O.C.G.A. § 24-3-3).

Recording of 9-1-1 call made by another driver. — In a trial for driving under the influence of alcohol to the extent of being a less safe driver in violation of O.C.G.A. § 40-6-391(a)(1), admission of a recording of a 9-1-1 call made by a caller who was following the defendant's vehicle was proper. Admission of the call did not violate the confrontation clause of the sixth amendment because the call's primary purpose was to prevent immediate harm to the public, not to establish evidentiary facts for a future prosecution, and the call was admissible under former O.C.G.A. § 24-3-3 because the caller had not deliberated about the statement and had personal knowledge of what the caller described to the 9-1-1 operator. Key v. State, 289 Ga. App. 317, 657 S.E.2d 273 (2008) (decided under former O.C.G.A. § 24-3-3).

9-1-1 calls by bystanders admissible. — Allowing a jury to hear an audiotape of two 9-1-1 calls made by bystanders to report a shooting was proper because, inter alia, the calls were placed within a short time after the shooting, and the callers had no opportunity to deliberate about their statements or be influenced by others; thus, the evidence was admissible under the former O.C.G.A. § 24-3-3 res gestae exception to the hearsay rule. Glover v. State, 285 Ga. 461, 678 S.E.2d 476 (2009) (decided under former O.C.G.A. § 24-3-3).

e. Children

Child's statements admissible though not competent witness. — Even though a child may be too young to be a competent witness this does not preclude admission of the child's declaration as part of the res gestae, if otherwise admissible. Williams v. State, 144 Ga. App. 130, 240 S.E.2d 890 (1977) (decided under former Code 1933, § 38-305).

Standing alone, the fact that a declarant is a child of tender years cannot be said to free the statements from the suspicion of device or afterthought. Hight v. Butler, 230 Ga. 533, 198 S.E.2d 169 (1973) (decided under former Code 1933, § 38-305); Stamper v. State, 235 Ga. 165, 219 S.E.2d 140 (1975) (decided under former Code 1933, § 38-305).

Age may be taken into consideration. — Fact that the declarant was a child of tender years may be taken into consideration in determining whether, under the res gestae rule, the declarant's declarations are so free from the suspicion of afterthought as to be admissible in evidence. Berry v. State, 9 Ga. App. 868, 72 S.E. 433 (1911) (decided under former Civil Code 1910, § 5766).

Child victim's responses to medical questions admissible. — Testimony of a doctor who related a child victim's responses to medical questions for purposes of diagnosis and treatment was admissible under the exception to the hearsay rule provided by former O.C.G.A. § 24-3-3 since the responses were given within a matter of minutes after the patient was taken to the hospital. Allen v. State, 174 Ga. App. 206, 329 S.E.2d 586 (1985) (de-

Res Gestae; Present Sense Impression and Excited Utterance (Cont'd)
6. Application and Examples (Cont'd)
e. Children (Cont'd)

cided under former O.C.G.A. § 24-3-3).

Statements made several days after incident not admissible. — When statements by a victim of cruelty to children were made several days after the incident and the child had several opportunities to report the incidents outside the presence of the child's parents and the reports were made over a period of several days in response to specific questions and there was no medically acceptable testimony that the child was laboring under some disability and the statements were narrative in form rather than spontaneously given, such statements lacked contemporaneity and spontaneity to such a degree as to be extremely suspect and therefore in violation of the res gestae exception to the hearsay rule. Allen v. State, 174 Ga. App. 206, 329 S.E.2d 586 (1985) (decided under former O.C.G.A. § 24-3-3).

Statements to parent in evening after afternoon molestation admissible. — When eight-year-old victim, who was allegedly molested in the afternoon, did not return to the victim's own home until that evening, after the victim's parent had returned from a doctor's appointment, and reported the act of molestation to the victim's parent at that time, which was the victim's first opportunity to do so since leaving the custody of defendant, the parent's testimony concerning the child's statements was admissible under the res gestae exception to the hearsay rule. Moseley v. State, 179 Ga. App. 698, 347 S.E.2d 686 (1986) (decided under former O.C.G.A. § 24-3-3).

Statements by child to parent nearly twenty-four hours after molestation were admissible. Millwood v. State, 174 Ga. App. 113, 329 S.E.2d 273 (1985) (decided under former O.C.G.A. § 24-3-3).

Statement by child to police approximately one year after the alleged molestation was not contemporaneous, was not spontaneous, but was in response to questioning of the police, and thus not a part of the res gestae. Lynn v. State, 181 Ga. App. 461, 352 S.E.2d 602 (1986) (decided under former O.C.G.A. § 24-3-3).

Statements by children held admissible as res gestae in the following cases. — See Ferguson v. Columbus & Rome Ry., 75 Ga. 637 (1885) (cause of injury) (decided under former Code 1882, § 3773); Johnson v. State, 142 Ga. App. 560, 236 S.E.2d 552 (1977) (relating details of child molestation) (decided under former Code 1933, § 38-305).

In the sexual molestation case, the trial court did not err in allowing into evidence the out-of-court statements of the sexual abuse victim's younger sibling who witnessed the molestation; the sibling's statements to the parent were made almost immediately after the defendant molested the victim and were made without premeditation or afterthought pursuant to former O.C.G.A. § 24-3-3. Mikell v. State, 281 Ga. App. 739, 637 S.E.2d 142 (2006) (decided under former O.C.G.A. § 24-3-3).

f. Criminal Law — Defendants

All circumstances of crime making up res gestae may be proved. Duffy v. State, 146 Ga. App. 400, 246 S.E.2d 420 (1978) (decided under former Code 1933, § 38-305).

Statement must be connected with crime. — Statement made by the accused was not admissible as part of the res gestae since while the statement was made "soon" after the shooting but it did not appear that it was so nearly connected with the homicide as to be "free from all suspicion of device or afterthought." Ingram v. State, 43 Ga. App. 218, 158 S.E. 529 (1931) (decided under former Penal Code 1910, § 1024).

Testimony should not have been admitted as part of the res gestae in a charge of two counts of aggravated assault arising from an altercation with the owners of a towing business since the testimony encompassed defendant's behavior during the receipt of medical treatment at some unspecified time after the commission of the charged crimes and did not involve any statements defendant made concerning the assault or any continuation of the defendant's actions at the scene of the

crime. Heflin v. State, 204 Ga. App. 161, 418 S.E.2d 770 (1992) (decided under former O.C.G.A. § 24-3-3).

Remark made by one perpetrator to the other as the perpetrators fled from the liquor store, where one of the perpetrators had shot the store owner, to the van the perpetrators were going to steal to make the perpetrators' getaway, was admissible as part of the res gestae. Tesfaye v. State, 275 Ga. 439, 569 S.E.2d 849 (2002) (decided under former O.C.G.A. § 24-3-3).

Evidence that a witness taught defendant how to make methamphetamine was properly admitted at defendant's trial for possession and trafficking the drug because the evidence was part of the main transaction of conspiracy to manufacture methamphetamine and was admitted as part of the res gestae; therefore, there was no error on the part of the trial court by not requiring the state to have complied with the notice and hearing requirements of Ga. Unif. Super. Ct. R. 31.1 and Ga. Unif. Super. Ct. R. 31.3. Goldsby v. State, 273 Ga. App. 523, 615 S.E.2d 592 (2005) (decided under former O.C.G.A. § 24-3-3).

Defendant did not receive ineffective assistance of counsel as: (1) a hearsay objection to statements the defendant made during an argument and to testimony that the defendant stated that the defendant should have killed the other witnesses would have been futile as the statements were not offered for the truth of the matter asserted; (2) a hearsay objection to a witness's testimony as to the defendant's statements during a van ride would also have been futile as the statements were admissible under former O.C.G.A. § 24-3-3; and (3) counsel's strategic decision to attack certain testimony through cross-examination was not ineffective assistance of counsel. Johnson v. State, 281 Ga. 229, 637 S.E.2d 393 (2006) (decided under former O.C.G.A. § 24-3-3).

Trial court properly held that the events leading up to the assault on the victim served to illustrate the defendant's motive in participating with a cohort to steal money from the victim; moreover, even if the defendant reiterated an objection at trial, the statements uttered by the defendant were so connected with the commission of the offense to be admissible. White v. State, 282 Ga. App. 286, 638 S.E.2d 426 (2006) (decided under former O.C.G.A. § 24-3-3).

Coconspirator's statements admissible. — Coconspirator's statements implicating defendant in a conspiracy to kill defendant's spouse were admissible as part of res gestae where made while the coconspirator was exercising control over the victims, and thus during the enterprise. Walker v. State, 213 Ga. App. 407, 444 S.E.2d 824 (1994) (decided under former O.C.G.A. § 24-3-3).

Bruton objection was properly overruled as the codefendant's statement that the codefendant would check with defendant regarding the victim's participation was part of the res gestae, rather than a confession or a statement. Ford v. State, 274 Ga. App. 695, 617 S.E.2d 262 (2005) (decided under former O.C.G.A. § 24-3-3).

Informant's comments. — Comments which an informant made on tape shortly after defendant sold drugs to the informant and left the informant's car were part of the res gestae, and the trial court did not abuse the court's discretion by admitting the comments during defendant's trial on charges that defendant sold cocaine. Lyons v. State, 266 Ga. App. 89, 596 S.E.2d 226 (2004) (decided under former O.C.G.A. § 24-3-3).

Declaration held not admissible in favor of accused. — Declaration of another person that the person alone committed the crime for which the defendant was on trial, the declarant not naming the person whom declarant had killed, and it not being shown whether the declarant's declaration was made before or after the crime was committed, or, if after, how long after, was not admissible in evidence in favor of the accused, and as a part of the res gestae. Johnson v. State, 188 Ga. 662, 4 S.E.2d 813 (1939) (decided under former Code 1933, § 38-305).

Admission of absent codefendant disallowed. — Informant was not allowed to relate what a codefendant said during the course of the crime, nor could the defendant offer testimony regarding what the defendant's absent codefendant told others about the defendant's role in the crime because admission of such declarations would allow a person to subvert

Res Gestae; Present Sense Impression and Excited Utterance (Cont'd)
6. Application and Examples (Cont'd)
f. Criminal Law — Defendants (Cont'd)

the ends of justice by admitting the crime to others and then absenting oneself from the jurisdiction of the court. Roberts v. State, 208 Ga. App. 64, 430 S.E.2d 175 (1993) (decided under former O.C.G.A. § 24-3-3).

Admission of victim's recollection of attacker's statements. — Rape victim's testimony that her attacker stated he was running from the law, had been drinking, was on drugs really bad, and needed money for gas was not impermissible character evidence and was admissible as res gestae. Hardegree v. State, 230 Ga. App. 111, 495 S.E.2d 347 (1998) (decided under former O.C.G.A. § 24-3-3).

Third party overheard on 9-1-1 call. — Because no evidence existed by which the trial court could assess the personal knowledge of the speaker overheard on a 9-1-1 call, who was not the caller, or the reliability of the statement generally, and the evidence against the defendant was less than overwhelming, the trial court's decision to admit the statement under the res gestae exception was clearly erroneous; moreover, given that the jury sent a note to the trial court requesting to hear the recording again, stating that it was "vital" to their deliberations, it was clear that what was said on the recording figured importantly in the jury's deliberations. Orr v. State, 281 Ga. 112, 636 S.E.2d 505 (2006) (decided under former O.C.G.A. § 24-3-3).

Statements by defendants held admissible as res gestae in the following cases. — See Thomas v. State, 27 Ga. 287 (1859) (declaration that shooting was in self-defense) (decided under former law); Caito v. State, 130 Ga. App. 831, 204 S.E.2d 765 (1974) (statement that "you got me") (decided under former Code 1933, § 38-305); Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979), vacated, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980) (bragging of participation in murder) (decided under former Code 1933, § 38-305).

Defendant could not raise an objection to the admission of defendant's spontaneous statement to police officers executing a search warrant that "you've got me" for the first time on appeal absent plain error. There was no plain error in admitting the statement because: (1) defendant was being detained under O.C.G.A. § 17-5-28, and was not under arrest; (2) defendant was not being interrogated, making Miranda warnings not required; (3) defense counsel cross-examined the officers on the statement: (4) the statement was admissible as a spontaneous statement; and (5) the statement was admissible under former O.C.G.A. § 24-3-3 as a part of the res gestae. Zackery v. State, 262 Ga. App. 646, 586 S.E.2d 346 (2003) (decided under former O.C.G.A. § 24-3-3).

Evidence that the defendant was a drug dealer and gave the police a false name when questioned after the alleged crime was committed was admissible as relevant and part of the res gestae as the former was incidental to and followed directly from the defendant's participation in the sale of marijuana to the victim, and the latter was part of what transpired shortly after the commission of the victim's murder; moreover, this was true even if the defendant's character was incidentally placed in issue. Roberts v. State, 282 Ga. 548, 651 S.E.2d 689 (2007) (decided under former O.C.G.A. § 24-3-3).

In a defendant's prosecution for, inter alia, felony murder, the introduction of a second inmate's statement that the defendant and the second inmate did not mean to kill a third inmate did not violate the defendant's sixth amendment confrontation rights because the voluntary statement, which was made shortly after the third inmate was found in the defendant's cell, was admissible pursuant to the res gestae exception to the rule against hearsay under former O.C.G.A. § 24-3-3. Butler v. State, 284 Ga. 620, 669 S.E.2d 118 (2008) (decided under former O.C.G.A. § 24-3-3).

Although a police car video of a defendant's traffic stop had poor audio quality resulting in inaudible portions, defendant's admissions that defendant's license was suspended were admissible as part of the res gestae pursuant to former

O.C.G.A. § 24-3-3. The defendant could attack the weight and credibility of the recording, but not the recording's admissibility. Steed v. State, 309 Ga. App. 546, 710 S.E.2d 696 (2011) (decided under former O.C.G.A. § 24-3-3).

Witness statements about another's cry for help admissible. — Evidence was properly admitted by the trial court in defendant's trial for aggravated assault in violation of O.C.G.A. § 16-5-21 since statements of a witness that another screamed for help when the witness saw the victim and defendant fighting were part of the res gestae exception to hearsay pursuant to former O.C.G.A. § 24-3-3. Statements by a witness that defendant was ordered to leave the premises were not hearsay under former O.C.G.A. § 24-3-1 because the statements were used to explain defendant's motive and conduct of remaining on the premises and waiting for the victim pursuant to former O.C.G.A. § 24-3-2, and statements regarding information from a police report which was not admitted into evidence were deemed harmless as cumulative. Regardless, there was sufficient evidence without the disputed evidentiary rulings to support defendant's conviction based on observations of several witnesses and the cuts on the victim's face and body. Kelley v. State, 260 Ga. App. 238, 581 S.E.2d 584 (2003) (decided under former O.C.G.A. § 24-3-3).

Statement by defendant to father was narrative. — Defendant's statements to law enforcement and to a college intern shortly after the shooting were properly excluded by the trial court. Defendant's statements in the patrol car were not free from all suspicion of device or afterthought because defendant advised a female caller that the defendant could not talk because the defendant was in the back of a patrol car, and asked the caller not to call the defendant back, and defendant's recounting of recent events to the defendant's father was a narrative and not part of the res gestae. Crane v. State, 300 Ga. App. 450, 685 S.E.2d 314 (2009) (decided under former O.C.G.A. § 24-3-3).

Surveillance videotape reflecting circumstances leading up to defendant's arrest was admissible as res gestae. — Because a department store videotape of defendant's spouse stealing items of merchandise from the store was made contemporaneously to the charged crime, which involved defendant leaving the store with merchandise in the defendant's cart for which the defendant had not paid, and because it provided context for the circumstances surrounding defendant's arrest, it was admissible as part of the res gestae of the crime under former O.C.G.A. § 24-3-3. Wright v. State, 301 Ga. App. 178, 687 S.E.2d 195 (2009) (decided under former O.C.G.A. § 24-3-3).

No independent ground for admission of previous conviction. — No independent ground pursuant to the res gestae evidence rule of former O.C.G.A. § 24-3-3 authorized the introduction of evidence that defendant was previously convicted of aggravated assault when defendant did not testify. Furthermore, the statements regarding defendant's criminal record were inherently prejudicial, and, as a result of the statement's admission, defendant's convictions had to be reversed. Pelowski v. State, 306 Ga. App. 41, 701 S.E.2d 529 (2010) (decided under former O.C.G.A. § 24-3-3).

g. Criminal Law — Investigating Officers

Statements made about a fight. — Statements made to a magistrate about a fight by one of the participants on the same day of the fight, and a short distance from the scene, were held to be not admissible as a part of the res gestae. Cherry v. McCall, 23 Ga. 193 (1857) (decided under former law).

Admission of police officer's testimony regarding the substance of what someone told the officer who had moved out of town at the time of trial and was not called as a witness was in error, since this testimony was hearsay and came under no exception to the hearsay rule. Liu's Enters. Corp. v. Li, 204 Ga. App. 397, 419 S.E.2d 511 (1992) (decided under former O.C.G.A. § 24-3-3).

Statement made to an officer after an arrest concerning a course of conduct by the person arrested is not a part of the res gestae but a narrative of events. Jones

Res Gestae; Present Sense Impression and Excited Utterance (Cont'd)
6. Application and Examples (Cont'd)
g. Criminal Law — Investigating Officers (Cont'd)

v. State, 62 Ga. App. 734, 9 S.E.2d 707 (1940) (decided under former Code 1933, § 38-305).

Statement made to officer at time of arrest. — When the stipulated facts showed the trustworthiness of statement made at time of arrest in that defendant's nephew informed officer that defendant had been operating a motorcycle soon after the occurrence of the contested driving offense; the statement was sufficiently contemporaneous to be a part of the res gestae and was therefore admissible. Jarrett v. State, 265 Ga. 28, 453 S.E.2d 461 (1995) (decided under former O.C.G.A. § 24-3-3).

Statements taken at scene of accident. — Statements made to an investigating officer not more than 20 to 30 minutes after an automobile collision may be allowed as testimony. Land v. McClure, 135 Ga. App. 243, 217 S.E.2d 600 (1975) (decided under former Code 1933, § 38-305).

Trial court did not err in overruling the defendant's hearsay objections to the testimony of a co-indictee's girlfriend that he told her by phone that the defendant was shooting at the victim and to the testimony of the responding police officer and another person that the victim's fiance, right after the shooting while she was upset and crying, identified the defendant as the shooter because the statements were admissible as part of the res gestae of the crime; both of the declarants testified at trial and were subject to questioning by the defense, and the declarants made the statements either during the shooting or immediately thereafter when crying and upset. McIlwain v. State, 287 Ga. 115, 694 S.E.2d 657 (2010) (decided under former O.C.G.A. § 24-3-3).

Observations by officer held admissible. — Testimony of an officer that the officer noticed bruises on the rape victim's neck is admissible. Zilinmon v. State, 234 Ga. 535, 216 S.E.2d 830 (1975), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006) (decided under former O.C.G.A. § 24-3-3).

Telephone calls received by officer. — With regard to a defendant's conviction for possessing cocaine, the trial court did not err by admitting evidence of telephone conversations between a deputy and unknown callers which occurred during the time the deputy was serving a temporary protective order and warrant for a probation violation on the defendant at the defendant's apartment because the telephone conversations occurred contemporaneously with the seizure of the drugs found in the apartment and tended to indicate that the drugs had not been brought to the apartment by a casual guest, but belonged to someone who was receiving calls about the drugs at the apartment. Stewart v. State, 285 Ga. App. 760, 647 S.E.2d 411 (2007) (decided under former O.C.G.A. § 24-3-3).

Statement admissible despite misidentification. — Statement given to a police officer shortly after a stabbing incident was admissible, and the fact that the witness may have misidentified the suspect did not render the statement inadmissible. Taylor v. State, 226 Ga. App. 339, 486 S.E.2d 601 (1997) (decided under former O.C.G.A. § 24-3-3).

Statement by victim to officer minutes after crime. — Trial court did not improperly rely on hearsay in determining whether reasonable suspicions existed to detain defendant as the burglary victim's description of the perpetrator of the burglary to the police officer did not go to the issue of whether defendant was guilty or innocent, but instead went to whether reasonable suspicion existed to perform a Terry detention; moreover, the burglary victim's description given on the scene to the officer only minutes after the perpetrator fled was admissible under the res gestae exception to the hearsay rule. Spear v. State, 259 Ga. App. 803, 578 S.E.2d 504 (2003) (decided under former O.C.G.A. § 24-3-3).

Trial court did not err in overruling hearsay objections the defendant made during testimony from the responding police officer regarding statements the victim made to the officer during the preliminary investigation because the

statements were admissible as part of the res gestae of the crime; because the officer testified that the victim was upset and had blood on the victim's face when the officer arrived and made the statements regarding the incident shortly thereafter, the statements were relevant and made without premeditation and were admissible as part of the res gestae. Mubarak v. State, 305 Ga. App. 419, 699 S.E.2d 788 (2010) (decided under former O.C.G.A. § 24-3-3).

Witness's out-of-court statement to officer admissible. — Police officer's testimony as to out-of-court statements made by a witness that the witness had hidden in a closet while defendant fired shots through the wall and closet door was admissible as part of the res gestae. Morris v. State, 228 Ga. App. 90, 491 S.E.2d 190 (1997) (decided under former O.C.G.A. § 24-3-3).

h. Criminal Law — Other Crimes

Evidence of other crimes was admissible when the extraneous crime formed a part of the res gestae. Bradley v. State, 154 Ga. App. 333, 268 S.E.2d 388 (1980) (decided under former Code 1933, § 38-305); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42 (1980) (decided under former Code 1933, § 38-305).

Generally, in the prosecution for a particular offense, evidence of another distinct crime, wholly independent from that which the accused is on trial, is inadmissible, but if the allegedly separate offense was a part of the same incident for which the accused is being tried and forms a part of the res gestae, the evidence is admissible, and the fact that such part of the res gestae incidentally placed defendant's character in issue does not render the evidence inadmissible. Yarbrough v. State, 186 Ga. App. 845, 368 S.E.2d 802 (1988) (decided under former O.C.G.A. § 24-3-3).

Fact that relevant evidence may indicate a crime or incidentally place a defendant's character in issue does not render the evidence inadmissible. Martin v. State, 219 Ga. App. 277, 464 S.E.2d 872 (1995) (decided under former O.C.G.A. § 24-3-3); Larkin v. State, 230 Ga. App. 129, 495 S.E.2d 605 (1998) (decided under former O.C.G.A. § 24-3-3).

Prosecutor's reference to other crime proper. — Trial court's denial of defendant's motion for mistrial for an argument made during an opening statement to the jury that the prosecutor expected the evidence to show "defendant was asking for cocaine, said, 'Where is the cocaine ...,'" was not error although the defendant had not been charged with any offense involving drugs as the state is entitled to inform the jury of all the circumstances surrounding the commission of the crime or crimes charged, even though it may have incidentally placed the defendant's character in evidence. Houston v. State, 187 Ga. App. 335, 370 S.E.2d 178 (1988) (decided under former O.C.G.A. § 24-3-3).

Statements are a part of the res gestae and are admissible as such, notwithstanding the fact the statements may show other criminal conduct on the part of the one who made the statement. Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978), cert. denied, 493 U.S. 876, 110 S. Ct. 214, 107 L. Ed. 2d 166 (1989) (decided under former Code 1933, § 38-305); Lord v. State, 156 Ga. App. 492, 274 S.E.2d 641 (1980), rev'd on other grounds, Potts v. Zant, 734 F.2d 526 (11th Cir. 1984) (decided under former Code 1933, § 38-305).

Trial court did not err in denying the defendant's motion in limine to exclude evidence of the defendant's probation status, and the underlying probation offense, as that evidence was properly admitted as part of the res gestae since the conduct of the officer flowed very directly from the statements made during the consensual encounter. Hampton v. State, 287 Ga. App. 896, 652 S.E.2d 915 (2007) (decided under former O.C.G.A. § 24-3-3).

Statement was admissible as part of res gestae, even if statement incidentally placed defendant's character in evidence. — Defendant's claim that defendant's character was impermissibly placed in issue when a similar transaction witness testified that immediately after defendant had raped the witness, the defendant lay beside the victim and told the victim that "he had done that to five other women" was rejected as defendant failed to object to the testimony until

Res Gestae; Present Sense Impression and Excited Utterance (Cont'd)
6. Application and Examples (Cont'd)
h. Criminal Law — Other Crimes (Cont'd)

after the jury was charged; moreover, had defendant raised a timely objection, the testimony still would have been admissible as part of the res gestae, even if the testimony incidentally placed defendant's character in evidence. Harden v. State, 272 Ga. App. 559, 612 S.E.2d 877 (2005) (decided under former O.C.G.A. § 24-3-3).

Uncharged crimes that occurred at same time as charged offenses. — Victim's testimony about seeing the defendant and the codefendant rob another person was admissible under former O.C.G.A. § 24-3-3 as part of the res gestae of the armed robbery and aggravated assault against the victim as the other act occurred in the same place and during the same time that the defendant and codefendant were committing the crimes against the victim. Herieia v. State, 297 Ga. App. 872, 678 S.E.2d 548 (2009) (decided under former O.C.G.A. § 24-3-3).

Offenses independent from prosecution. — Generally, in the prosecution for a particular offense, evidence of another offense wholly independent from the one being prosecuted is inadmissible. But, if the statement by the defendant forms a part of the same transaction of the one being prosecuted, it is a part of the res gestae and is admissible. The fact that it shows another crime and incidentally places the defendant's character in issue does not render the statement inadmissible. Mosley v. State, 150 Ga. App. 802, 258 S.E.2d 608 (1979) (decided under former Code 1933, § 38-305).

Because facts surrounding the defendant's commission of a prior crime were similar enough to the charged crimes, evidence of the prior crime was properly admitted despite the defendant's hearsay claim since the state established that it was introducing the evidence for an appropriate purpose, there was sufficient similarity between the independent offense and the crime charged, and proof of the former tended to show the latter. Kimbrough v. State, 281 Ga. 885, 644 S.E.2d 125 (2007) (decided under former O.C.G.A. § 24-3-3).

Other crimes evidence admissible as part of res gestae. — In a prosecution for felony forgery, a witness's testimony that, just prior to the charged offense, the defendant had tried to induce the witness to cash forged checks and that the witness saw the defendant use an accomplice to cash forged checks, was properly admitted as res gestae evidence because the testimony showed the planning process for the forgeries in question. Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597 (2011), cert. denied, No. S11C1861, 2011 Ga. LEXIS 985 (Ga. 2011) (decided under former O.C.G.A. § 24-3-3).

i. Criminal Law — Victims

Declarations as natural consequence of crime are admissible. — Victim's declarations, made shortly after the commission of the crime and as a natural consequence thereof, were admissible in evidence as part of the res gestae. Horn v. State, 140 Ga. App. 592, 231 S.E.2d 414 (1976) (decided under former Code 1933, § 38-305).

Statements made during rape. — In a rape prosecution, statements the victim made to defendant and defendant's codefendant while the crime was in progress were admissible because the statements were part of the res gestae of the crime. Cole v. State, 279 Ga. App. 219, 630 S.E.2d 817 (2006) (decided under former O.C.G.A. § 24-3-3).

Statements within minutes of crime. — Testimony as to statements of a victim of armed robbery made within a few minutes after the incident was admissible. Perkins v. State, 226 Ga. App. 613, 487 S.E.2d 365 (1997) (decided under former O.C.G.A. § 24-3-3).

Absent victim's statements to the officer who first responded to the emergency call and the victim's first conversation with a detective at the hospital shortly after commission of the crime were admissible as part of the res gestae. Jay v. State, 232 Ga. App. 661, 503 S.E.2d 563 (1998) (decided under former O.C.G.A. § 24-3-3).

Trial court did not err in admitting the statements the domestic violence victim made to the police officer at the crime

scene as the statements were made an hour or less after the officer arrived at the scene and while the victim was still under the effects of the crimes; accordingly, the statements were admissible as part of res gestae. Mize v. State, 262 Ga. App. 486, 585 S.E.2d 913 (2003) (decided under former O.C.G.A. § 24-3-3).

Trial counsel's failure to object to admission of the victim's statement to the witness that victim and defendant had just had sex, in a case in which defendant was being prosecuted for child molestation and statutory rape did not amount to ineffective assistance of counsel, as the victim made the statement to the witness moments after the sex occurred, and, thus, the statement was admissible as res gestae evidence. Drummond v. State, 275 Ga. App. 86, 619 S.E.2d 784 (2005) (decided under former O.C.G.A. § 24-3-3).

Victim's statement made within minutes of a crime to an officer was admissible as part of the res gestae, under former O.C.G.A. § 24-3-3, including the fact that the victim recognized one of the perpetrators of the crime as the defendant. Inman v. State, 281 Ga. 67, 635 S.E.2d 125 (2006), cert. denied, 552 U.S. 828, 128 S. Ct. 42, 169 L. Ed. 2d 40 (2007) (decided under former O.C.G.A. § 24-3-3).

Murder victim's statements to neighbors, paramedics, and an officer identifying the defendant as the shooter were nontestimonial as the statements were made while the incident was still ongoing and the perpetrator was at large. Thus, the confrontation clause was not implicated, and the admission of the statements under former O.C.G.A. § 24-3-3, the res gestae exception to the hearsay rule, did not violate the defendant's sixth amendment rights. Thomas v. State, 284 Ga. 540, 668 S.E.2d 711 (2008) (decided under former O.C.G.A. § 24-3-3).

An armed robbery defendant's counsel was not ineffective in failing to object to the testimony of the detective as to what the victim and a witness said when the detective arrived at the bank, seven minutes after the robbery. There was no showing that the statements were made as the result of any afterthought; they were therefore admissible as res gestae under former O.C.G.A. § 24-3-3. Collier v. State, 303 Ga. App. 31, 692 S.E.2d 697 (2010) (decided under former O.C.G.A. § 24-3-3).

Trial court did not err in admitting an investigating officer's testimony regarding the victim's prior consistent statement identifying the defendant as the victim's attacker despite the defendant's hearsay objection. The victim's statement was made within minutes of the violent assault and while the victim was still suffering its effects; therefore, the victim's statement was admissible as part of the res gestae of the event under former O.C.G.A. § 24-3-3. Mims v. State, 314 Ga. App. 170, 723 S.E.2d 486 (2012) (decided under former O.C.G.A. § 24-3-3).

When the victim's statements were derived solely from his or her personal observations, were made within minutes of the crime, and were free of all suspicion, the victim's statements are admissible under the res gestae exception to the hearsay rule. Milford v. State, 291 Ga. 347, 729 S.E.2d 352 (2012) (decided under former O.C.G.A. § 24-3-3).

Statement shortly after crime occurred. — Trial court was not clearly erroneous in admitting testimony as to a statement made by an earlier victim as to a sexual assault by defendant under the res gestae exception; the statement was made shortly after the crime occurred when the victim was still upset and shaking. Leaptrot v. State, 272 Ga. App. 587, 612 S.E.2d 887 (2005) (decided under former O.C.G.A. § 24-3-3).

Defendant's claim that trial counsel was ineffective for allowing the prosecutor to "elicit extensive hearsay" regarding what the victim told a friend about the rape was rejected as counsel made a hearsay objection to the testimony which was sustained in part; the trial court permitted the victim's outcry witness to testify about what the victim said because those statements were made immediately after the rape and, therefore, constituted admissible res gestae evidence. Powell v. State, 272 Ga. App. 628, 612 S.E.2d 916 (2005) (decided under former O.C.G.A. § 24-3-3).

Trial court properly admitted the excited utterances of an armed robbery victim as part of the res gestae free from all suspicion of device or afterthought; moreover, Crawford did not apply as the state-

Res Gestae; Present Sense Impression and Excited Utterance (Cont'd)
6. Application and Examples (Cont'd)
i. Criminal Law — Victims (Cont'd)

ments were not made to a police officer during a subsequent investigation of the crime, nor were the statements made to an officer or 9-1-1 operator for the purpose of proving a fact regarding some past event. Fields v. State, 283 Ga. App. 208, 641 S.E.2d 218 (2007) (decided under former O.C.G.A. § 24-3-3).

Trial court did not err in admitting into evidence statements the victim made to an officer that the defendant shot the victim because the statements were properly admitted under the res gestae exception to the hearsay rule, former O.C.G.A. § 24-3-3; the victim made the statements shortly after a shooting, in the midst of the chaos of the crime scene, and while awaiting emergency treatment. Sanford v. State, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, U.S. , 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011) (decided under former O.C.G.A. § 24-3-3).

Statements within hours of crime. — Evidence showed that the victim's statements were all consistent and delivered within a few hours of the time the victim said the victim escaped captivity; trial court did not err in concluding that the statements were free from suspicion of device or afterthought so as to allow the statements' admission as an exception to the hearsay exclusion. Underwood v. State, 250 Ga. App. 764, 552 S.E.2d 915 (2001) (decided under former O.C.G.A. § 24-3-3).

Statements made by a child victim within hours of an alleged sexual assault were made at a time so nearly connected with the incident so as to be free from all suspicion, device, or afterthought, and hence, were admissible as part of res gestae. Freeman v. State, 282 Ga. App. 185, 638 S.E.2d 358 (2006) (decided under former O.C.G.A. § 24-3-3).

Victim's on-the-scene description admissible. — There was no error in allowing the investigating officer to relate for the jury the distraught victim's on-the-scene description of the attack upon the victim, including the victim's description of the assailant, even though this evidence was more narrative than exclamatory. McKinney v. State, 218 Ga. App. 633, 463 S.E.2d 136 (1995) (decided under former O.C.G.A. § 24-3-3); Basu v. State, 228 Ga. App. 591, 492 S.E.2d 329 (1997) (decided under former O.C.G.A. § 24-3-3).

When an outcry is communicated to witnesses immediately after a victim locates the witnesses, which is within one hour after the offense, these declarations, made so shortly after the commission of the crime, constitute part of the res gestae. Tucker v. State, 243 Ga. 683, 256 S.E.2d 365 (1979) (decided under former Code 1933, § 38-305).

Robbery victim's statements to the arresting officer and emergency room physician identifying the victim's assailant as the victim's great grandson were so closely connected to the offense as to be inherently reliable, particularly in light of the victim's refusal to testify once the victim realized the penal consequences to the defendant. Jenkins v. State, 232 Ga. App. 395, 501 S.E.2d 891 (1998) (decided under former O.C.G.A. § 24-3-3).

Conversations before crime not part of res gestae. — Testimony concerning a conversation between deceased victim and a murder suspect occurring some hours before the murder was not part of the res gestae because it did not lead to the murder, and was in no way connected with the murder. Mitchell v. State, 71 Ga. 128 (1883) (decided under former Code 1882, § 3773).

Statements preceding crime. — Statement from deceased child declarant that there was no need for the child's mother to call the school and confirm that the child arrived safely on the day the child disappeared was not part of the res gestae as it was not made contemporaneously with, or in relation to, the commission of the crimes for which defendant was being tried; appellate court believed that the statement was merely intended to demonstrate the child's nature and trusting disposition. Head v. State, 276 Ga. 131, 575 S.E.2d 883 (2003) (decided under former O.C.G.A. § 24-3-3).

Earlier incident involving other victims was admissible. — In an aggra-

vated battery and criminal gang violence case that took place outside an amusement park, evidence of an earlier incident involving the gang inside the park was admissible as part of the res gestae of the crime under former O.C.G.A. § 24-3-3 because the same people were involved and the beatings arose from a motive of revenge for the earlier incident. Morey v. State, 312 Ga. App. 678, 719 S.E.2d 504 (2011), cert. denied, No. S12C0451, 2012 Ga. LEXIS 592 (Ga. 2012) (decided under former O.C.G.A. § 24-3-3).

Audiotape of 9-1-1 calls. — In a prosecution for rape, kidnapping, assault, and sodomy, it was not error to allow the state to play a 9-1-1 audiotape of calls made by the victim and witnesses during the attack. Moore v. State, 217 Ga. App. 207, 456 S.E.2d 708 (1995) (decided under former O.C.G.A. § 24-3-3).

When defendant kidnapped the victim in front of the victim's children, the victim and the children were part of res gestae since the victim's statements were made while the incident was in progress, one of the children was on the telephone with the 9-1-1 operator recounting the altercation as the altercation occurred, and a policeman found the children distraught and holding makeshift weapons; as the statements sprang out of the incident, the statements were admissible. Jackson v. State, 255 Ga. App. 279, 564 S.E.2d 865 (2002) (decided under former O.C.G.A. § 24-3-3).

When a tape of a 9-1-1 call was made contemporaneous with the call, the content of the call showed that the call was contemporaneous with the burglary at issue, the 9-1-1 operator testified that the tape was a fair and accurate depiction of the actual conversation, the caller's statements were made while the incident was actually in progress, and the statements were made without premeditation or afterthought, a trial court correctly allowed admission of the tape as part of the res gestae of the burglary. Sweney v. State, 265 Ga. App. 21, 593 S.E.2d 12 (2003) (decided under former O.C.G.A. § 24-3-3).

Defendant's motion in limine to exclude evidence of a 9-1-1 call and the defendant's motion for a directed verdict were properly denied as the 9-1-1 call was not testimonial since the call was not premeditated and was made to prevent or stop a crime; under Georgia law, the 9-1-1 statements were admissible as part of the res gestae or as an excited utterance and the confrontation clause and Crawford v. Washington, 541 U. S. 36 (2004), were inapplicable. Kimbrell v. State, 280 Ga. App. 867, 635 S.E.2d 237 (2006) (decided under former O.C.G.A. § 24-3-3).

Trial court correctly admitted a 9-1-1 recording as part of the res gestae pursuant to former O.C.G.A. § 24-3-3 because the caller identified the defendant while or soon after the incident occurred in an attempt to secure police assistance and was still on the phone with the 9-1-1 operator when the police arrived. Landaverde v. State, 305 Ga. App. 488, 699 S.E.2d 816 (2010) (decided under former O.C.G.A. § 24-3-3).

Recording of victim's radio transmission. — Recorded radio voice transmission of the deceased victim made while proceeding to the scene of the homicide is admissible as forming part of the res gestae. The victim's voice transmission made while proceeding to the scene together with the events occurring there only moments later constituted the transaction under investigation. The death of the person making such statement is no ground for the statement's exclusion. Callahan v. State, 229 Ga. 737, 194 S.E.2d 431 (1972) (decided under former Code 1933, § 38-305).

Victim's taped interview. — Absent victim's taped interview made 18 or 19 hours after the incident was not part of the res gestae but, because it was cumulative of other testimony, admission of the statement was not reversible error. Jay v. State, 232 Ga. App. 661, 503 S.E.2d 563 (1998) (decided under former O.C.G.A. § 24-3-3).

Evidence that the victim heard an unidentified female voice scream defendant's name, tell the defendant "don't do it," and tell defendant that the defendant was going to kill the victim, as a gun was cocked and fired at the victim, was admissible under the res gestae exception to the hearsay rule. Sharif v. State, 272 Ga. App. 660, 613 S.E.2d 176 (2005) (decided under former O.C.G.A. § 24-3-3).

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6. Application and Examples (Cont'd)
i. Criminal Law — Victims (Cont'd)

Statements by assault victims held admissible as res gestae in the following cases. — See Life & Cas. Ins. Co. v. Lingerfelt, 100 Ga. App. 482, 111 S.E.2d 730 (1959) (statement made within 10 minutes of assault) (decided under former Code 1933, § 38-305); Barker v. State, 144 Ga. App. 339, 241 S.E.2d 11 (1977) (statement shortly after assault) (decided under former Code 1933, § 38-305); Nasworthy v. State, 169 Ga. App. 603, 314 S.E.2d 446 (1984) (testimony of ex-spouse and child) (decided under former O.C.G.A. § 24-3-3); Robinson v. State, 197 Ga. App. 600, 399 S.E.2d 94 (1990) (victim's identification of attacker to adult child) (decided under former O.C.G.A. § 24-3-3).

Nurse's testimony that a victim told the nurse that the victim was attacked by the victim's roommate while the victims was sleeping was admissible under former O.C.G.A. § 24-3-3 because of the victim's physical and emotional condition when the victim made the statements and because the statements were made immediately after the attack; further, the correctional officers had testified that defendant was the aggressor in the affray and that the victim appeared to have been asleep at the inception of the incident, so the hearsay testimony given by the nurse was cumulative of other evidence. Brown v. State, 273 Ga. App. 88, 614 S.E.2d 187 (2005) (decided under former O.C.G.A. § 24-3-3).

Statements by child molestation victim. — Testimony by two witnesses regarding statements made by one of the victims about seeing the defendants engaged in sex was admissible as res gestae evidence. Grimsley v. State, 233 Ga. App. 781, 505 S.E.2d 522 (1998) (decided under former O.C.G.A. § 24-3-3).

Statements by child molestation victim made to mother several hours after event admissible. — See Kilgore v. State, 177 Ga. App. 656, 340 S.E.2d 640 (1986) (decided under former O.C.G.A. § 24-3-3).

Statements by victim of child molestation made to teacher some hours after the event was admissible. Samples v. State, 169 Ga. App. 605, 314 S.E.2d 448 (1984) (decided under former O.C.G.A. § 24-3-3).

Statements by child molestation victim about battery on grandmother. — Trial court did not err in denying defendant's motion for mistrial after one of the child victims testified that defendant battered the child's grandmother shortly after the grandmother stumbled upon defendant molesting that child as the evidence supported a finding that this battering was part of the res gestae of the child molestation crime. Prather v. State, 279 Ga. App. 552, 631 S.E.2d 758 (2006) (decided under former O.C.G.A. § 24-3-3).

Witness's testimony concerning victim's recital to the witness of facts of an alleged rape some 12 hours after the offense was not admissible as an outcry — i.e., as part of the res gestae — but was admissible for the purpose of establishing that the prosecutor had complained that a rape had occurred. Barnes v. State, 171 Ga. App. 478, 320 S.E.2d 597 (1984) (decided under former O.C.G.A. § 24-3-3).

Victim's parent's testimony about phone call following rape. — Victim's parent's testimony as to the daughter's telephone call to the parent after the rape was admissible as res gestae. Howard v. State, 228 Ga. App. 784, 492 S.E.2d 759 (1997) (decided under former O.C.G.A. § 24-3-3).

Victim's statement following phone call. — Victim's statement following a phone conversation with defendant that the victim had to "get" defendant because defendant told the victim the defendant was going to kill the victim, considered in the context in which it was made, was an excited utterance. Walthour v. State, 269 Ga. 396, 497 S.E.2d 799 (1998) (decided under former O.C.G.A. § 24-3-3).

Testimony of police officer that victim told the officer that defendant forced the victim's car off the road was within the "excited utterance" hearsay exception and admissible as part of the res gestae. T.G. & Y. Stores Co. v. Waters, 175 Ga. App. 884, 334 S.E.2d 910 (1985) (decided under former O.C.G.A. § 24-3-3).

Testimony by victim on witness's statements to victim. — Trial court did not err by allowing a burglary victim to testify that the victim's neighbor, an eyewitness, told the victim that the witness saw someone running from the victim's house or as to the neighbor's description of the perpetrator when such declarations were made in a phone call to the victim substantially contemporaneously with the burglary and soon thereafter when the victim returned home. Lovelace v. State, 262 Ga. App. 690, 586 S.E.2d 386 (2003) (decided under former O.C.G.A. § 24-3-3).

Statements by victims identifying their murderers admissible as res gestae in the following cases. — See Jordan v. State, 180 Ga. 871, 181 S.E. 151 (1935) (decided under former Code 1933, § 38-305); Gates v. State, 120 Ga. App. 518, 171 S.E.2d 375 (1969) (decided under former Code 1933, § 38-305).

Defendant's threatening words and behavior made defendant's angry telephone message and act of hunting for the victim's hotel room a startling event that, in all probability, impeded the victim's normal thought processes, and the victim's comment to the victim's friend that defendant was going to kill the victim appears to have been spontaneous and not the result of reasoned deliberation. Testimony such as the friend's, that the declarant appeared nervous and upset, combined with a reasonable basis for emotional upset, will usually suffice for admission under the excited utterance exception of former O.C.G.A. § 24-3-3. Demons v. State, 277 Ga. 724, 595 S.E.2d 76 (2004) (decided under former O.C.G.A. § 24-3-3).

Firmly rooted hearsay exceptions, such as res gestae, the excited utterance exception of former O.C.G.A. § 24-3-3, are generally not a sufficient substitute for a prior opportunity for cross-examination in order to admit testimonial hearsay in a criminal case. However, when a deceased victim's statements were not "testimonial," the statements were not precluded from admission under Georgia's res gestae exception to the hearsay rule. Demons v. State, 277 Ga. 724, 595 S.E.2d 76 (2004) (decided under former O.C.G.A. § 24-3-3).

Rape and kidnapping part of one transaction. — Because the evidence showed that a victim's kidnapping and rape were part of one criminal transaction, the trial court did not abuse the court's discretion in admitting evidence of the rape, as it formed a part of the res gestae. Garrett v. State, 285 Ga. App. 282, 645 S.E.2d 718 (2007) (decided under former O.C.G.A. § 24-3-3).

Statement by victim to police officer. — Evidence of a victim's statement to the police, although not properly admitted as a prior inconsistent statement due to the failure to lay a proper foundation under former O.C.G.A. § 24-9-83 (see now O.C.G.A. § 24-6-608), was properly admitted as part of the res gestae under former O.C.G.A. § 24-3-3 because the victim's description of a distinctive jacket worn by one of the individuals who took a pickup truck was used by the police to search the defendant's residence. Stubbs v. State, 293 Ga. App. 692, 667 S.E.2d 905 (2008) (decided under former O.C.G.A. § 24-3-3).

Testimony of officer. — Because a police officer's hearsay testimony of any instances of harassment was cumulative to the victim's direct testimony on the issue, there was no error on the part of the trial court to admit the testimony simply on the basis that the statement was hearsay. Pate v. State, 315 Ga. App. 205, 726 S.E.2d 691 (2012), cert. denied, No. S12C1308, 2012 Ga. LEXIS 1027 (Ga. 2012) (decided under former O.C.G.A. § 24-3-1).

Trial counsel was not ineffective for failing to object on hearsay grounds to portions of a Secret Service agent's testimony about what the agent learned during the investigation as the testimony was not hearsay since the agent did not repeat the testimony of an out-of-court declarant. Bearden v. State, 316 Ga. App. 721, 728 S.E.2d 874 (2012) (decided under former O.C.G.A. § 24-3-1).

Trial counsel was not ineffective for failing to make a hearsay objection to the investigating officer's testimony concerning statements that a witness and the victim's mother made to the officer recounting the allegations of the victim because counsel's trial strategy was to highlight the inconsistencies between what the witness and the mother said the vic-

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tim told them and what the victim subsequently told the forensic interviewer. Henry v. State, 316 Ga. App. 132, 729 S.E.2d 429 (2012) (decided under former O.C.G.A. § 24-3-1).

Testimony as to statements of third persons. — Trial counsel was not ineffective for failing to make a hearsay objection to the testimony of the victim's mother and a witness recounting allegations of molestation because trial counsel wanted the testimony admitted as part of counsel's trial strategy to show those witnesses fabricated the charges and coached the victim. Henry v. State, 316 Ga. App. 132, 729 S.E.2d 429 (2012) (decided under former O.C.G.A. § 24-3-1).

Prior consistent statement of victim. — Trial court erred in admitting the victim's prior consistent statements because the victim made the statements to a police officer after the victim was accused of possessing narcotics; nevertheless, any error in admitting the evidence was harmless because the jury acquitted the defendant of the most serious sexual offenses, and the acquittals established that the jury was able to objectively consider the evidence of the charges, despite the improper bolstering. Pate v. State, 315 Ga. App. 205, 726 S.E.2d 691 (2012), cert. denied, No. S12C1308, 2012 Ga. LEXIS 1027 (Ga. 2012) (decided under former O.C.G.A. § 24-3-1).

Evidence admissible under necessity exception. — Trial court did not abuse the court's discretion in allowing a witness to testify about the victim's statement regarding threats the victim had received a few days before the shooting because the requirements of the necessity exception to the hearsay rule were met; the victim was deceased and unavailable to testify, the witness testified that the victim and the witness were friends, and the defendant identified no alternative source of the information revealed in the statement. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661 (2012) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion by allowing the admission of hearsay evidence by three witnesses concerning statements that the victim made about the victim's relationship with the defendant because such admissions were proper under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b) (see now O.C.G.A. §§ 24-8-803 and 24-8-807), as the witnesses showed the close relationship between the defendant and the victim, the statements were uncontradicted, found reliable, and bore sufficient indicia of trustworthiness to be admissible. Bunnell v. State, 292 Ga. 253, 735 S.E.2d 281 (2013) (decided under former O.C.G.A. § 24-3-1).

In a murder case wherein the defendant killed the defendant's father and brother and was involved with the defendant's brother's wife, the trial court did not abuse the court's discretion when the court allowed a woman who had counseled the brother about the brother's marital problems to testify about an incident that the brother had described to the counselor, in which the defendant threatened the defendant's brother's life at their parents' home because the statement was admissible under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b), as the witness was shown to have been "like a second mother" to the brother, that the witness had counseled and advised the brother about the brother's marital problems, and that the brother had no reason to lie to the woman; further, the testimony was consistent with the testimony of other witnesses, including two witnesses who testified about another incident in which the brother and the defendant threatened to kill each other. Heidt v. State, 292 Ga. 343, 736 S.E.2d 384 (2013) (decided under former O.C.G.A. § 24-3-1).

No reversible error in criminal case when defendant failed to show harm. — Defendant failed to preserve for review the argument that the trial court erred in allowing a witness to testify about the victim's statement because although the codefendant's counsel vigorously opposed the state's request to elicit the hearsay statements, the defendant's counsel failed to object, join in the codefendant's objec-

tion, or argue in any way regarding the issue. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661 (2012) (decided under former O.C.G.A. § 24-3-1).

Testimony as to prior difficulties between defendant and the victim. — Trial court did not err in refusing to grant a mistrial on the ground that an eyewitness's testimony was based on hearsay because to the extent the testimony exposed prior difficulties between the codefendants and the victim, it was cumulative of other testimony that the defendant and the codefendant threatened the victim the day before the shooting; the other evidence implicating the defendant in the shooting made it highly probable that the hearsay testimony did not contribute to the verdict. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661 (2012) (decided under former O.C.G.A. § 24-3-1).

j. Donors

Statements by donor of gift. — Declarations of the donor, made on the evening of the same day on which an alleged gift was made, but after the gift was made, going to show that there was a gift, and the manner of the gift, are not admissible as parts of the res gestae. Carter v. Buchannon, 3 Ga. 513 (1847) (decided under former law).

k. Employees

Statement made by the store manager in a slip and fall action pertaining to the identity of the slippery substance which allegedly caused the fall was admissible as an admission against interest or under the res gestae exception and was sufficient to raise a question of fact precluding summary judgment in favor of the store. Brown v. Piggly Wiggly S., Inc., 210 Ga. App. 459, 436 S.E.2d 513 (1993) (decided under former O.C.G.A. § 24-3-3).

Employee's statement held admissible. — Statement made just after plaintiff's fall by an unknown employee in the presence of the store manager that "if this floor had been mopped or kept mopped this wouldn't happen" was admissible as part of the res gestae and might also have been an admission against defendant store's interest. Sutton v. Winn Dixie Stores, Inc., 233 Ga. App. 424, 504 S.E.2d 245 (1998) (decided under former O.C.G.A. § 24-3-3).

Hearsay testimony of a bank employee as to another employee's telephone conversation was admissible under former O.C.G.A. §§ 24-3-1(b) and 24-3-3 (see now O.C.G.A. §§ 24-8-801, 24-8-802, and 24-8-803) as part of the res gestae of the other employee's conversation. Goldsmith v. Peterson, 307 Ga. App. 26, 703 S.E.2d 694 (2010) (decided under former O.C.G.A. § 24-3-3).

Employee's statement held not admissible. — Extrajudicial admission of employee, who was not a party to the indemnity contract, nor a party to the suit was not admissible as a part of the res gestae of the larceny for which the employer was seeking indemnification, nor as an admission by a stranger to the suit bearing upon a collateral issue essential to the adjudication, as the admission was not collateral to the main issue involved, but bore directly upon it. Glens Falls Indem. Co. v. Gottlieb, 80 Ga. App. 634, 56 S.E.2d 799 (1949) (decided under former Code 1933, § 38-305).

In an action for injuries sustained after falling on a wet floor, testimony of the injured customer that a store employee came up to the customer after the customer fell and stated that a child had thrown up on the floor was not admissible as part of the res gestae. The testimony did not create a triable issue of fact as to the store owner's knowledge of a dangerous condition. Hagan v. Goody's Family Clothing, Inc., 227 Ga. App. 585, 490 S.E.2d 107 (1997) (decided under former O.C.G.A. § 24-3-3).

As a witness's hearsay statement to an investigator was made 13 days after the fire at issue in the litigation, it could not be said to have been voluntary or free of all suspicion or afterthought, and hence was not admissible under the res gestae exception. HCP III Woodstock, Inc. v. Healthcare Servs. Group, Inc., 254 Ga. App. 242, 562 S.E.2d 225 (2002) (decided under former O.C.G.A. § 24-3-3).

l. Opinions

An opinion or conclusion is admissible as res gestae evidence if it is

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spontaneous or reflective rather than a reasoned one arrived at deliberately after thoughtful consideration. Bentley v. State, 131 Ga. App. 425, 205 S.E.2d 904 (1974) (decided under former Code 1933, § 38-305).

m. Personal Injuries

Statements by injured persons held admissible in the following cases. — See Charleston & W. Carolina Ry. v. Burckhalter, 141 Ga. 127, 80 S.E. 278 (1913) (statement to doctor) (decided under former Civil Code 1910, § 5766); Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69 (1915) (statement to spouse) (decided under former Civil Code 1910, § 5766); Aetna Life Ins. Co. v. Jones, 80 Ga. App. 472, 56 S.E.2d 305 (1949) (statement to stepson) (decided under former Code 1933, § 38-305); Gilbert Corp. of Del., Inc. v. Yetman, 219 Ga. App. 320, 464 S.E.2d 822 (1995) (officer's testimony about decedent's statements) (decided under former O.C.G.A. § 24-3-3).

Statements held inadmissible. — Statements by an injured party to a hospital surgeon were held inadmissible. Hunter v. State, 147 Ga. 823, 95 S.E. 668 (1918) (decided under former Penal Code 1910, § 1024).

Excluded testimony of two witnesses that a patient told the witnesses that the patient had pointed out a bump on the patient's breast to a doctor and that the doctor told the patient not to be concerned about the bump was not admissible under the res gestae exception as it was unclear how much time elapsed between the office visit and the patient's statements to the witnesses; moreover, the patient did not testify that the patient told the witnesses about the office visit and there was no way to establish the exact sequence of events that occurred between the office visit and the discussions about that visit or to determine the circumstances surrounding the making of the statements. Davis v. Reid, 272 Ga. App. 312, 612 S.E.2d 112 (2005) (decided under former O.C.G.A. § 24-3-3).

n. Principal and Surety

Statements during transaction for which surety is bound held admissible. — If the admissions of a principal are made during the transaction of the business for which the surety is bound, the admissions become a part of the res gestae and are admissible; otherwise, the admissions are not. Dobbs v. Justices of Inferior Court, 17 Ga. 624 (1855) (decided under former law).

o. Sales

Agreement of sale. — Declarations of a vendor of property, as to the vendor's motive for the sale, made at the time and during the progress of the sale, and even so soon thereafter as to be free from all suspicion of afterthought, are admissible evidence on a trial as to the validity of the sale. McLean v. Clark, 47 Ga. 24 (1872) (decided under former Code 1868, § 3720).

p. Transcripts

Testimonial conclusions contained in an incident report prepared by store's security personnel that a customer of the store had been struck in the abdomen by shopping carts steered by an employee of the store were admissible under the res gestae exception to the hearsay rule. Super Disct. Mkts., Inc. v. Coney, 210 Ga. App. 659, 436 S.E.2d 803 (1993) (decided under former O.C.G.A. § 24-3-3).

Photostatic copy of log made by the operator on duty representing radio communication of officers engaged in high speed chase with defendant was admissible as part of the res gestae. Waller v. State, 80 Ga. App. 488, 56 S.E.2d 491 (1949) (decided under former Code 1933, § 38-305).

q. Wills

Any acts or declarations by the principal legatee, who procures the will under which one claims to be written, may be given in evidence as a part of the res

gestae. Morris v. Stokes, 21 Ga. 552 (1857), aff'd, 27 Ga. 239 (1859) (decided under former law).

Statements for Medical Diagnosis/Treatment

Former statute related only to factual matters which would be within the immediate knowledge of the patient personally, and statements of medical opinion were not included. Dunn v. McIntyre, 146 Ga. App. 362, 246 S.E.2d 398 (1978) (decided under former Code 1933, § 38-315).

Former statute did not encompass statements of medical opinion made by one physician to another but instead referred only to statements made by or on behalf of the patient when seeking medical care. Dunn v. McIntyre, 146 Ga. App. 362, 246 S.E.2d 398 (1978) (decided under former Code 1933, § 38-315).

Former O.C.G.A. § 24-3-4 did not cover statements of medical opinion made by one physician to another, much less a secondhand recitation of what the witness was told by another person concerning the injured plaintiff's condition. Pirkle v. Hawley, 199 Ga. App. 371, 405 S.E.2d 71, cert. denied, 199 Ga. App. 906, 405 S.E.2d 71 (1991) (decided under former O.C.G.A. § 24-3-4).

Responses to medical questions of patient taken to hospital admissible. — Testimony of a doctor who related a patient's responses to medical questions for purposes of diagnosis and treatment was admissible under the exception to the hearsay rule provided by former O.C.G.A. § 24-3-4 since the responses were given within a matter of minutes after the patient was taken to the hospital. Allen v. State, 174 Ga. App. 206, 329 S.E.2d 586 (1985) (decided under former O.C.G.A. § 24-3-4).

Statements made by child to nurse several months after sexual abuse. — Testimony of nurse, who prepared child for examination by physician, as to statements made to the nurse by the child was admissible in prosecution for child molestation, even though the statements were made several months after the sexual abuse occurred, since the statements were made for the purpose of medical diagnosis and treatment and did not identify or in any way refer to the defendant. Sparks v. State, 172 Ga. App. 891, 324 S.E.2d 824 (1984) (decided under former O.C.G.A. § 24-3-4).

Statements to psychologist as to grief. — When a psychologist, in a deposition which was introduced into evidence at trial, stated several times that plaintiffs were suffering from great pain, grief, and stress when the psychologist met with them approximately one year after the death of their son, the statements made to the psychologist during the psychologist's evaluation were exceptions to the hearsay rule under former O.C.G.A. § 24-3-4. Southern Ry. v. Lawson, 256 Ga. 798, 353 S.E.2d 491 (1987) (decided under former O.C.G.A. § 24-3-4).

Testimony from psychologist on schizophrenia. — In a proceeding on termination of parental rights, the trial court did not err in allowing a clinical psychologist to testify as to the possible effects schizophrenia may have on caring for children based upon the psychologist's psychological evaluations of the mother. In re M.D., 244 Ga. App. 156, 534 S.E.2d 889 (2000) (decided under former O.C.G.A. § 24-3-4).

Failure to assert admissibility is waiver. — Failure of the plaintiff to assert that a statement made by a therapist at a deposition was admissible under former O.C.G.A. § 24-3-4 as a statement made for medical diagnosis or treatment at trial when the trial court asked for the plaintiff's response to a hearsay objection precluded the appellate court from considering the issue for the first time on appeal. Bryant v. Food Giant, Inc., 184 Ga. App. 155, 361 S.E.2d 38 (1987) (decided under former O.C.G.A. § 24-3-4).

Past recollections within medical record inadmissible. — When the original of the medical record itself is admissible but diagnostic opinions and conclusions therein are inadmissible, past recollection recorded by a doctor of a patient's medical history contained in a medical record, which included a diagnostic opinion of another doctor, would be inadmissible. Stoneridge Properties, Inc. v. Kuper, 178 Ga. App. 409, 343 S.E.2d 424 (1986) (decided under former O.C.G.A. § 24-3-4).

Statements for Medical Diagnosis/Treatment (Cont'd)

Physical description of a victim's assailant was not reasonably pertinent to the diagnosis and treatment of the victim, and the exclusion of a hospital report containing such a description was proper. Arnold v. State, 166 Ga. App. 313, 304 S.E.2d 118 (1983) (decided under former O.C.G.A. § 24-3-4).

Testimony pertinent to diagnosis and treatment of victim. — See Davis v. State, 168 Ga. App. 272, 308 S.E.2d 602 (1983) (decided under former O.C.G.A. § 24-3-4).

Testimony by a doctor that the doctor received a report that a mixture of hot bleach was thrown in the victim's face was properly admitted as the testimony related to the cause of the victim's injuries and was made for the purpose of the victim's diagnosis and treatment. Payne v. State, 273 Ga. App. 483, 615 S.E.2d 564 (2005) (decided under former O.C.G.A. § 24-3-4).

Trial court properly admitted testimony of an emergency medical technician who arrived on the scene of a vehicle accident caused by defendant as the technician's questions to defendant were pertinent to defendant's medical treatment, and defendant's response that defendant had been drinking alcohol and smoking marijuana all night was properly admitted pursuant to former O.C.G.A. § 24-3-4. Ellis v. State, 275 Ga. App. 881, 622 S.E.2d 89 (2005) (decided under former O.C.G.A. § 24-3-4).

Trial court did not err in permitting a challenged state expert, who examined the victim, to testify as to what the victim stated during an emergency room examination, as the victim corroborated the expert's testimony and the expert based the testimony on personal knowledge, not hearsay; moreover, the expert's testimony did not improperly bolster that of the victim, but merely repeated the information that the victim provided, which the expert used to examine the victim and draw medical conclusions. Scott v. State, 281 Ga. App. 106, 635 S.E.2d 582 (2006) (decided under former O.C.G.A. § 24-3-4).

With regard to a defendant's trial and conviction for aggravated sodomy and simple battery involving the sexual assault of an inmate upon an inmate, the trial court did not violate the defendant's rights under the confrontation clause by admitting the statements made by the victim to the physician and the nurse who treated the victim for the injuries received because the statements were admissible under former O.C.G.A. § 24-3-4, the medical diagnosis or treatment exception, and did not fall within any class of testimonial statement. In particular, no objective witness would reasonably conclude that the statements were made under such circumstances that the statement would be available for use at a later trial. Thomas v. State, 288 Ga. App. 602, 654 S.E.2d 682 (2007), cert. denied, No. S08C0725, 2008 Ga. LEXIS 471 (Ga. 2008) (decided under former O.C.G.A. § 24-3-4).

With regard to a defendant's convictions for aggravated sodomy, rape, and other related crimes, trial counsel's decision not to object to hearsay testimony of the emergency room physician who treated the victim did not amount to ineffective assistance of counsel as the physician's testimony was admissible under the hearsay exception set forth in former O.C.G.A. § 24-3-4 since the challenged statements related to the cause of the victim's injuries and were made for the purpose of the victim's diagnosis and treatment. As a result, the trial court did not err in admitting the statements and, therefore, since the statements were admissible, there was no merit to the defendant's contention that the defendant's trial counsel's failure to object to the hearsay testimony was ineffective assistance. Greene v. State, 295 Ga. App. 803, 673 S.E.2d 292 (2009), cert. denied, No. S09C0862, 2009 Ga. LEXIS 259 (Ga. 2009) (decided under former O.C.G.A. § 24-3-4).

Nurse was properly allowed to testify as to a rape victim's statement to the nurse that her assailant had blindfolded her and pushed her into furniture because the victim's statement to the nurse was given to explain the nature and origin of some of her injuries. This evidence was sufficient to allow the jury to find that the rape victim had been pushed into furniture as she was pushed and dragged through her home while blindfolded, supporting the

defendant's aggravated assault convictions. Bryant v. State, 304 Ga. App. 456, 696 S.E.2d 439 (2010) (decided under former O.C.G.A. § 24-3-4).

Medical history and records admissible. — In a personal injury action, plaintiff's alleged statements made to plaintiff's medical providers regarding medical history during plaintiff's diagnosis and treatment were not inadmissible hearsay. Barone v. Law, 242 Ga. App. 102, 527 S.E.2d 898 (2000) (decided under former O.C.G.A. § 24-3-4).

Testimony held not within rule. — When a physician's testimony includes the victim's out-of-court statements to the physician that intercourse with the victim's father (the defendant) had taken place, admission of that portion of the statement was error; the identity of the defendant contained in the out-of-court statements was unnecessary to any legitimate purpose addressed in the former statute. Johnson v. State, 149 Ga. App. 544, 254 S.E.2d 757 (1979) (decided under former Code 1933, § 38-315).

Admission of an emergency room physician's testimony that the patient told the physician she had been raped by a black man named "Miller" was error; however, since the evidence was cumulative, the admission was not prejudicial to defendant. Miller v. State, 194 Ga. App. 533, 390 S.E.2d 901 (1990) (decided under former O.C.G.A. § 24-3-4).

Admission of a shooting victim's statements to a physician regarding the circumstances and activity prior to the shooting, which did not fall within the statutory exception because they were not reasonably pertinent to the physician's diagnosis or treatment, was harmless error since it was highly probable that the error did not contribute to the judgment. Howard v. State, 261 Ga. 251, 403 S.E.2d 204 (1991) (decided under former O.C.G.A. § 24-3-4).

Doctor's testimony that a child abuse victim's father told the doctor that defendant abused the child was not admissible as an out-of-court statement made for the purpose of describing medical history reasonably pertinent to diagnosis or treatment. Cupe v. State, 253 Ga. App. 851, 560 S.E.2d 700 (2002) (decided under former O.C.G.A. § 24-3-4).

Nurse's testimony that a victim told the nurse that the victim was attacked by the victim's roommate while the victim was sleeping was not admissible under former O.C.G.A. § 24-3-4 as the statements were not reasonably pertinent to the nurse's diagnosis or treatment of the victim. Brown v. State, 273 Ga. App. 88, 614 S.E.2d 187 (2005) (decided under former O.C.G.A. § 24-3-4).

Testimony admissible. — Trial court did not err in admitting the medical record from the doctor as an exception to the hearsay rule. Central of Ga. R.R. v. Carter, 212 Ga. App. 528, 442 S.E.2d 269 (1994) (decided under former O.C.G.A. § 24-3-4).

In a negligence action seeking compensatory damages for a disabling injury, because an emergency room report was prepared prior to performance of the surgery on plaintiff's foot so that the statement was made before medical treatment was rendered, the trial court did not err in allowing admission as such under former O.C.G.A. § 24-3-4. Imm v. Chaney, 287 Ga. App. 606, 651 S.E.2d 855 (2007) (decided under former O.C.G.A. § 24-3-4).

Trial court did not abuse its discretion when it admitted the testimony of the nurse who performed the initial examination of the victim because, even assuming that the victim's identification of the defendant as the victim's attacker was not reasonably pertinent to the diagnosis or treatment, that identification was cumulative of other evidence as to the defendant's identity. McGill v. State, 302 Ga. App. 378, 690 S.E.2d 648 (2010) (decided under former O.C.G.A. § 24-3-4).

Nurse practitioner's testimony which identified child molestation victim's father as the molester was cumulative of that of other witnesses, including the victim personally, and therefore harmless. Hyde v. State, 189 Ga. App. 727, 377 S.E.2d 187, cert. denied, 189 Ga. App. 912, 377 S.E.2d 187 (1988) (decided under former O.C.G.A. § 24-3-4).

Trial court did not err in sustaining the state's hearsay objection to a nurse's testimony regarding whether a doctor's medical report reflected that a victim had made an inconsistent statement because the defendant failed to show reversible error by the record since the medical re-

Statements for Medical Diagnosis/Treatment (Cont'd)

port was not introduced for inclusion in the appellate record, and thus, the court of appeals had no means of determining whether the alleged impeachment evidence actually existed; any error in the exclusion of the evidence was harmless because the evidence would have been cumulative of the trial testimony that had already been admitted. Bearfield v. State, 305 Ga. App. 37, 699 S.E.2d 363 (2010) (decided under former O.C.G.A. § 24-3-4).

Impeachment of declarant. — Party must be given the opportunity to impeach the credibility of a declarant whose statement is admitted under the medical diagnosis or treatment exception to the hearsay rule. Allen v. State, 247 Ga. App. 10, 543 S.E.2d 45 (2000) (decided under former O.C.G.A. § 24-3-4).

Information given to a licensed professional counselor was admissible under this exception to the hearsay rule. Allen v. State, 247 Ga. App. 10, 543 S.E.2d 45 (2000) (decided under former O.C.G.A. § 24-3-4).

Business Records

1. In General

Purpose of exception. — Purpose of former O.C.G.A. § 24-3-14 was not to bolster the witness on the stand but to serve in place of witness by giving the manner of entry within the usual course of the business enterprise an independent prima facie probative value of its own, thus broadening an exception to the hearsay rule. Calhoun v. Chappell, 117 Ga. App. 865, 162 S.E.2d 300 (1968) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former statute was primarily adapted to allowing testimony of business records the authentication of which was otherwise difficult against a hearsay objection because it was "the routine product of an efficient clerical system." Calhoun v. Chappell, 117 Ga. App. 865, 162 S.E.2d 300 (1968) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Purpose of exception in allowing into evidence routine business records is not to allow the conclusions of anyone, and it certainly was not intended that such conclusions stand without opportunity to cross-examine the maker. Wesley v. State, 225 Ga. 22, 165 S.E.2d 719 (1969) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Purpose of exception was to allow the determination of records without the necessity of producing all the various clerical personnel who made the entries. Dowling v. Jones-Logan Co., 123 Ga. App. 380, 181 S.E.2d 75 (1971) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Timothy McCarthy Constr. Co. v. Southern Detectives, Inc., 125 Ga. App. 205, 186 S.E.2d 895 (1971) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Cotton v. John W. Eshelman & Sons, 137 Ga. App. 360, 223 S.E.2d 757 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Lewis v. United Cal. Bank, 143 Ga. App. 126, 237 S.E.2d 645 (1977), aff'd, 240 Ga. 823, 242 S.E.2d 581 (1978) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Record Data, Inc. v. Vinylgrain Indus. of Ga., Inc., 143 Ga. App. 854, 240 S.E.2d 223 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Gray v. Cousins Mtg. & Equity Invs., 150 Ga. App. 296, 257 S.E.2d 365 (1979) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Reisman v. Martori, Meyer, Hendricks, & Victor, 155 Ga. App. 551, 271 S.E.2d 685 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Purpose of former O.C.G.A. § 24-3-14 was to provide for the admissibility of records that would otherwise be excluded as hearsay. Allen v. State, 248 Ga. 676, 286 S.E.2d 3 (1982) (decided under former O.C.G.A. § 24-3-14).

Former O.C.G.A. § 24-3-14 was intended to preempt the field with regard to admission of business records and the statutory requirements are exclusive in this regard. Dowling v. Jones-Logan Co., 123 Ga. App. 380, 181 S.E.2d 75 (1971) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former Ga. L. 1952, p. 177, §§ 1, 2, 3 was intended to bring realities of business and professional practice into courtroom and should not be interpreted so as to destroy the former statute's obvious usefulness. Cotton v. John W. Eshelman & Sons, 137 Ga. App. 360, 223 S.E.2d 757 (1976) (decided under Ga. L.

1952, p. 177, §§ 1, 2, 3).

Former statute opened a broad departure from the hitherto fixed rules of evidence relative to the introduction of books and papers. Guthrie v. Berrien Prods. Co., 91 Ga. App. 45, 84 S.E.2d 596 (1954) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former statute was never expanded to include private custody or simple possession since the circumstances of private possession were infinitely more varied than those of business or official custody. Martin v. State, 135 Ga. App. 4, 217 S.E.2d 312 (1975) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Summary need not qualify as "business record." — Summary of business records is admissible even though the summary itself may not qualify as a "business record" under former O.C.G.A. § 24-3-14. Polma, Inc. v. Coastal Canvas Prods. Co., 199 Ga. App. 616, 405 S.E.2d 531, cert. denied, 199 Ga. App. 906, 405 S.E.2d 531 (1991) (decided under former O.C.G.A. § 24-3-14).

Discussion of the admissibility of summaries of business records. — See Tyner v. Sheriff, 164 Ga. App. 360, 297 S.E.2d 114 (1982) (decided under former O.C.G.A. § 24-3-14).

Summaries of voluminous business records are admissible so long as the original records are accessible to the court and the parties. Lawhorn v. State, 200 Ga. App. 451, 408 S.E.2d 425 (1991) (decided under former O.C.G.A. § 24-3-14).

In a suit to recover monies owed on notes and related guaranties, a bank failed to establish the amounts owed with admissible evidence because computer printouts of the balances due and interest and related fees owed were inadmissible hearsay since the printouts were summaries that were not accompanied by the underlying business records on which the summaries were based. Capital City Developers, LLC v. Bank of N. Ga., 316 Ga. App. 624, 730 S.E.2d 99 (2012) (decided under former O.C.G.A. § 24-3-14).

An affidavit need not recite the words "true and correct copies" before the accompanying business records will be admissible. Questions about the accuracy of business records go to their weight, not their admissibility. Bagley v. Fulton-DeKalb Hosp. Auth., 216 Ga. App. 537, 455 S.E.2d 325 (1995) (decided under former O.C.G.A. § 24-3-14).

Language of former statute suggested that writing must be made as memorandum or record rather than for some other purpose. American San. Servs., Inc. v. EDM of Tex., Inc., 139 Ga. App. 662, 229 S.E.2d 136 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former statute did not abrogate right of party to cross-examine witness called against the party. Meeks v. Lunsford, 106 Ga. App. 154, 126 S.E.2d 531 (1962) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former O.C.G.A. § 24-3-14 must be liberally interpreted and applied. McConnell v. State, 166 Ga. App. 530, 304 S.E.2d 733 (1983) (decided under former O.C.G.A. § 24-3-14).

Confrontation clause. — Business record exception is an exception to the hearsay rule, and not a general exception to the confrontation clause. Adams v. State, 217 Ga. App. 706, 459 S.E.2d 182 (1995) (decided under former O.C.G.A. § 24-3-14).

Right to confrontation. — In a case when a summary of business records was properly admitted and the figures so introduced were relied upon by another witness, there was no violation of defendant's right of confrontation. Stewart v. State, 246 Ga. 70, 268 S.E.2d 906 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Records noting conversation's contents not admissible. — Records which noted the contents of a conversation rather than an act, transaction, occurrence, or event were not eligible for the business records exception to the hearsay rule. Mitchell v. State, 254 Ga. 353, 329 S.E.2d 481 (1985) (decided under former O.C.G.A. § 24-3-14).

Reason for reasonable time requirement is so the entry might appear to have taken place while the memory of the fact was recent, or the source from which the knowledge of it was derived was unimpaired. Martin v. Glenn's Furn. Co., 126 Ga. App. 692, 191 S.E.2d 567 (1972) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Business Records (Cont'd)
1. In General (Cont'd)

Uniform business records as evidence statute. — Former Ga. L. 1952, p. 177, §§ 1, 2, 3 contained what was referred to by courts of other states and textbooks as the "Uniform Business Records as Evidence" statute. There was no material difference in the former Georgia statute and similar statutes of the other states. Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370 (1957), for comment, see 20 Ga. B.J. 381 (1958). (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Kind of books. — Books contemplated by this exception are permanent books. Bush v. Fourcher, 3 Ga. App. 43, 59 S.E. 459 (1907) (decided under former law); Eley v. Holden, 48 Ga. App. 152, 172 S.E. 75 (1933) (decided under former law).

Waiver. — Requirement that entries be made in the ordinary course of business can be waived. Finch v. Caldwell, 155 Ga. App. 813, 273 S.E.2d 216 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Money orders. — Trial court erred in admitting money orders stamped "apparent counterfeit" during the defendant's trial for forgery in the first degree, O.C.G.A. § 16-9-1(a), because the stamped money orders constituted inadmissible hearsay; the testimony of a bank's chief financial officer indicated that the determination that the money orders were counterfeit was a conclusion or opinion made by a third party institution, whose representatives did not testify at trial and, thus, the money orders were inadmissible as a business record under former O.C.G.A. § 24-3-14(b) to prove that the money orders were counterfeit. Holmes v. State, 315 Ga. App. 812, 727 S.E.2d 520 (2012) (decided under former O.C.G.A. § 24-3-1).

2. Procedural Considerations

a. Foundation for Admission

Compliance renders further proof unnecessary. — Once a certificate of inspection is completed as specified under former O.C.G.A. § 24-3-14, the certificate is admissible in any court of law without further proof, and a further foundation for admission under the business records exception to the hearsay rule is rendered unnecessary. State v. Haddock, 235 Ga. App. 726, 510 S.E.2d 561 (1998) (decided under former O.C.G.A. § 24-3-14).

Nature of foundation. — Before a writing or record is admissible under subsection (b) of former O.C.G.A. § 24-3-14, a foundation must be laid through the testimony of a witness who is familiar with the method of keeping records and who can testify thereto and to facts which show that the entry was made in the regular course of business at the time of the event or within a reasonable time thereafter. Suarez v. Suarez, 257 Ga. 102, 355 S.E.2d 649 (1987) (decided under former O.C.G.A. § 24-3-14).

In an action in which the victim was awarded restitution for tools and equipment taken from a stolen truck, all that was required was that a foundation be laid through the testimony of a witness who was familiar with the method of keeping the record of the list of equipment and tools normally found on the truck who could testify thereto, and to facts which showed that the entry was made in the regular course of business at the time of the event or within a reasonable time thereafter. Tindol v. State, 284 Ga. App. 45, 643 S.E.2d 329 (2007) (decided under former O.C.G.A. § 24-3-14).

Preliminary proof is necessary before the writing or record is admissible. The evidence should include identification of the writing or record by a witness who is familiar with the method of keeping the records and who can testify thereto and to facts which show that the entry was made in the regular course of business and that it was the regular course of the business to make such memorandum or record at the time of the event or within a reasonable time thereafter. Walburn v. Taunton, 107 Ga. App. 411, 130 S.E.2d 279 (1963) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Cassano v. Pilgreen's, Inc., 117 Ga. App. 260, 160 S.E.2d 439 (1968) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Absent preliminary proof required to qualify statements as to facts, the knowledge of which were obtained from records not personally kept by testifying

witness, had no probative value. Eatonton Oil & Auto Co. v. Greene County, 53 Ga. App. 145, 185 S.E. 296 (1936) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Thomasson v. Trust Co. Bank, 149 Ga. App. 556, 254 S.E.2d 881 (1979) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Harris v. Collins, 149 Ga. App. 638, 255 S.E.2d 107 (1979) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Hill Aircraft & Leasing Corp. v. Planes, Inc., 158 Ga. App. 151, 279 S.E.2d 250 (1981) (decided under former O.C.G.A. § 24-3-14).

When defendant submitted an unsigned document purported to be in the plaintiff's handwriting, but was not able to locate anyone who could identify the document, defendant was unable to produce the required foundation testimony, and the document was properly excluded. Metropolitan Atlanta Rapid Transit Authority v. Green Int'l, Inc., 235 Ga. App. 419, 509 S.E.2d 674 (1998) (decided under former O.C.G.A. § 24-3-14).

Condominium declarations which were submitted by a condominium unit neighbor in an action against another condominium unit owner were hearsay under former O.C.G.A. § 24-3-1(a). However, the neighbor did not present admissible evidence of the heightened duty of care allegedly imposed by the declarations so that duty, therefore, could not be considered on summary judgment under former O.C.G.A. § 24-3-14(b). Karle v. Belle, 310 Ga. App. 115, 712 S.E.2d 96 (2011) (decided under former O.C.G.A. § 24-3-14).

Authentication required. — Witness's testimony is inadmissible in the absence of any authentication of the records which the witness's testimony is purported to track. Hall v. State, 244 Ga. 86, 259 S.E.2d 41 (1979) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

In the absence of authentication by the issuing officer or testimony of the witness officers that the license tag number on the traffic ticket accurately reflected the license tag number of the car the witnesses saw appellant driving, the citations were hearsay as to the identity of the license tag number. Since the proper foundation was not laid, the tickets did not qualify for the business record exception to the hearsay rule. Curtis v. State, 190 Ga. App. 173, 378 S.E.2d 516 (1989) (decided under former O.C.G.A. § 24-3-14).

An uncertified copy of a check was properly excluded since the witness had no personal knowledge of the transaction or the making of the copy and provided conflicting testimony about the witness's familiarity with the business practices or regular course of dealing. U.B. Vehicle Leasing, Inc. v. Vision Int'l, Inc., 224 Ga. App. 611, 481 S.E.2d 597 (1997) (decided under former O.C.G.A. § 24-3-14).

Ride safety checklist had not been authenticated as a business record and thus was merely inadmissible hearsay that could not be considered as evidence in support of a motion for summary judgment. Valentin v. Six Flags Over Ga., L.P., 286 Ga. App. 508, 649 S.E.2d 809 (2007) (decided under former O.C.G.A. § 24-3-14).

Personal knowledge not required. — It was not necessary that a witness identifying business records have personal knowledge of the correctness of the records or have actually made the entries personally. Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370 (1957) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3) for comment, see 20 Ga. B.J. 381 1958; Seaboard Coast Line R.R. v. Smalley, 127 Ga. App. 652, 194 S.E.2d 612 (1972) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Welborn v. State, 132 Ga. App. 207, 207 S.E.2d 688 (1974) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Cotton v. John W. Eshelman & Sons, 137 Ga. App. 360, 223 S.E.2d 757 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); F.N.B. Fin. Co. v. Glaze Tire Co., 140 Ga. App. 184, 230 S.E.2d 342 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Smith v. Bank of S., 141 Ga. App. 114, 232 S.E.2d 629 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Vaughn & Co. v. Saul, 143 Ga. App. 74, 237 S.E.2d 622 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Bentley v. State, 153 Ga. App. 410, 265 S.E.2d 293 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Whittington v. State, 155 Ga. App. 667, 272 S.E.2d 532 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Hines v. Good Housekeeping Shop, 161 Ga. App. 318, 291 S.E.2d 238 (1982) (decided under former O.C.G.A.

Business Records (Cont'd)
2. Procedural Considerations (Cont'd)
a. Foundation for Admission (Cont'd)

§ 24-3-14); Murphy v. State, 182 Ga. App. 791, 357 S.E.2d 147 (1987) (decided under former O.C.G.A. § 24-3-14).

Witness identifying business records under former O.C.G.A. § 24-3-14 does not have to have personal knowledge of the correctness of the records or have made the entry personally. Hertz Corp. v. McCray, 198 Ga. App. 484, 402 S.E.2d 298 (1991) (decided under former O.C.G.A. § 24-3-14).

There is no requirement that in order to lay a proper foundation for the admission of a certificate of inspection under the business record exception, the person who conducted the inspection of the machine, or someone who actually witnessed the inspection, appear in court to testify about the inspection or the completion of the certificate. State v. Haddock, 235 Ga. App. 726, 510 S.E.2d 561 (1998) (decided under former O.C.G.A. § 24-3-14).

There was no error in denying the property owner's motion to strike virtually all of the evidence against the owner; the trial judge was authorized to admit the tax documents into evidence as records made in the regular course of business under former O.C.G.A. § 24-3-14(b) because the testimony of the custodian of the sheriff department's tax levy files and an employee of the county tax commissioner's delinquent tax division, even without personal knowledge, was sufficient to authorize finding that the witnesses were familiar with the method of keeping the records and that the documents were made in the regular course of business at the time of the events. Tharp v. Vesta Holdings I, LLC, 276 Ga. App. 901, 625 S.E.2d 46 (2005) (decided under former O.C.G.A. § 24-3-14).

Trial court did not err in admitting a copy of the defendant's fingerprint card, pursuant to former O.C.G.A. §§ 24-3-14 and 24-5-26 (see now O.C.G.A. §§ 24-8-803 and 24-10-1003), despite the defendant's claim that the testifying witness lacked personal knowledge with regard to the circumstances or time of the creation or transmission of the card, as the card itself showed that the card was created and transmitted at the time of the defendant's arrest, and was handled in the gathering agency's regular and routine course of business. Tubbs v. State, 283 Ga. App. 578, 642 S.E.2d 205 (2007) (decided under former O.C.G.A. § 24-3-14).

Person laying foundation need not be custodian of records. — Georgia Business Records Act, former O.C.G.A. § 24-3-14, does not require that the person laying the foundation for business records' admissibility be the custodian of the records, that is, be the person who "keeps the records" under that person's "control and supervision." Hertz Corp. v. McCray, 198 Ga. App. 484, 402 S.E.2d 298 (1991) (decided under former O.C.G.A. § 24-3-14).

In a negligence action seeking compensatory damages for a disabling injury, the trial court did not err in admitting certain prescription drug records pertaining to the injured plaintiff as a pharmacist presented sufficient testimony to satisfy the foundational requirements necessary for admission under the business records exception to the hearsay rule. Imm v. Chaney, 287 Ga. App. 606, 651 S.E.2d 855 (2007) (decided under former O.C.G.A. § 24-3-14).

Housekeeping supervisor of a motel where a victim was found dead of strangulation after being seen with a defendant could properly lay the foundation for the motel's lock interrogation log as the record only had to be made in the regular course of business at the time of the transaction; any lack of personal knowledge by the supervisor as to how the records were created only went to the weight of the evidence. Hamilton v. State, 297 Ga. App. 47, 676 S.E.2d 773 (2009) (decided under former O.C.G.A. § 24-3-14).

Testimony of a bank officer may provide the required foundation for business records. Shannon v. Toronto-Dominion Bank, 168 Ga. App. 279, 308 S.E.2d 682 (1983) (decided under former O.C.G.A. § 24-3-14).

Affidavit of custodian of bank records. — The affidavit of a bank records custodian was properly admitted in support of the bank's motion for summary judgment under former O.C.G.A.

§ 24-3-14(b). The custodian averred that the custodian was the records custodian for the bank and that the records filed with the custodian's affidavit were maintained in the regular and ordinary course of business and that the transactions were recorded contemporaneously with the events as they occurred. Vadde v. Bank of Am., 301 Ga. App. 475, 687 S.E.2d 880 (2009), cert. denied, No. S10C0624, 2010 Ga. LEXIS 338 (Ga. 2010); cert. denied, 131 S. Ct. 298, 178 L. Ed. 2d 143 (2010) (decided under former O.C.G.A. § 24-3-14).

In questions of proof of business records stored on tape on electronic computing equipment, the proper foundation to be laid was the same as that for business records of any other type or description. Cotton v. John W. Eshelman & Sons, 137 Ga. App. 360, 223 S.E.2d 757 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Officer qualified to introduce other officer's report. — Police officer was qualified to lay foundation for introduction of accident report prepared by another officer since testifying officer was able to testify as to the preparation and keeping of such reports. Reed v. Heffernan, 171 Ga. App. 83, 318 S.E.2d 700 (1984) (decided under former O.C.G.A. § 24-3-14).

Any alleged inaccuracies in a ledger would go to weight and not to admissibility. Murphy v. State, 182 Ga. App. 791, 357 S.E.2d 147 (1987) (decided under former O.C.G.A. § 24-3-14).

Compliance with provisions of statute prohibiting drunk driving not necessary for admission of blood-alcohol test. — When the blood-alcohol test was performed pursuant to the medical treatment of the plaintiff and recorded in the regular course of hospital business, and it was not administered for the purpose of determining whether plaintiff violated O.C.G.A. § 40-6-391, it was not necessary that defendant establish compliance with § 40-6-391 to render the test results admissible; the blood test results thus recorded in the regular course of hospital business were admissible under former O.C.G.A. § 24-3-14. Bynum v. Standard (Chevron) Oil Co., 157 Ga. App. 819, 278 S.E.2d 669, cert. dismissed, 248 Ga. 429, 285 S.E.2d 186 (1981) (decided under former O.C.G.A. § 24-3-14).

Medical records in drunk driving case. — Medical records certified by the records custodian of a hospital showing the results of an independent chemical test requested by defendant in a drunk driving case were not admissible without further foundational evidence that would satisfy the requirements of the business records exception to the hearsay rule. Brahm v. State, 230 Ga. App. 407, 497 S.E.2d 240 (1998) (decided under former O.C.G.A. § 24-3-14).

Presumption on review. — Mere recital in the motion for a new trial that the preliminary proof of the requirements for admissibility of documentary evidence was lacking was insufficient to show that as a matter of fact such preliminary proof was not made, and the reviewing court must presume that such preliminary proof was made and affirm the action of the trial judge in admitting the evidence. Gray v. General Fin. Corp., 108 Ga. App. 586, 134 S.E.2d 58 (1963) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

State laid the proper foundation for the admission of certificates of equipment testing when two witnesses testified to them having been made within a reasonable time of the testing, and the notary jurat for each certificate confirmed the certificate was filled out on the day of inspection. Davis v. State, 236 Ga. App. 32, 510 S.E.2d 889 (1999) (decided under former O.C.G.A. § 24-3-14).

When a patrolman testified that certificates of inspection were generated in the police department's ordinary course of business, made at the time the breath analyzer was inspected, and kept along side the machine, this evidence was sufficient to satisfy the foundational requisites for the admission of the certificates as business records. Brandon v. State, 236 Ga. App. 203, 511 S.E.2d 573 (1999) (decided under former O.C.G.A. § 24-3-14).

Proper foundation found. — Professional association did not fail to lay the proper foundation for admission of computer printouts under the business records exception to the hearsay rule in

Business Records (Cont'd)
2. Procedural Considerations (Cont'd)
a. Foundation for Admission (Cont'd)

order to establish the amount owed to a client for professional services since the president of the firm described of the president's own personal knowledge how the computer printouts were developed and how the printouts were used in determining what a client owed. Reisman v. Martori, Meyer, Hendricks, & Victor, 155 Ga. App. 551, 271 S.E.2d 685 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Trial court did not err by admitting into evidence two accident reports created by a driver's supervisor because the supervisor made the reports in the regular course of business shortly after the collision occurred based on what the driver had told the supervisor, and both the driver and the supervisor testified at trial and were available for cross examination. Lee v. Thomason, 277 Ga. App. 573, 627 S.E.2d 168 (2006) (decided under former O.C.G.A. § 24-3-14).

In a criminal case where the victim was robbed of a cellular telephone, the telephone records were properly admitted under former O.C.G.A. § 24-3-14; the testimony of the telephone company's records custodian provided the necessary foundation for the records to be introduced into evidence, and the custodian's lack of personal knowledge as to how the records were actually printed out affected their weight, not their admissibility. Santana v. State, 283 Ga. App. 696, 642 S.E.2d 390 (2007) (decided under former O.C.G.A. § 24-3-14).

State laid the foundation for admission of a hospital-administered blood alcohol test as a routine business record with the testimony of two witnesses, and admission of the results of the test was proper; a custodian of medical records testified that when a blood test was completed in the hospital, the results were printed out then entered into the hospital computer system in the normal course of business, the printout was stored as a hard copy, and the printout contained only the factual data of the test results and a lab manager familiar with the usual practices and policies of the emergency room testified that it was the normal procedure of emergency room personnel to draw a patient's blood once the patient was admitted, before the patient has been seen by an attending physician. The certified copy of the test results printout showed that the defendant's blood was drawn within the normal procedures of the hospital. Daniel v. State, 298 Ga. App. 245, 679 S.E.2d 811 (2009) (decided under former O.C.G.A. § 24-3-14).

A "cash for keys" agreement entered into between a former owner's tenant and the new owner following a foreclosure sale was admissible in the former owner's wrongful eviction suit under the business record exception to the hearsay rule; the agreement was authenticated in the affidavit of the person who signed the agreement and witnessed the tenant sign the agreement, and the custodian testified by affidavit that the agreement was one of the custodian's own business records that were maintained in the regular course of business. Steed v. Fed. Nat'l Mortg. Corp., 301 Ga. App. 801, 689 S.E.2d 843 (2009) (decided under former O.C.G.A. § 24-3-14).

Arresting officer's testimony laid a sufficient foundation for the introduction of a department of public safety roadblock approval form into evidence under the business records exception to the hearsay rule, former O.C.G.A. § 24-3-14, because the officer testified that the form was a type of document kept in the regular course of business at the Georgia State Patrol. Hite v. State, 315 Ga. App. 221, 726 S.E.2d 704 (2012), cert. denied, No. S12C1286, 2012 Ga. LEXIS 1020 (Ga. 2012) (decided under former O.C.G.A. § 24-3-14).

Proper foundation not laid. — Trooper testified that the trooper was familiar with the book in which the records were maintained, but the trooper did not know if the documents were made contemporaneously with the testing; therefore, the trooper's testimony did not satisfy the foundational requirements. Mullinax v. State, 231 Ga. App. 534, 499 S.E.2d 903 (1998) (decided under former O.C.G.A. § 24-3-14).

Disciplinary reports of a Diversion Center were not admissible as business re-

cords absent inquiry as to whether it was in the regular course of the Center's control officer to make an incident or disciplinary report and whether the reports were in fact made in the regular course of the Center's business. Kendrick v. State, 240 Ga. App. 530, 523 S.E.2d 414 (1999) (decided under former O.C.G.A. § 24-3-14).

State failed to lay the foundation required to admit hearsay under the business records exception when a police sergeant testified that reports were "copies of the typewritten reports submitted by an officer of the police department" and that the officer retrieved the reports from the police files, but the officer gave no testimony regarding the preparation and keeping of the reports. Johnson v. State, 247 Ga. App. 660, 544 S.E.2d 496 (2001) (decided under former O.C.G.A. § 24-3-14).

Trial court properly ruled in favor of a subdivision association board of directors as to claims by the owner of a development company that the board erred in charging water service and building fees because the owner failed to show that any damages were suffered as a result of the imposition of the fees, as the trial court properly excluded computer records concerning the fees, as the records did not meet the former O.C.G.A. § 24-3-14 standard for the business records hearsay exception as the owner did not testify that the writings proffered were made in the regular course of business at the time of the underlying transaction or within a reasonable time thereafter. Crawford v. Dammann, 277 Ga. App. 442, 626 S.E.2d 632 (2006) (decided under former O.C.G.A. § 24-3-14).

In an action to recover the balance of the money owed under a loan, because the guarantor of the loan failed to show the lack of an adequate foundation for the admitted evidence, a claim that the trial court erred in admitting the loan history report as a business record failed; hence, the proponent bank was properly granted summary judgment on the issue. Ishak v. First Flag Bank, 283 Ga. App. 517, 642 S.E.2d 143 (2007) (decided under former O.C.G.A. § 24-3-14).

Worker injured while using an elevator had not shown that reports purportedly generated by elevator maintenance company fell within the business records exception to the hearsay rule; company's service technician was unfamiliar with the reports and did not testify that the reports were made in the regular course of business. Henson v. Georgia-Pacific Corp., 289 Ga. App. 777, 658 S.E.2d 391 (2008) (decided under former O.C.G.A. § 24-3-14).

Trial court erred in admitting the state's exhibits, which were copies of two traffic citations stamped "FTA," pursuant to former O.C.G.A. § 24-5-20 (see now O.C.G.A. § 24-10-1005) without any determination that the exhibits fell within an exception to the rule prohibiting the use of hearsay because the state introduced the exhibits to prove the truth of the statement of the unidentified person who stamped "FTA" on the citations that the defendant failed to appear for the defendant's court date, and despite defendant's objection to the documents as hearsay, the state argued only the issue of authentication and never identified any exception to the rule prohibiting hearsay that would authorize admitting the documents; the state failed to lay the required foundation for the application of the business records exception, former O.C.G.A. § 24-3-14(b), because the state did not call any witness to provide the required foundation. McKinley v. State, 303 Ga. App. 203, 692 S.E.2d 787 (2010) (decided under former O.C.G.A. § 24-3-14).

Absence of foundation held harmless. — Assuming a proper foundation was not presented for the introduction of medical records at defendant's trial for battery, any error in admitting the records was harmless since the records were not critical but merely cumulative evidence showing the extent of the victim's injuries. Flowers v. State, 181 Ga. App. 572, 353 S.E.2d 69 (1987) (decided under former O.C.G.A. § 24-3-14).

b. Weight and Credibility

Questions for jury. — Credibility, both of the books and of the party, is to be weighed by the jury, and depends upon various circumstances of which the jury are the judges. Taylor v. Tucker, 1 Ga. 231

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2. Procedural Considerations (Cont'd)
b. Weight and Credibility (Cont'd)

(1846) (decided under former law); Allstate Ins. Co. v. Buck, 96 Ga. App. 376, 100 S.E.2d 142 (1957) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Seaboard Coast Line R.R. v. Hart, 120 Ga. App. 492, 171 S.E.2d 383 (1969) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

All circumstances may be shown to affect weight of evidence but not the admissibility of the evidence. Hurst v. Jackson, 134 Ga. App. 129, 213 S.E.2d 511 (1975) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Serve v. First Nat'l Bank, 143 Ga. App. 239, 237 S.E.2d 719 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Trial court did not err in admitting a podiatrist's medical records on a patient into evidence in a medical malpractice suit as the circumstances of the making of the records could be shown to affect the weight of the evidence; but the circumstances could not affect the admissibility of the records. Kohl v. Tirado, 256 Ga. App. 681, 569 S.E.2d 576 (2002) (decided under former O.C.G.A. § 24-3-14).

Physical appearance of records and their self-serving nature are questions that go to the weight of the evidence but not to admissibility. Whitehead v. Joiner, 234 Ga. 457, 216 S.E.2d 317 (1975) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Hall v. State, 239 Ga. 832, 238 S.E.2d 912 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Dispute over accuracy of record and of the witness's recollection affects only the weight to be given the record by the jury. Don Howard's Music Mart, Inc. v. Southern Bell Tel. & Tel. Co., 154 Ga. App. 648, 269 S.E.2d 506 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Irregularities in account books sought to be introduced in evidence should be exceedingly gross and palpable to justify the court in arresting the evidence from that tribunal whose peculiar province it is to judge of the credibility of testimony. Bush v. Fourcher, 3 Ga. App. 43, 59 S.E. 459 (1907) (decided under former law).

Gaps in chain of custody of blood sample. — When the blood-alcohol test results are properly admitted as a business record, gaps in the chain of custody of the blood sample admitted as part of the hospital record do not affect the admissibility of the test results but merely go to the weight of the evidence accorded by the jury. Bynum v. Standard (Chevron) Oil Co., 157 Ga. App. 819, 278 S.E.2d 669, cert. dismissed, 248 Ga. 254, 285 S.E.2d 186 (1981) (decided under former O.C.G.A. § 24-3-14).

Impeachment. — In a suit by a bank, the defendant having introduced in evidence the books of the bank, the defendant cannot impeach the books as a whole, but may show that particular items in the books are wrong and disprove those items, and that by mistake or fraud they have been improperly kept. Merchants' Bank v. Rawls, 7 Ga. 191, 50 Am. Dec. 394 (1849) (decided under former law).

c. Objections

When document offered in evidence is admissible in part and inadmissible in part, and objection is made to the document as a whole, it is not error to admit the whole document. Stubbs v. Daughtry, 115 Ga. App. 22, 153 S.E.2d 633 (1967) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Deletion of objectionable material. — If it is desired by either side that a police report of accident be introduced in evidence after the foundation is laid, the report will not be offered unless all parts of the report containing objectionable material are first deleted. Calhoun v. Chappell, 117 Ga. App. 865, 162 S.E.2d 300 (1968) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Failure to identify objectionable portions of record. — When defendant was offered two opportunities to identify objectionable portions of hospital records and was given time to review the records for that purpose, defendant's failure to identify objectionable portions resulted in a waiver of defendant's hearsay objection. Corbett v. State, 266 Ga. 561, 468 S.E.2d 757 (1996) (decided under former O.C.G.A. § 24-3-14).

Opinions and conclusions. — If a hospital record contains diagnostic opinions and conclusions, the record cannot, upon proper objection, be admitted into evidence unless and until the proper foundation is laid, i.e., the person who entered such diagnostic opinions and conclusions upon the record must qualify as an expert and relate the facts upon which the entry was based. Cassano v. Pilgreen's, Inc., 117 Ga. App. 260, 160 S.E.2d 439 (1968) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

When the document as a whole contained conclusions, opinions, estimates, impressions, and recommendations of a third party not before the court the document was not admissible as a whole. Hurt v. State, 239 Ga. 665, 238 S.E.2d 542 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

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Prima facie evidence. — When the books conform to the provisions of the former statute, the books themselves stand as a witness of the correctness of the account and make a prima facie case which shifted the burden of proof to the defendant debtor to show the items contained in the books, or some of the items, were not correct. Chambers v. Williams Bros. Lumber Co., 80 Ga. App. 38, 55 S.E.2d 244 (1949) (decided under former law); International Bus. Consulting, Ltd. v. First Union Nat'l Bank, 192 Ga. App. 742, 386 S.E.2d 400 (1989) (decided under former O.C.G.A. § 24-3-14).

Books of account when admitted under the former statute were prima facie evidence of the facts the books state, and when not contradicted or explained could become conclusive. Wright v. Trust Co., 108 Ga. App. 783, 134 S.E.2d 457 (1963) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Admission by defendant in defendant's testimony, that defendant bought of plaintiffs the articles set forth in the account sued on, the price being attached to each article, establishes prima facie the correctness of the account. F.N.B. Fin. Co. v. Glaze Tire Co., 140 Ga. App. 184, 230 S.E.2d 342 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

If a business record is qualified according to the statutory standard it may be admissible to prove the truth of the fact stated therein. Moore v. State, 154 Ga. App. 535, 268 S.E.2d 706 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Primary evidence. — As a general rule, the testimony of a person who has knowledge of the facts from which books of account are made up is primary evidence as to these facts, and is admissible, whether or not the books themselves are put in evidence. Harper v. Hammond & Sons, 13 Ga. App. 238, 79 S.E. 44 (1913) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Christopher v. Georgian Co., 22 Ga. App. 707, 97 S.E. 97 (1918) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Atlantic Coast Line R.R. v. Grimes, 99 Ga. App. 774, 109 S.E.2d 890 (1959) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Don Howard's Music Mart, Inc. v. Southern Bell Tel. & Tel. Co., 154 Ga. App. 648, 269 S.E.2d 506 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Admission against deceased debtors. — Business records that were admissible under the former statute were admissible against a deceased debtor. F & W Farm Serv., Inc. v. Citizens & S. Nat'l Bank, 116 Ga. App. 757, 159 S.E.2d 190 (1967) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Roberts v. Artistic Ornamental Iron Co., 124 Ga. App. 744, 186 S.E.2d 143 (1971) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Glo-Ann Plastic Indus., Inc. v. Peak Textiles, Inc., 134 Ga. App. 924, 216 S.E.2d 715 (1975) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Agents. — Rule that the entries of an agent, made in the course of the business, were admissible in evidence after the agent's death was recognized by former statute. Turner v. Turner, 123 Ga. 5, 50 S.E. 969 (1905) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Fact that a document was not signed by an agent or representative of the party to whom the document pertains did not affect the document's admissibility. F.N. Roberts Corp. v. Southern Bell Tel. & Tel. Co., 132 Ga. App. 800, 209 S.E.2d 138 (1974) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Auction company records prepared in ordinary course of business admis-

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sible. — Auction company's business records, showing that the vehicle was announced at auction as having frame and body damage, were admissible without testimony from the inspector because the company's controller laid a sufficient foundation, averring that the controller had personal knowledge of the company's method of maintaining business records, such records were kept in the ordinary course of business, and record entries were made at or near the time of the auction and post-sale inspection. Isbell v. Credit Nation Lending Serv., LLC, 319 Ga. App. 19, 735 S.E.2d 46 (2012) (decided under former O.C.G.A. § 24-3-14).

Business records. — Information in the affidavit of the management corporation's vice president regarding the lessor's record keeping methods fell squarely within the business records exception to the hearsay rule codified at former O.C.G.A. § 24-3-14. Int'l Biochemical Indus. v. Jamestown Mgmt. Corp., 262 Ga. App. 770, 586 S.E.2d 442 (2003) (decided under former O.C.G.A. § 24-3-14).

Trial court's order granting summary judgment to a collection company and against a debtor in the former's deficiency action was upheld on appeal as it was not based on inadmissible hearsay, but upon records kept in the ordinary course of business, and thus admissible under the business records exception to the hearsay rule. Boyd v. Calvary Portfolio Servs., 285 Ga. App. 390, 646 S.E.2d 496 (2007) (decided under former O.C.G.A. § 24-3-14).

In a breach of contract action, a lender's witness was properly allowed to testify about the loan records involving the debtor sued under the business records exception to the hearsay rule as: (1) the witness testified that the records were kept in the ordinary course of the lender's business; (2) the witness was familiar with the records and the manner in which the records were kept; (3) the records were made at or near the time the documents were created or received by the lender; and (4) the records of the lender's predecessors became the records of the lender. Jenkins v. Sallie Mae, Inc., 286 Ga. App. 502, 649 S.E.2d 802 (2007) (decided under former O.C.G.A. § 24-3-14).

Trial court properly granted summary judgment to the purchaser of real estate in a quiet title action that involved the taxpayer's home and the taxpayer's failure to pay the property taxes on the property as the property was properly levied upon and no question of fact remained that the sheriff officially seized the property. Further, the affidavits of the civil process coordinator at the time of the tax sale, and the coordinator's successor, were properly admitted into evidence as such affidavits fell within the business records exception to the rule against hearsay. Davis v. Harpagon Co., LLC, 283 Ga. 539, 661 S.E.2d 545 (2008) (decided under former O.C.G.A. § 24-3-14).

In convictions of aggravated child molestation and statutory rape, defendant was not entitled to admission into evidence of a motel registration card under former O.C.G.A. § 24-3-14(b) because the defendant failed to present testimony of a motel employee, who was familiar with the motel registration card and the methods for generation and keeping the motel's business records. Flewelling v. State, 300 Ga. App. 505, 685 S.E.2d 758 (2009) (decided under former O.C.G.A. § 24-3-14).

Trial court did not abuse the court's discretion in admitting the results of a hospital-administered blood test under the business record exception to the hearsay rule, former O.C.G.A. § 24-3-14, because the defendant acquiesced in the procedure by which a lab technician identified the computer printout but did not relate the results stated thereon, and acquiescence deprived the defendant of the right to complain of the procedure on appeal; because the lab technician testified that the document tendered was an accurate copy of the result obtained, the testimony was properly admitted as original evidence. Potter v. State, 301 Ga. App. 411, 687 S.E.2d 653 (2009) (decided under former O.C.G.A. § 24-3-14).

State failed to prove that the defendant lacked the authority to possess and deliver money orders as required to support forgery convictions under O.C.G.A. § 16-9-1(a) because the trial court erred

in admitting the "counterfeit" stamps on the money orders as business records under former O.C.G.A. § 24-3-14(b); the determination that the money orders were counterfeit was a conclusion made by a third party institution, whose representatives did not testify at trial, and to allow the admission of the stamp as proof that the money orders were counterfeit would deprive the defendant of the right to conduct a thorough and sifting cross-examination on the determination that the money orders were counterfeit. Forrester v. State, 315 Ga. App. 1, 726 S.E.2d 476 (2012) (decided under former O.C.G.A. § 24-3-14).

Trial court did not err in granting a bank's motion for summary judgment in the bank's action against guarantors to recover the outstanding balance on a promissory note because payoff statements, which were attached as exhibits to the affidavit of the bank's special assets manager, qualified as business records under the Business Records Act, former O.C.G.A. § 24-3-14(b), since the special assets manger testified that the manager had personal knowledge that the statements were made in the regular course of the bank's business; because the payoff statements conformed to the provisions of the Act, the statements themselves stood as a witness of the correctness of the account and made a prima facie case. Angel Business Catalysts, LLC v. Bank of the Ozarks, 316 Ga. App. 253, 728 S.E.2d 854 (2012) (decided under former O.C.G.A. § 24-3-14).

Trial court did not abuse the court's discretion in admitting documents pursuant to the Business Records Act, former O.C.G.A. § 24-3-14(b), because a bank established that the affidavit of the bank's special assets manager and attached exhibits were admissible as business records; the special assets manager averred that the manager was the custodian of records for the bank, that the business records relating to a promissory note were transferred and delivered to the bank, that the documents included the original note and individual guaranties, and that the records were obtained in the regular course of business. Angel Business Catalysts, LLC v. Bank of the Ozarks, 316 Ga. App. 253, 728 S.E.2d 854 (2012) (decided under former O.C.G.A. § 24-3-14).

Telephone messages. — As telephone messages made following conversations between a party opponent and a testifying witness noted the contents of a conversation, not an act, transaction, occurrence, or event, the business records exception to the hearsay rule was inapplicable; for the contents of the party's telephone conversations to be admissible, the party would have to be given the opportunity to cross-examine the employees to whom the witness spoke with regard to the potential for misrepresenting the statements. Bailey v. Edmundson, 280 Ga. 528, 630 S.E.2d 396 (2006) (decided under former O.C.G.A. § 24-3-14).

Notations of a telephone conversation and testimony explaining the notation were not admissible under the business record exception to the hearsay rule, former O.C.G.A. § 24-2-14(b), because such notations were not considered records of a transaction, event or occurrence as contemplated by this rule. Griffin v. Bankston, 302 Ga. App. 647, 691 S.E.2d 229 (2009) (decided under former O.C.G.A. § 24-3-14).

Telephone conversation not a business record. — Trial court erroneously admitted hearsay at trial because the document reflecting a telephone conversation between a claims representative and an insured, which an insurer offered into evidence, did not constitute a business record admissible under former O.C.G.A. § 24-3-14 since the document was nothing more than a record of a conversation; the hearsay evidence went directly to the ultimate issue before the jury, and its erroneous admission was not harmless. Saye v. Provident Life & Accident Ins. Co., 311 Ga. App. 74, 714 S.E.2d 614 (2011), cert. denied, No. S11C1857, 2011 Ga. LEXIS 984 (Ga. 2011) (decided under former O.C.G.A. § 24-3-14).

Notice of cancellation of insurance policy. — Supervisor who was the custodian of documents showing that notice of cancellation of an insurance policy was properly mailed was not required to have actual personal knowledge of the preparation of and mailing of the notice. Stapleton v. Colonial Ins. Co., 209 Ga. App. 674, 434

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S.E.2d 116 (1993) (decided under former O.C.G.A. § 24-3-14).

Types of evidence held admissible. — See Hall v. Carey, 5 Ga. 239 (1848) (corporate books) (decided under former law); Banks v. Darden ex rel. Jerrenaud, 18 Ga. 318 (1855) (bank books) (decided under former law); Ganahl v. Shore, 24 Ga. 1 (1858) (account books) (decided under former law); Bush v. Fourcher, 3 Ga. App. 43, 59 S.E. 459 (1907) (account books of repairer) (decided under former law); Harper v. Hammond & Sons, 13 Ga. App. 238, 79 S.E. 44 (1913) (ledgers); Chambers v. Williams Bros. Lumber Co., 80 Ga. App. 38, 55 S.E.2d 244 (1949) (ledger sheets and tradesman's shop book) (decided under former law); Allstate Ins. Co. v. Buck, 96 Ga. App. 376, 100 S.E.2d 142 (1957) (invoices, delivery slips and circulation accounts) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Franco v. Bank of Forest Park, 118 Ga. App. 700, 165 S.E.2d 593 (1968) (insurance policies and bank records showing premiums deposited to accounts of issuing companies) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Hamilton v. State, 118 Ga. App. 842, 165 S.E.2d 884 (1968) (photostat copy of check identified as bank record) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Pickett v. State, 123 Ga. App. 1, 179 S.E.2d 303 (1970) (police report); Butler v. Garrison, 123 Ga. App. 645, 182 S.E.2d 185 (1971) (recorded claim for materialman's lien and invoices for materials) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Tidwell Co. v. Robley Hats, Inc., 125 Ga. App. 102, 186 S.E.2d 489 (1971) (fire department records) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Smith v. Smith, 125 Ga. App. 257, 187 S.E.2d 330 (1972) (x-rays) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Harris v. United States Fid. & Guar. Co., 134 Ga. App. 739, 216 S.E.2d 127 (1975) (mailing list constituting post office receipt for mailing) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Lawson v. State, 236 Ga. 770, 225 S.E.2d 258, cert. denied, 429 U.S. 857, 97 S. Ct. 156, 50 L. Ed. 2d 134, cert. denied, 429 U.S. 859, 97 S. Ct. 159, 50 L. Ed. 2d 136 (1976) (registration of particular phone) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Bramblett v. State, 139 Ga. App. 745, 229 S.E.2d 484 (1976), aff'd, 239 Ga. 336, 236 S.E.2d 580 (1977), cert. denied, 434 U.S. 1013, 98 S. Ct. 728, 54 L. Ed. 2d 757 (1978) (return of search warrant) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Benn v. McBride, 140 Ga. App. 698, 231 S.E.2d 438 (1976) (invoices) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Tillman & Deal Farm Supply, Inc. v. Deal, 146 Ga. App. 232, 246 S.E.2d 138 (1978) (laboratory tests records) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); SCM Corp. v. Thermo Structural Prods., Inc., 153 Ga. App. 372, 265 S.E.2d 598 (1980) (annual tax return) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Graham v. State, 154 Ga. App. 198, 267 S.E.2d 842 (1980) (computer printouts) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Wiggins v. State, 249 Ga. 302, 290 S.E.2d 427 (1982) (certifications from manufacturer regarding radar device; records of Department of Public Safety kept for use in speeding cases) (decided under former O.C.G.A. § 24-3-14); Zipperer v. State, 162 Ga. App. 775, 293 S.E.2d 44 (1982) (probationer's travel permits in probation revocation proceeding) (decided under former O.C.G.A. § 24-3-14); Boatner v. Kandul, 180 Ga. App. 234, 348 S.E.2d 753 (1986) (ledger book) (decided under former O.C.G.A. § 24-3-14); White v. State, 263 Ga. 94, 428 S.E.2d 789 (1993) (Red Cross blood testing) (decided under former O.C.G.A. § 24-3-14); Morris v. National W. Life Ins. Co., 208 Ga. App. 443, 430 S.E.2d 813 (1993) (computer-generated summaries) (decided under former O.C.G.A. § 24-3-14); Gee v. State, 210 Ga. App. 60, 435 S.E.2d 275 (1993) (hospital intake record) (decided under former O.C.G.A. § 24-3-14); Stephens v. Howard, 221 Ga. App. 469, 471 S.E.2d 898 (1996) (physical therapist's report prepared for treating physician) (decided under former O.C.G.A. § 24-3-14); Neill v. State, 247 Ga. App. 152, 543 S.E.2d 436 (2000) (hotel registration card) (decided under former O.C.G.A. § 24-3-14).

Admission of lawyer's notes. — In an action seeking reformation of an option

contract, even assuming the trial court erred in admitting a lawyer's handwritten notes indicating that an option contract was to include all of the decedent's land because such notes were inadmissible hearsay, the estate failed to show reversible error because there was other evidence to support the court's ruling. Morris v. Morris, 282 Ga. App. 127, 637 S.E.2d 838 (2006) (decided under former O.C.G.A. § 24-3-14).

Documents transmitted between businesses. — When routine, factual documents are made by one business, transmitted, or delivered to a second business, and there entered or kept by the second business in the regular course of business of the receiving business, the documents can become business records of the receiving business. Moore v. State, 154 Ga. App. 535, 268 S.E.2d 706 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Jackson v. State, 209 Ga. App. 217, 433 S.E.2d 655 (1993) (decided under former O.C.G.A. § 24-3-14).

Sufficient evidence supported defendant's convictions for two counts of theft by deception based on defendant withdrawing the contents of two bank accounts after depositing checks from other banks into the accounts that were eventually dishonored because the dishonored checks were properly admitted into evidence without testimony from the payor banks as the checks became the business records of the bank from which funds were withdrawn, since there was testimony that the bank received, relied upon, and retained the checks in the regular course of the bank's business, as well as testimony from the bank establishing a foundation for admitting the checks. Ross v. State, 298 Ga. App. 525, 680 S.E.2d 435 (2009) (decided under former O.C.G.A. § 24-3-14).

Opinions. — Former statute did not authorize the introduction of papers containing the opinions of experts or the diagnosis of physicians. Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370 (1957) For comment, see 20 Ga. B.J. 381 (1958) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Meeks v. Lunsford, 106 Ga. App. 154, 126 S.E.2d 531 (1962) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

When a report was the opinion of the persons making the report and was based, at least to some extent, on what was reported to the people by unidentified persons, it was not admissible in evidence. Yarbrough v. Cantex Mfg. Co., 97 Ga. App. 438, 103 S.E.2d 138 (1958), for comment, see 22 Ga. B.J. 100 (1959) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Business record containing hearsay opinions is not generally admissible. Wallis v. Odom, 130 Ga. App. 437, 203 S.E.2d 613 (1973) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Emmett v. State, 232 Ga. 110, 205 S.E.2d 231 (1974) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Business records must be reflective of an act, occurrence, or event, and not an opinion. Finch v. Caldwell, 155 Ga. App. 813, 273 S.E.2d 216 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Affidavits by company officials concerning alleged forgeries that were not memoranda or records of acts, transactions, occurrences, or events and that contained inadmissible opinions and conclusions were not admissible as business records. Adams v. State, 217 Ga. App. 706, 459 S.E.2d 182 (1995) (decided under former O.C.G.A. § 24-3-14).

Even though an affidavit in support of a motion for summary judgment did not recite that the affidavit was made from the affiant's personal knowledge, it was admissible because the affidavit set forth the affiant's title and responsibilities and included attached documents made and kept in the ordinary course of business. Kondo v. Marietta Toyota, Inc., 224 Ga. App. 490, 480 S.E.2d 851 (1997) (decided under former O.C.G.A. § 24-3-14).

As the affidavits of an assignee's chief financial officer (CFO) showed that the CFO's knowledge of the facts sworn to was based on the CFO's review of the attached business records and not personal knowledge, the affidavits were inadmissible hearsay. Nyankojo v. North Star Capital Acquisition, 298 Ga. App. 6, 679 S.E.2d 57 (2009) (decided under former O.C.G.A. § 24-3-14).

Testimony by corporate attorney. — Testimony by attorney, who handled right of way acquisitions and maintained corporate records regarding rights of way for

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defendant corporation, as to width of the defendant's right of way was relevant background information that the attorney could testify to both from the attorney's personal knowledge and from corporate business records. Simpson v. Colonial Pipeline Co., 269 Ga. 520, 499 S.E.2d 634 (1998) (decided under former O.C.G.A. § 24-3-14).

Affidavit of an official made after a review of business records which were in the official's care, custody, and control, and which were maintained in the course of the company's business, was admissible. Carter v. Tokai Fin. Servs., Inc., 231 Ga. App. 755, 500 S.E.2d 638 (1998) (decided under former O.C.G.A. § 24-3-14).

Contents of records. — Since there was no testimony to the effect that a card or record was customarily made in the due course of business and since the card or record was not introduced in evidence as a record made in the due course of business, the admission of testimony as to the contents of the card or record was erroneous. Hardy v. Waits, 97 Ga. App. 580, 104 S.E.2d 136, rev'd on other grounds, 214 Ga. 495, 105 S.E.2d 719 (1958) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Testimony concerning the content of records, unsupported in the evidence by the records themselves, which are never offered in evidence should be excluded as hearsay. Foster v. National Ideal Co., 119 Ga. App. 773, 168 S.E.2d 872 (1969) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Compiling documents for admission. — Individual documents could be compiled and admitted as a group, even though the documents were not kept together by the business as one record since each of the documents was made in the regular course of business and was kept as a business record. Archer Motor Co. v. International Bus. Inv., Inc., 193 Ga. App. 86, 386 S.E.2d 918 (1989) (decided under former O.C.G.A. § 24-3-14).

Summaries. — When pertinent and essential facts can be ascertained only by an examination of a large number of entries in books of account, an auditor or an expert accountant who has made an examination and analysis of the books and figures may testify as a witness and give summarized statements of what the books show as a result of the expert's investigation, provided the books themselves are accessible to the court and the parties. Bible v. Somers Constr. Co., 197 Ga. 761, 30 S.E.2d 623 (1944) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Cotton v. John W. Eshelman & Sons, 137 Ga. App. 360, 223 S.E.2d 757 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Vaughn & Co. v. Saul, 143 Ga. App. 74, 237 S.E.2d 622 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Stewart v. State, 246 Ga. 70, 268 S.E.2d 906 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Extracts, summaries, and transcripts provided by one business purely as information to the second business clearly did not fall within the former statute. Moore v. State, 154 Ga. App. 535, 268 S.E.2d 706 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Monthly statements which were either drafted by president of firm or prepared under the president's supervision were admissible as summaries of computer printouts which were already in evidence. Reisman v. Martori, Meyer, Hendricks, & Victor, 155 Ga. App. 551, 271 S.E.2d 685 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

When invoices of business records were admissible under former O.C.G.A. § 24-3-14(b), an account statement that was a summary of the invoices therein was admissible. Walter R. Thomas Assocs. v. Media Dynamite, Inc., 284 Ga. App. 413, 643 S.E.2d 883 (2007) (decided under former O.C.G.A. § 24-3-14).

Trial court abused the court's discretion by considering a one-page summary of the amount owed under a lease in determining damages because the record a landlord submitted was not a business record under former O.C.G.A. § 24-3-14 but was a summary of such records; no underlying business records were available to the trial court or the guarantor. Patterson v. Bennett St. Props., 314 Ga. App. 896, 726 S.E.2d 147 (2012) (decided under former O.C.G.A. § 24-3-14).

Self-serving memoranda. — Former statute did not go to the extent of rendering admissible self-serving memoranda. Maryfield Plantation, Inc. v. Harris Gin Co., 116 Ga. App. 744, 159 S.E.2d 125 (1967) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Nationwide Mut. Fire Ins. Co. v. Rhee, 160 Ga. App. 468, 287 S.E.2d 257 (1981) (decided under former O.C.G.A. § 24-3-14).

Document did not qualify as a business record since the document was prepared from notes dictated while a receiver of the property performed a complete walk-through of vacant units in an apartment complex and since the purpose of the document was to remind the receiver of what the receiver observed in each unit. Great W. Bank v. Davis, 203 Ga. App. 473, 416 S.E.2d 899 (1992) (decided under former O.C.G.A. § 24-3-14).

Trial court properly refused to admit into evidence unauthenticated handwritten bid allegedly taken over the telephone by a secretary no longer employed by defendant contractor. Bishop Contracting Co. v. North Ga. Equip. Co., 203 Ga. App. 655, 417 S.E.2d 400, cert. denied, 203 Ga. App. 905, 417 S.E.2d 400 (1992) (decided under former O.C.G.A. § 24-3-14).

Handwritten note of deceased payee of promissory notes, as to loans to and payments from the signatory of the notes, was admissible. Harrison v. Martin, 213 Ga. App. 337, 444 S.E.2d 618 (1994) (decided under former O.C.G.A. § 24-3-14).

Letters. — To construe Ga. L. 1952, p. 177, § 1 et seq. to permit the admission in evidence of a letter in which is contained the diagnosis of a party's condition by a witness who has not been qualified as an expert, and a memorandum opinion not signed by any person but simply enclosed in the letter, when the party whose interest the letter and memorandum opinion are offered is not afforded the opportunity to examine either the author of the letter or the maker of the memorandum would in effect repeal former Code 1933, § 38-1705 (see now O.C.G.A. § 24-6-611), relating to the right of cross-examination, and ignore opinions of the Supreme Court and of this court. Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370 (1957). For comment, see 20 Ga. B.J. 381 (1958) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Letters frequently would not qualify as letters are usually written for the purpose of communicating rather than recording information. American San. Servs., Inc. v. EDM of Tex., Inc., 139 Ga. App. 662, 229 S.E.2d 136 (1976) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Former statute did not automatically render admissible correspondence and all kinds of writings if made by one in connection with the operation of a business. American San. Servs., Inc. v. EDM of Tex., Inc., 139 Ga. App. 662, 229 S.E.2d 136 (1976) (decided under former O.C.G.A. § 24-3-14).

Claim letter required by the Department of Transportation as part of the department's contract with a contractor was admissible as original evidence and as a business record. DOT v. Dalton Paving & Constr., Inc., 227 Ga. App. 207, 489 S.E.2d 329 (1997) (decided under former O.C.G.A. § 24-3-14).

Financial statements. — Financial statement compiled from the records of the corporation is not itself a memorandum or record of any act, transaction, occurrence, or event but a compilation of figures furnished by someone else, and should not be admissible. Smith v. Smith, 224 Ga. 689, 164 S.E.2d 225 (1968) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Unaudited financial statements which had been prepared by independent accountants who were not present in court to authenticate the reports should not have been admitted into evidence as business records. DOT v. Fitzpatrick, 184 Ga. App. 249, 361 S.E.2d 241 (1987) (decided under former O.C.G.A. § 24-3-14).

Documents provided by subcontractors to plaintiff for purposes of billing and reimbursement qualified as business records of the plaintiff and testimony of plaintiff's president was appropriate to lay the foundation for their admittance. Wheat Enters., Inc. v. Redi-Floors, Inc., 231 Ga. App. 853, 501 S.E.2d 30 (1998) (decided under former O.C.G.A. § 24-3-14).

Credit card holder failed to prove that

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the statement, demonstrating the holder's debt, attached to the assignee's summary judgment motion affidavit was hearsay and should not have been considered by the trial court in the court's grant of summary judgment; the holder failed to contradict the assignee's claim, made in the assignee's affidavit, that the statement fell under the business records exception to the hearsay rule under former O.C.G.A. § 24-3-14. Bozeman v. CACV of Colo., LLC, 282 Ga. App. 256, 638 S.E.2d 387 (2006) (decided under former O.C.G.A. § 24-3-14).

When a plaintiff purchased advertising time from media providers on behalf of the defendant, invoices received from the media providers and kept by the plaintiff as part of the plaintiff's own records were business records of the plaintiff under former O.C.G.A. § 24-3-14(b), and testimony from the plaintiff's president could lay a foundation for their introduction into evidence. Walter R. Thomas Assocs. v. Media Dynamite, Inc., 284 Ga. App. 413, 643 S.E.2d 883 (2007) (decided under former O.C.G.A. § 24-3-14).

Credit agreement and statements. — Credit card company's summary judgment motion, supported by the sworn statement of the company's operation analyst, together with a credit card agreement and statements showing the amount due, which were admissible as business records pursuant to former O.C.G.A. § 24-3-14, was properly granted. A copy of the credit application was not required. Melman v. FIA Card Servs., N.A., 312 Ga. App. 270, 718 S.E.2d 107 (2011), cert. denied, No. S12C0411, 2012 Ga. LEXIS 215 (Ga. 2012) (decided under former O.C.G.A. § 24-3-14).

Department of Labor records. — In a prosecution for fraudulently obtaining public housing, computer printouts of defendant's wage records received by the county housing authority from the Department of Labor were admissible as business records. Robertson v. State, 210 Ga. App. 834, 437 S.E.2d 816 (1993) (decided under former O.C.G.A. § 24-3-14).

Timeline prepared by a Georgia Department of Children and Families case worker was not a business record as it was prepared for a termination of parental rights proceeding, was not prepared in the regular course of business, and was not prepared and maintained pursuant to a routine practice; however, the admission of the timeline was harmless error. In re C.M., 258 Ga. App. 387, 574 S.E.2d 433 (2002) (decided under former O.C.G.A. § 24-3-14).

Computer printouts. — Absence of original daily time sheets did not render computer printouts inadmissible; this may have gone to their credit but not to their admissibility. Reisman v. Martori, Meyer, Hendricks, & Victor, 155 Ga. App. 551, 271 S.E.2d 685 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

Computer printouts were clearly admissible under former O.C.G.A. § 24-3-14. WGNX, Inc. v. Gorham, 185 Ga. App. 489, 364 S.E.2d 621 (1988) (decided under former O.C.G.A. § 24-3-14).

Subcontractor agreement forms. — Because a limited liability company did not object to the admission of subcontractor agreement forms at trial on the ground that the forms did not fall within the business records exception to the hearsay rule, former O.C.G.A. § 24-3-14, an appellate court would not consider that argument on appeal. Forrest Cambridge Apts., LLC v. Redi-Floors, Inc., 295 Ga. App. 840, 673 S.E.2d 318 (2009) (decided under former O.C.G.A. § 24-3-14).

Operating record of intoximeter operator admissible. — Operating record of an intoximeter operator who gave a test to a driver, subsequently accused of driving while intoxicated, was a writing in proof of an act or transaction and, thus, was admissible as direct evidence of the manner in which a scientific test was conducted and results thereby obtained. Munda v. State, 172 Ga. App. 857, 324 S.E.2d 799 (1984) (decided under former O.C.G.A. § 24-3-14).

Breath testing device certificates. — Breath testing device certificates provided for in O.C.G.A. § 40-6-392(f) are records made within the regular course of business. Brown v. State, 268 Ga. 76, 485 S.E.2d 486 (1997) (decided under former

O.C.G.A. § 24-3-14); Payne v. State, 232 Ga. App. 591, 502 S.E.2d 526 (1998) (decided under former O.C.G.A. § 24-3-14); Jackson v. State, 233 Ga. App. 568, 504 S.E.2d 505 (1998) (decided under former O.C.G.A. § 24-3-14).

Proper foundation for admitting an inspection certificate was provided through testimony of the trooper who actually tested the machine. Mealor v. State, 233 Ga. App. 193, 504 S.E.2d 29 (1998) (decided under former O.C.G.A. § 24-3-14).

"Self-authenticating" provision, O.C.G.A. § 40-6-392(f), contained the proper foundation for admission of a certificate of inspection, and a further foundation under the "business records" exception of subsection (b) of former O.C.G.A. § 24-3-14 was not necessary. Jackson v. State, 233 Ga. App. 568, 504 S.E.2d 505 (1998) (decided under former O.C.G.A. § 24-3-14).

Admission of self-authenticating certificates of inspection for the Intoxilyzer 5000 used to test defendant's breath was proper as the certificates were required by O.C.G.A. § 40-6-392(f), the certificates qualified as business records under former O.C.G.A. § 24-3-14, and the certificates did not violate defendant's confrontation rights under U.S. Const., amend. 6. Neal v. State, 281 Ga. App. 261, 635 S.E.2d 864 (2006) (decided under former O.C.G.A. § 24-3-14).

As certificates of inspection regarding an Intoxilyzer 5000 used in defendant's criminal matter were properly admitted pursuant to the business records exception to the hearsay rule under former O.C.G.A. §§ 24-3-14 and 40-6-392(f), the trial court's refusal to give the limiting instruction regarding their use, as requested by defendant, was not reversible error. Neal v. State, 281 Ga. App. 261, 635 S.E.2d 864 (2006) (decided under former O.C.G.A. § 24-3-14).

Testing certificates for a breath-testing machine were properly admitted into evidence in a defendant's trial for driving under the influence (less safe and per se) under former O.C.G.A. § 24-3-14 and O.C.G.A. § 40-6-392(f). The documents did not come within the Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) standard. Ritter v. State, 306 Ga. App. 689, 703 S.E.2d 8 (2010) (decided under former O.C.G.A. § 24-3-14).

Fingerprints. — An adequate foundation was laid for the admission of evidence of defendant's fingerprints since the trial record reflected that everybody arrested had a folder on them and the fingerprints were kept in the folder, the fingerprint card was a part of the record and was generally made at the time of a subject's arrest during the booking procedure, the name of the person who took the prints was on the card, and the card normally was maintained in the file jacket of the subject's arrest record at the sheriff's department. Davis v. State, 194 Ga. App. 902, 392 S.E.2d 327 (1990) (decided under former O.C.G.A. § 24-3-14).

Evidence established that the defendant's 1991 fingerprint card was made in the regular course of business when the card bore the defendant's full name, date of birth, description, and signature and when the officer who conducted the fingerprinting and signed the card testified that the officer would have obtained the information on the card from written identification. The defendant's assertion that the prints on the 1991 card could be those of someone else purporting to be the defendant and using the defendant's identification at the time the prints were obtained amounted to mere speculation, and the state was under no obligation to re-fingerprint the defendant. Hurst v. State, 285 Ga. 294, 676 S.E.2d 165 (2009) (decided under former O.C.G.A. § 24-3-14).

Trial court did not err in allowing the testimony of the state's fingerprint expert, an employee of the Georgia Bureau of Investigation (GBI), who identified the victim based on the victim's comparison of a post-mortem fingerprint card belonging to the victim and a fingerprint card bearing the victim's known fingerprints because a proper foundation was laid, and the fingerprints cards were properly admitted in evidence as business records under former O.C.G.A. § 24-3-14; the expert testified that the expert was familiar with GBI's methods of recordkeeping, that the GBI maintained post-mortem fingerprint cards in the regular course of busi-

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ness, and that the fingerprint cards were made contemporaneously with autopsies of dead persons conducted at the morgue. Rowe v. State, 302 Ga. App. 239, 690 S.E.2d 884 (2010) (decided under former O.C.G.A. § 24-3-14).

Trial court did not abuse the court's discretion in requiring the defendant's counsel to specify the missing steps of a business record exception after defense counsel objected to the state's introduction in evidence of the defendant's fingerprint cards because even assuming that the trial court erred, the fingerprint cards were not the sole evidence linking the defendant to the crimes; an investigator testified that the investigator made a visual comparison of the defendant's fingerprints and concluded that two latent prints taken from the scene belonged to the defendant, and the investigator also testified that the results of a computer analysis identified a known print of the defendant's as the closest of ten matches to the latent print. Mallory v. State, 306 Ga. App. 684, 703 S.E.2d 120 (2010) (decided under former O.C.G.A. § 24-3-14).

Police report. — Narratives contained in police reports generated in connection with police investigations are not the appropriate subject of the business records exception to the hearsay rule. To the extent that any case holds that a police report narrative is admissible as a business record, those cases are overruled. Brown v. State, 274 Ga. 31, 549 S.E.2d 107 (2001) (decided under former O.C.G.A. § 24-3-14).

Because a form document, entitled the "Henry County Police Department Roadblock & Safety Checkpoint Record," introduced at a motion to suppress hearing by the state was properly admitted as a business record under former O.C.G.A. § 24-3-14, and the testimonial evidence regarding the primary purpose of the roadblock passed constitutional muster, in that it was legitimately conducted as part of a statewide "zero tolerance" campaign, the defendant's motion to suppress the evidence seized as a result was properly denied. Yingst v. State, 287 Ga. App. 43, 650 S.E.2d 746 (2007) (decided under former O.C.G.A. § 24-3-14).

Even if the trial court in a nuisance and trespass case erred in admitting narrative portions of a police officer's reports as business records, the error was harmless because the officer was available for cross-examination and because the reports were cumulative of the officer's testimony. Stanfield v. Waste Mgmt. of Ga., Inc., 287 Ga. App. 810, 652 S.E.2d 815 (2007), cert. denied, No. S08C0317, 2008 Ga. LEXIS 228 (Ga. 2008) (decided under former O.C.G.A. § 24-3-14).

There is no error in the admission of a police report showing that the defendant had a large amount of change in the defendant's possession when the defendant was apprehended inside a store. Johnson v. State, 168 Ga. App. 271, 308 S.E.2d 681 (1983) (decided under former O.C.G.A. § 24-3-14).

Police officer's receipt for property constituted business record. — When an undercover officer who purchased marijuana from defendant testified regarding the purchase, opined that the substance was marijuana, and also identified the receipt for property and testified that the official filled out the receipt in the normal course of business, the receipt for property was clearly identified as a business record and was properly admitted as such over defendant's hearsay objection. Green v. State, 165 Ga. App. 702, 302 S.E.2d 604 (1983) (decided under former O.C.G.A. § 24-3-14).

Police officer's letter containing compilation of figures furnished by another showing the number of accidents involving left-turning vehicles at an intersection over a three-year period was not admissible as a business record. Loper v. Drury, 211 Ga. App. 478, 440 S.E.2d 32 (1994) (decided under former O.C.G.A. § 24-3-14).

With regard to proof of transmittal of contraband to state crime lab by certified mail, the state could only produce a photostatic copy of the certification receipt in lieu of the original and the defendant urged that, without an adequate explanation for the absence of the original certified mail receipt as required by for-

mer O.C.G.A. § 24-5-4 (see now O.C.G.A. § 24-10-1002), the chain of custody was not sufficiently proven, but a deputy sheriff testified that the deputy would always make a copy of the certified mail receipt when the deputy mailed contraband to the state crime lab, but had been unable to locate the original receipt for this particular mailing, and identified the deputy's handwriting on the photostatic copy and noted that the certification number was identical to that on the state crime lab report, the trial court was authorized to conclude that the copy of the receipt had been made in the regular course of business so as to be admissible pursuant to former O.C.G.A. §§ 24-3-14 and 24-5-26 (see now O.C.G.A. §§ 24-8-803 and 24-10-1003). Spead v. State, 187 Ga. App. 359, 370 S.E.2d 213 (1988) (decided under former O.C.G.A. § 24-3-14).

Roadblock approval form. — Department of public safety roadblock approval form was subject to admission as a business record because the form contained only routine facts whose accuracy was not affected by bias, judgment, and memory; the form was created for the administration of the State Patrol's affairs as it was prepared in every case of a road block, presumably for recordkeeping purposes. Hite v. State, 315 Ga. App. 221, 726 S.E.2d 704 (2012), cert. denied, No. S12C1286, 2012 Ga. LEXIS 1020 (Ga. 2012) (decided under former O.C.G.A. § 24-3-14).

4. Foundation for Admission

Business records admissible to prove crime. — Defendant's conviction for theft by taking in violation of O.C.G.A. § 16-8-2 was proper under former O.C.G.A. § 24-3-14 because the business records exception did not require that the person laying the foundation for the admission of business records be the custodian of the records. Instead, the former statute required only that the record offered to prove an act or transaction be made in the regular course of business and that it was the regular course of business to make the record at the time of the act or transaction; the witness's lack of personal knowledge regarding how the records were created did not render the records inadmissible, but merely affected the weight given to the evidence. Loyal v. State, 300 Ga. App. 65, 684 S.E.2d 124 (2009) (decided under former O.C.G.A. § 24-3-14).

Pawn ticket admissible as business record. — Pawn ticket constitutes a contemporaneous record of a transaction made in the regular course of business pursuant to regular business practices, and thus is admissible as evidence of the transaction under former O.C.G.A. § 24-3-14. Baxter v. State, 254 Ga. 538, 331 S.E.2d 561 (1985), cert. denied, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 275 (1985); 498 U.S. 1041, 111 S. Ct. 714, 112 L. Ed. 2d 703 (1991) (decided under former O.C.G.A. § 24-3-14).

Report containing opinions of party not before court. — Even if a proper foundation was laid to introduce a laboratory report as a business record, it was still not admissible as a whole if the report contained the opinions or conclusion of a third party not before the court. Department of Human Resources v. Corbin, 202 Ga. App. 10, 413 S.E.2d 484 (1991), cert. denied, 202 Ga. App. 905, 413 S.E.2d 484 (1992) (decided under former O.C.G.A. § 24-3-14).

Trial court did not err by refusing to admit medical records of non-testifying physicians who had treated plaintiff because defendant failed to lay a proper foundation. Hodson v. Mawson, 227 Ga. App. 490, 489 S.E.2d 855 (1997) (decided under former O.C.G.A. § 24-3-14).

Records which contain diagnostic opinions of third parties not before the court are not admissible under the business records exception to the hearsay rule. Baker v. State, 251 Ga. 464, 306 S.E.2d 917 (1983) (decided under former O.C.G.A. § 24-3-14).

Testimonials from customers. — In a suit between a manufacturer and a purchaser, the testimony of one of the purchaser's customers was properly excluded as hearsay because the testimony did not contain the type of routine facts whose accuracy was not affected by bias, judgment, and memory, as contemplated for the admission of business records under former O.C.G.A. § 24-3-14(b). Pendley Quality Trailer Supply, Inc. v. B&F Plas-

Business Records (Cont'd)
4. Foundation for Admission (Cont'd)

tics, Inc., 260 Ga. App. 125, 578 S.E.2d 915 (2003) (decided under former O.C.G.A. § 24-3-14).

Medical records. — Medical records regarding plaintiff's injuries and treatment were not admissible in the absence of testimony satisfying foundational requirements. Buford v. Benton, 232 Ga. App. 102, 501 S.E.2d 272 (1998) (decided under former O.C.G.A. § 24-3-14).

Blood-alcohol test as hospital business record. — When the doctor who treated plaintiff-driver in the hospital emergency room following the accident detected what the doctor thought was the odor of alcohol about the plaintiff-driver and, without a request or direction by the officer, ordered a blood-alcohol test to be performed upon the plaintiff-driver in order to determine the type of anesthesia to use on plaintiff-driver, the blood-alcohol test results were admissible under former O.C.G.A. § 24-3-14 as part of a hospital record made in the regular course of hospital business, and thus, compliance with O.C.G.A. § 40-6-392(a)(2) and (3) was not a prerequisite to the admission of the blood test results. Bynum v. Standard (Chevron) Oil Co., 157 Ga. App. 819, 278 S.E.2d 669, cert. denied, 248 Ga. 254, 285 S.E.2d 186 (1981) (decided under former O.C.G.A. § 24-3-14).

Trial court properly admitted, at defendant's trial for vehicular homicide, the results of a blood test performed by a hospital, since the test was administered for the purpose of assisting in defendant's medical treatment, was requested by the treating physician and not by a law enforcement officer, and was not obtained for the purpose of showing that defendant was in violation of the driving-under-the-influence statute. Jackson v. State, 196 Ga. App. 724, 397 S.E.2d 13 (1990) (decided under former O.C.G.A. § 24-3-14).

Blood alcohol test performed by officer. — There was adequate foundation to admit printouts of test results of defendant's breath test as business records under subsection (b) of former O.C.G.A. § 24-3-14, in that it was in the regular course of the trooper's business to perform such a test, and these printouts were the result of one of those tests conducted in the regular course of the trooper's duties; consequently, there was no violation of defendant's right of confrontation. Sisson v. State, 232 Ga. App. 61, 499 S.E.2d 422 (1998) (decided under former O.C.G.A. § 24-3-14).

Blood test results. — Hospital record showing blood test results was properly admitted as a business records exception to the hearsay rule. Dixon v. State, 227 Ga. App. 533, 489 S.E.2d 532 (1997) (decided under former O.C.G.A. § 24-3-14).

Videotape of surgical procedure. — Videotape of arthroscopic surgical procedure performed on plaintiff's shoulder was admissible as a business record since the doctor was available for cross-examination. Freeland v. Baker, 205 Ga. App. 470, 422 S.E.2d 315 (1992) (decided under former O.C.G.A. § 24-3-14).

Summary prepared in support of demand for payment not "business record". — When a witness's testimony concerning the amount of alleged indebtedness under a lease is derived not from an examination of any books of account or other records prepared in the ordinary course of business, but rather from a summary prepared in support of a demand for payment, this summary is not a "business record" within the meaning of former O.C.G.A. § 24-3-14. Gateway Leasing Corp. v. Heath, 168 Ga. App. 858, 310 S.E.2d 549 (1983) (decided under former O.C.G.A. § 24-3-14).

Tax assessments did not fall under the business record exception to hearsay. Sheppard v. Sheppard, 229 Ga. App. 494, 494 S.E.2d 240 (1997) (decided under former O.C.G.A. § 24-3-14).

List of promissory notes, not made according to regular business procedure, which was offered in evidence to support the witness's contention that such notes existed and to alert the jury of the amount of the notes, was improperly admitted under the business records exception. Growth Properties of Fla., Ltd. v. Wallace, 168 Ga. App. 893, 310 S.E.2d 715 (1983) (decided under former O.C.G.A. § 24-3-14).

Bulldozer operator's worksheets prepared in anticipation of litigation

were not admissible as evidence since the operator had not kept a contemporaneous record of the operator's hours or expenses. Goss v. Mathis, 188 Ga. App. 702, 373 S.E.2d 807, cert. denied, 188 Ga. App. 911, 373 S.E.2d 807 (1988) (decided under former O.C.G.A. § 24-3-14).

Automobile repair estimates were not admissible in a personal injury action arising out of an automobile collision. Moore v. Graham, 221 Ga. App. 616, 472 S.E.2d 152 (1996) (decided under former O.C.G.A. § 24-3-14).

Billing statements. — Proof of attorney fees did not require the testimony of the attorneys or paralegals who performed the work; sufficient evidence was presented by a witness who introduced billing statements that were admissible as business records. Santora v. American Combustion, Inc., 225 Ga. App. 771, 485 S.E.2d 34 (1997) (decided under former O.C.G.A. § 24-3-14).

Minutes from meeting of church members. — Minutes of a meeting of church members were not admissible as business records in the absence of a statement that it was the regular course of business to create the minutes. White Missionary Baptist Church v. Trustees of First Baptist Church, 268 Ga. 668, 492 S.E.2d 661 (1997) (decided under former O.C.G.A. § 24-3-14).

Fiber counts. — There was no evidence that skill of observation or judgment was a significant factor affecting the reliability of fiber counts performed for the former employer by an independent laboratory, or that the accuracy of the counts was affected by bias, so the trial court did not err by admitting the fiber counts under the business records exception to the hearsay rule. Stewart v. CSX Transp., Inc., 268 Ga. App. 434, 602 S.E.2d 665 (2004) (decided under former O.C.G.A. § 24-3-14).

Affidavit by creditor's "recovery specialist." — An affidavit supported by a creditor in support of the creditor's motion for summary judgment satisfied the business records exception when the affiant, a "recovery specialist," stated that the affiant was familiar with the creditor's books and records, that the books and records were kept in the ordinary course of business to keep such books and records, that the entries on the books and records concerning the debtor were posted at or about the time of the transaction, and that the documents named in the affidavit and identifiable in the record showed the terms of the contract between the parties and provided the financial history of the debtor's personal credit line account. Gerben v. Beneficial Ga., Inc., 283 Ga. App. 740, 642 S.E.2d 405 (2007) (decided under former O.C.G.A. § 24-3-14).

Preprinted form documents admissible. — As preprinted form documents contained very specific information concerning goods purchased, and bore signatures on behalf of the buyer and the seller, the trial court was authorized to find sufficient circumstantial evidence of authentication to admit the documents as business records. Nyankojo v. North Star Capital Acquisition, 298 Ga. App. 6, 679 S.E.2d 57 (2009) (decided under former O.C.G.A. § 24-3-14).

Sales acknowledgment. — In a suit against a carrier by a shipper's insurer under 49 U.S.C. § 14706 of the Interstate Commerce Act, the shipper's "sales acknowledgment" business records were admissible to show the sale of the goods to a third party, but were not sufficient to establish the necessary element of proof that the goods were delivered to the carrier in good condition. Transp. Solutions, Inc. v. St. Paul Mercury Ins. Co., 297 Ga. App. 757, 678 S.E.2d 201 (2009) (decided under former O.C.G.A. § 24-3-14).

Creditor failed to establish link in chain of assignment of debt. — Chapter 7 debtor's objections to three proofs of claim held by a creditor who was the fourth assignee of each of the debts were sustained as the creditor failed to establish any links in the chain of assignment as required under Georgia law and failed to lay a proper foundation for documents used as required by the Business Records Act, former O.C.G.A. § 24-3-14. An affidavit of sale from an authorized representative of one of the assignors was deficient because the affiant's testimony was not based on personal knowledge and because the only business record introduced was a contract assigning unidentified accounts;

Business Records (Cont'd)
4. Foundation for Admission (Cont'd)

there were no documents identifying the account holder, the account number, and the account balance. In re Stephens, 443 B.R. 225 (Bankr. M.D. Ga. 2010) (decided under former O.C.G.A. § 24-3-14).

Evidence was properly admitted under former O.C.G.A. § 24-3-14 in the following cases. — See Haygood v. Smith, 80 Ga. App. 461, 56 S.E.2d 310 (1949) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Guthrie v. Berrien Prods. Co., 91 Ga. App. 45, 84 S.E.2d 596 (1954) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Crooke v. Elliott, 96 Ga. App. 314, 99 S.E.2d 842 (1957) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Home Fin Co. v. Smith, 116 Ga. App. 76, 156 S.E.2d 522 (1967) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Calhoun v. Chappell, 117 Ga. App. 865, 162 S.E.2d 300 (1968) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Huff v. State, 141 Ga. App. 66, 232 S.E.2d 403 (1977) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Tucker v. Whitehead, 155 Ga. App. 104, 270 S.E.2d 317 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Head v. State, 246 Ga. 360, 271 S.E.2d 452 (1980) (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3); Anderson v. Chatham, 190 Ga. App. 559, 379 S.E.2d 793 (1989) (decided under former O.C.G.A. § 24-3-14); Johnson v. State, 266 Ga. 775, 470 S.E.2d 637 (1996) (decided under former O.C.G.A. § 24-3-14); Tolver v. State, 269 Ga. 530, 500 S.E.2d 563 (1998) (decided under former O.C.G.A. § 24-3-14).

Recorded Recollections

1. In General

Obvious purpose of the former statute was to allow proper and legitimate aid to a witness which would enable the witness to testify fully as to the witness's knowledge. Whitaker v. State, 199 Ga. 344, 34 S.E.2d 499 (1945) (decided under former Code 1933, § 38-1707).

Illegal evidence must not be allowed to reach the jury on the pretense that the evidence was offered in compliance with the former statute. Whitaker v. State, 199 Ga. 344, 34 S.E.2d 499 (1945) (decided under former Code 1933, § 38-1707); Hull v. State, 265 Ga. 757, 462 S.E.2d 596 (1995) (decided under former O.C.G.A. § 24-9-69).

Past and present recollections distinguished. — For discussion of the distinction between cases where the witness finally testifies to a "past" recollection, and where the witness finally testifies to a "present" recollection, see Stansall v. Columbian Nat'l Life Ins. Co., 32 Ga. App. 87, 122 S.E. 733, cert. denied, 32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5878).

Testimony must be based on memory and not on memorandum. — Witness may, for the purpose of refreshing the witness's recollection, use any memoranda useful for that purpose; and the witness's testimony will not be objectionable if it is not dependent upon the memoranda, but is based upon the memory of the witness, even though the memoranda may be necessary in order to refresh the witness's recollection. Southern Ry. v. Cowan, 52 Ga. App. 360, 183 S.E. 331 (1936) (decided under former Code 1933, § 38-1707).

Independent memory of contents not required. — Witness may testify from the witness's memory refreshed by a writing that the witness made, though the witness has no independent memory of the writing's contents. Bridges v. Mutual Benefit Health & Accident Ass'n, 49 Ga. App. 552, 176 S.E. 543 (1934) (decided under former Code 1933, § 38-1707); Steinmetz v. Chambley, 90 Ga. App. 519, 83 S.E.2d 318 (1954) (decided under former Code 1933, § 38-1707); Woodward v. City Council, 117 Ga. App. 857, 162 S.E.2d 304 (1968) (decided under former Code 1933, § 38-1707); State Hwy. Dep't v. Godfrey, 118 Ga. App. 560, 164 S.E.2d 340 (1968) (decided under former Code 1933, § 38-1707); Marby v. Henley, 123 Ga. App. 561, 181 S.E.2d 884 (1971) (decided under former Code 1933, § 38-1707).

Does not affect probative value. — Rule relates as to the admissibility of testimony, and not a rule for the determination of the testimony's probative value. Scott v. Gidelight Mfg. Co., 37 Ga. App. 240, 139 S.E. 686 (1927) (decided under former Civil Code 1910, § 5873); Kines v.

State, 67 Ga. App. 314, 20 S.E.2d 89 (1942) (decided under former Code 1933, § 38-1707).

Reading record in hearing of jury. — Witness may not only read the witness's own deposition but it may be read to the witness in the presence and hearing of the jury to refresh the witness's memory. Burney v. Ball, 24 Ga. 505 (1858) (decided under former law).

Waiver. — When only part of the memorandum was admitted in evidence at the instance of the party who offered the witness, over objection urged by the opposite party that it was inadmissible, the putting in evidence later by the opposite party of the remainder of the memorandum amounted to a waiver of the party's objection. Scott v. Gidelight Mfg. Co., 37 Ga. App. 240, 139 S.E. 686 (1927) (decided under former Civil Code 1910, § 5873).

Error in allowing counsel to view witness's notes harmless. — Though the trial court erred in permitting the plaintiff's counsel to examine the notes used by the defendant's witness to refresh the witness's memory, the defendant failed to show how this error prejudiced the defense, therefore, the error was harmless. Seaboard Coastline R.R. v. Delahunt, 179 Ga. App. 647, 347 S.E.2d 627 (1986), overruled on other grounds, CSX Transp. v. Williams, 230 Ga. App. 573, 497 S.E.2d 66 (1998) (decided under former O.C.G.A. § 24-9-69).

Preserving error. — While it was true that under former O.C.G.A. § 24-9-69, a witness whose memory was refreshed with a document had to continue their testimony on the basis of recollection alone, when such was not the basis of the defendant's objection at trial, the claim was not preserved for review. Hunter v. State, 282 Ga. App. 355, 638 S.E.2d 804 (2006) (decided under former O.C.G.A. § 24-9-69).

2. Written Instrument or Memorandum

Either personal preparation or knowledge that facts true. — In order to testify positively from paper itself, the witness must either have made the paper personally, or, at some time when facts were fresh in the witness's memory, the witness must have known the facts stated in the paper to be correct. Bradshaw v. State, 162 Ga. App. 750, 293 S.E.2d 360 (1982) (decided under former O.C.G.A. § 24-9-69).

After a defendant was charged with DUI, the trial court did not err in allowing one of the police witnesses to refresh the witness's recollection from a written document without any showing that the witness had prepared the document personally; so long as a witness is testifying from personal recollection, the witness is entitled to have the witness's memory refreshed by a document which the witness personally did not prepare. Ussery v. State, 195 Ga. App. 394, 393 S.E.2d 522 (1990) (decided under former O.C.G.A. § 24-9-69).

Paper itself as evidence. — When a witness testifies from the witness's recollection refreshed as provided by statute, the paper itself, where not otherwise binding upon the party against whom the witness testifies, is without probative value and is not admissible as documentary evidence for any purpose. Stansall v. Columbian Nat'l Life Ins. Co., 32 Ga. App. 87, 122 S.E. 733, cert. denied, 32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5873).

Excluding such memoranda as are admissible as business records or as part of the res gestae, it is generally held that the memorandum has no present evidentiary value, since it is not the memorandum that is the evidence, but the recollection of the witness. An exception is when the opposite side wished to introduce the memorandum in order to weaken the effect of the testimony. Woodward v. City Council, 117 Ga. App. 857, 162 S.E.2d 304 (1968) (decided under former Code 1933, § 38-1707); State Hwy. Dep't v. Godfrey, 118 Ga. App. 560, 164 S.E.2d 340 (1968) (decided under former Code 1933, § 38-1707); Mason v. State, 147 Ga. App. 179, 248 S.E.2d 302 (1978) (decided under former Code 1933, § 38-1707).

Memorandum prepared by another. — If the writing, instrument, document, or other thing from which the witness refreshes the witness's recollection was made in the witness's presence or at the witness's direction and if the witness

Recorded Recollections (Cont'd)
2. Written Instrument or Memorandum (Cont'd)

knows that it contains true and correct information and is willing to swear positively to that effect, it is immaterial that the witness did not personally make the thing from which the witness testified. Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639 (1959), for comment, see 22 Ga. B.J. 380 (1960). (decided under former Code 1933, § 38-1707).

Although a witness may refresh the witness's memory from a writing prepared by another, the witness must nevertheless testify from the witness's memory thus refreshed. When the document is prepared by a third person not in the presence of a witness, the memory is not refreshed by such memorandum and such testimony is inadmissible. Zilinmon v. State, 234 Ga. 535, 216 S.E.2d 830 (1975), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006) (decided under former Code 1933, § 38-1707).

In view of a prosecution witness's averment that the witness was testifying from the witness's refreshed memory, the trial court did not err in permitting the witness to testify to the tag number on defendant's truck, even though the witness refreshed the witness's memory by viewing a computer printout bearing the tag number; since the witness was entitled to have the witness's memory refreshed by a document which the witness personally did not prepare. Byrd v. State, 182 Ga. App. 284, 355 S.E.2d 666 (1987) (decided under former O.C.G.A. § 24-9-69).

Trial court correctly allowed a testifying police officer to refresh the officer's memory of the incident using a report written by someone else; former O.C.G.A. § 24-9-69, permitted a witness to refresh and assist the witness's memory by the use of any written instrument or memorandum. Penland v. State, 258 Ga. App. 659, 574 S.E.2d 880 (2002) (decided under former O.C.G.A. § 24-9-69).

Witness at some time must have had personal knowledge of the memorandum's correctness. Davis v. State, 91 Ga. 167, 17 S.E. 292 (1893) (decided under former Code 1882, § 3866); Hematite Mining Co. v. East Tenn., Va. & Ga. Ry., 92 Ga. 268, 18 S.E. 24 (1893) (decided under former Code 1882, § 3866); Jones v. State, 99 Ga. 46, 25 S.E. 617 (1896) (decided under former Penal Code 1895, § 1020); Lenney v. Finley, 118 Ga. 427, 45 S.E. 317 (1903) (decided under former Civil Code 1895, § 5284); Shrouder v. State, 121 Ga. 615, 49 S.E. 702 (1905) (decided under former Penal Code 1895, § 1020); Smith v. City of Atlanta, 22 Ga. App. 511, 96 S.E. 334 (1918) (decided under former Civil Code 1910, § 5873); Stansall v. Columbian Nat'l Life Ins. Co., 32 Ga. App. 87, 122 S.E. 733, cert. denied, 32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5873); Herring v. State, 122 Ga. App. 730, 178 S.E.2d 551 (1970) (decided under former Code 1933, § 38-1707); Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971), cert. denied, 405 U.S. 1050, 92 S. Ct. 1511, 31 L. Ed. 2d 786 (1972) (decided under former Code 1933, § 38-1707); Moore v. State, 240 Ga. 807, 243 S.E.2d 1, cert. denied, 439 U.S. 903, 99 S. Ct. 268, 58 L. Ed. 2d 249 (1978) (decided under former Code 1933, § 38-1707).

Investigation reports prepared by witness. — In a proceeding to terminate the parental rights of a parent who had been convicted of molesting the parent's children, the trial court did not err in allowing a probation official to use a confidential presentence investigation report to refresh the official's recollection about interviews the official had with the parent. In re S.M.L., 228 Ga. App. 81, 491 S.E.2d 186 (1997) (decided under former O.C.G.A. § 24-9-69).

It was not improper for an officer to use a police report to refresh the officer's recollection about a prior driving under the influence incident involving the defendant. Becker v. State, 280 Ga. App. 97, 633 S.E.2d 436 (2006) (decided under former O.C.G.A. § 24-9-69).

Investigation reports prepared by another witness. — Investigating officer's report can be used to refresh another witness's recollection. Brown v. State, 247 Ga. App. 741, 545 S.E.2d 114 (2001) (decided under former O.C.G.A. § 24-9-69).

Statement as past recollection recorded. — Although it is preferable to

ask a witness specifically at trial whether the witness had told the truth as the witness then perceived it when the witness gave the witness's oral statement and whether a transcript thereof constituted an accurate recording in toto of what the witness had personally stated, since an adequate foundation was established, the transcribed statement may qualify as past recollection recorded under former O.C.G.A. § 24-9-69. Platt v. National Gen. Ins. Co., 205 Ga. App. 705, 423 S.E.2d 387, cert. denied, 205 Ga. App. 900, 423 S.E.2d 283 (1992) (decided under former O.C.G.A. § 24-9-69).

Statement was inadmissible as a past recollection recorded or under the medical diagnosis exception to the hearsay rule because after reviewing the typed statement, the social worker testified that the worker's memory was not refreshed and the worker was unwilling to swear that the statement accurately reflected the interview as required under former O.C.G.A. § 24-9-69. Sandlin v. State, 273 Ga. 440, 542 S.E.2d 496 (2001) (decided under former O.C.G.A. § 24-9-69).

Transcript allowed to go out with jury. — Transcript of statement by witness which was admissible as past recollection recorded should not have been allowed to go out with the jury during deliberation. Platt v. National Gen. Ins. Co., 205 Ga. App. 705, 423 S.E.2d 387, cert. denied, 205 Ga. App. 900, 423 S.E.2d 283 (1992) (decided under former O.C.G.A. § 24-9-69).

Cross-examination concerning contents. — Cross-examiner should and does possess the right to quiz the witness concerning the contents of the written instrument without introduction of the document. In doing so the witness is entitled to shed light on the relevant issues whether this be favorable or unfavorable to the client's cause. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860 (1972) (decided under former Code 1933, § 38-1707).

Examination of memorandum by opposing counsel. — Trial court does not err in refusing to allow defense counsel to examine all a police officer's notes in the officer's file, although defense counsel is allowed to cross-examine the officer with reference to the notes used to refresh the officer's recollection. Sprague v. State, 147 Ga. App. 347, 248 S.E.2d 711 (1978) (decided under former Code 1933, § 38-1707). See also Ellison v. Robinson, 96 Ga. App. 882, 101 S.E.2d 902 (1958) (decided under former Code 1933, § 38-1707).

Use of codefendant's testimony prohibited. — Witness may not refresh witness's memory from testimony given at the trial of another defendant under the same indictment. Brown v. State, 28 Ga. 199 (1859) (decided under former law).

3. Illustrations

Recollection refreshed. — Testimony was admissible in the following cases, when a witness's recollection was refreshed by a memorandum: Veal v. Wood, 29 Ga. App. 94, 113 S.E. 818 (1922) (decided under former Civil Code 1910, § 5873); Lazar v. Black & White Cab Co., 50 Ga. App. 567, 179 S.E. 250 (1935) (decided under former Code 1933, § 38-1707).

Since the doctor was present when the plaintiff was brought into the hospital immediately after plaintiff's injury, was present when X-ray pictures were taken and developed, examined the x-rays immediately thereafter and ascertained therefrom that the nature of the plaintiff's injury was such that it was necessary to refer the plaintiff to an orthopedic surgeon, the refusal of the court to allow the witness to refresh the witness's memory under the circumstances shown was probably harmful error and required a reversal of the case. Smith v. Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639 (1959), for comment, see 22 Ga. B. J. 380 (1960) (decided under former Code 1933, § 38-1707).

Trial court did not improperly allow a prosecutor to refresh a victim's recollection with a letter the victim wrote to the district attorney's office expressing fear of the defendant as: (1) the defense counsel asked to see the letter before the prosecutor handed the letter to the victim; (2) the prosecutor granted that request; (3) after previewing the letter, the defense counsel did not object to the victim using the letter to refresh the victim's memory; and (4) the

Recorded Recollections (Cont'd)
3. Illustrations (Cont'd)

letter was neither admitted into evidence nor read to the jury. Haggins v. State, 277 Ga. App. 742, 627 S.E.2d 448 (2006) (decided under former O.C.G.A. § 24-9-69).

Detective's use of a photograph to refresh that detective's recollection as to which of the codefendants was the defendant on trial went to the weight of the detective's testimony, but did not require that the identification of the defendant on trial be excluded due to a substantial likelihood of irreparable misidentification. Ford v. State, 285 Ga. App. 106, 645 S.E.2d 590 (2007) (decided under former O.C.G.A. § 24-9-69).

Trial court did not err in allowing an attorney to read a letter memorializing a conversation between the attorney and a decedent because a proper foundation was laid for the attorney to read the letter to the jury as a past recollection recorded when the attorney testified that the attorney personally prepared the letter and that the conversation concerning the scope of a receipt that was recounted in the letter occurred no more than three days before the letter was prepared; although the attorney could not presently recall being told by the decedent that the release from indebtedness contained in the receipt was intended to be limited in scope, the attorney testified that based on the wording of the letter the attorney believed that such a conversation with the decedent and the executor's two siblings had taken place, and that testimony established that the attorney memorialized the conversation in the letter when it was fresh in the attorney's mind and that the attorney believed that the letter was true and accurate when written. Jerkins v. Jerkins, 300 Ga. App. 703, 686 S.E.2d 324 (2009) (decided under former O.C.G.A. § 24-9-69).

Swearing positively from paper. — Testimony was admissible in the following cases when witness swore positively from the paper that the facts contained therein were correct: Williams v. C. & G.H. Kelsey & Halsted, 6 Ga. 365 (1849) (decided under former law); Black v. Thornton, 30 Ga. 361 (1860) (decided under former law); Schmidt v. Wambacker & Weil, 62 Ga. 321 (1879) (decided under former Code 1873, § 3866); Scott v. Gidelight Mfg. Co., 37 Ga. App. 240, 139 S.E. 686 (1927) (decided under former Civil Code 1910, § 5873); Clackum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936) (decided under former Code 1933, § 38-1707); Elliott v. Georgia Power Co., 58 Ga. App. 151, 197 S.E. 914 (1938) (decided under former Code 1933, § 38-1707); Brown-Rogers-Dixon Co. v. Southern Ry., 79 Ga. App. 449, 53 S.E.2d 702 (1949) (decided under former Code 1933, § 38-1707); Haskins v. Carson, 115 Ga. App. 336, 154 S.E.2d 626 (1967) (decided under former Code 1933, § 38-1707).

Before a witness may swear positively from a paper it is not necessary that the witness show a present recollection of the contents of the document. Mincey v. State, 257 Ga. 500, 360 S.E.2d 578 (1987) (decided under former O.C.G.A. § 24-9-69).

Reading from paper for rebuttal purposes. — Trial court properly permitted an arresting officer to read that portion of the form containing the Miranda warnings which the witness had administered to the defendant for the sole purpose of rebutting the defendant's contention that the defendant had not been advised of the defendant's Miranda rights. Adams v. State, 260 Ga. 298, 392 S.E.2d 866 (1990) (decided under former O.C.G.A. § 24-9-69).

Inadequate basis for use of memorandum. — Witness could not, over objection, testify to the contents of a typewritten signed memorandum which purported to be a statement of the witness's account with the plaintiff when on cross-examination the witness admitted that the witness did not prepare the memorandum, that the witness did not know who did, that the witness received the memorandum through the mail, but the witness did not recall even the return address on the envelope, that the memorandum was not signed, and that the witness had no independent knowledge of the memorandum's contents or that the items had in fact been charged back to the witness's account. Stalvey v. Varn Motors & Fin. Co., 56 Ga. App. 696, 193 S.E. 627 (1937) (decided under former Code 1933, § 38-1707).

No refreshment absent personal knowledge. — Trial court did not err by refusing to allow one of the prosecution witnesses (a police officer) to refresh the officer's recollection from a police report prepared by another officer since the officer testified that the officer had no such personal knowledge. Sweat v. State, 203 Ga. App. 290, 416 S.E.2d 845 (1992) (decided under former O.C.G.A. § 24-9-69).

Refusal to refresh recollection appropriate. — Refusal to allow the defendant to use an officer's report to refresh a witness's recollection was harmless error since the defendant's goal was to use the witness's refreshed recollection to impeach the witness in an impermissible manner — with a document created by one other than the witness and which the witness had not signed. Woods v. State, 269 Ga. 60, 495 S.E.2d 282 (1998) (decided under former O.C.G.A. § 24-9-69).

Pursuant to former O.C.G.A. § 24-9-69, a witness was allowed to refresh and assist the witness's memory by the use of any written instrument or memorandum; trial counsel's failure to object to the refreshing of a witness's recollection was not ineffective assistance of counsel. Usher v. State, 258 Ga. App. 459, 574 S.E.2d 580 (2002) (decided under former O.C.G.A. § 24-9-69).

Refreshing police officer's recollection on be on the lookout bulletin. — Trial court's refusal in a suppression hearing to allow a police officer to refresh the officer's recollection about the contents of a be on the lookout police dispatch was harmless error because, given the other evidence that was presented, it did not contribute either to the court's decision on the suppression motion or to the court's adjudication of a juvenile as delinquent. In re H.A., 308 Ga. App. 111, 706 S.E.2d 615 (2011) (decided under former O.C.G.A. § 24-9-69).

Failure to object to reading of transcript from preliminary hearing did not constitute ineffective assistance of counsel. — As counsel allowed a detective to read from a transcript of the defendant's preliminary hearing so that counsel could cross-examine the detective about a "blank" in the transcript and thus imply that it did not reflect the defendant's entire statement, counsel's strategic decision not to object to the reading of the transcript under former O.C.G.A. § 24-9-69 did not constitute ineffective assistance. Nesbitt v. State, 296 Ga. App. 139, 673 S.E.2d 652 (2009) (decided under former O.C.G.A. § 24-9-69).

Public Records and Reports

Federal interpretation on utilization of certified document to prove absence of public records. — The Eleventh Circuit held that a certified document is admissible under Fed. R. Evid. 803(10) to prove the absence of public records. United States v. Herrera-Britto, 739 F.2d 551 (11th Cir. 1984).

Admission of laboratory findings. — Since Ga. L. 1953, Jan.-Feb. Sess., p. 602, § 19 did not change the rules of competency or relevancy, and since the most that laboratory evidence procured under the statute could tend to prove was the analysis of the particular blood sample tested, it was necessary for the admissibility of this evidence to lay a proper foundation by showing the identity of the blood sample tested with the decedent and the chain of custody to render the report admissible as relevant evidence. Interstate Life & Accident Ins. Co. v. Whitlock, 112 Ga. App. 212, 144 S.E.2d 532 (1965) (decided under former Ga. L. 1953, Jan.-Feb. Sess., p. 602, § 19).

It was not error to exclude portion of death certificate containing coroner's findings and to refuse to admit into evidence the coroner's jury verdict in action on insurance policy itself or for purpose of negating insurer's bad faith. Security Life Ins. Co. v. Blitch, 155 Ga. App. 167, 270 S.E.2d 349 (1980) (decided under former Ga. L. 1953, Jan.-Feb. Sess., p. 602, § 19).

Court of Appeals may not take judicial notice of rules and regulations of Public Service Commission. Atlanta Gas Light Co. v. Newman, 88 Ga. App. 252, 76 S.E.2d 536 (1953) (decided under former Code 1933, § 93-504).

Interest in Property

1. In General

Affidavit is a special pleading to be employed solely as a basis for raising and

Interest in Property (Cont'd)
1. In General (Cont'd)

trying an issue as to the genuineness of a recorded deed. Haithcock v. Sargent, 145 Ga. 84, 88 S.E. 550 (1916) (decided under former Civil Code 1910, § 4210).

Former statute was intended to qualify the ordinary effect of registry, leaving the genuineness of the deed to be proved as with respect to other papers not required by law to be registered. Hanks v. Phillips, 39 Ga. 550 (1869) (decided under former Code 1868, § 2670).

Effect of the former statute was to make registration the equivalent of proof in the absence of an attack for forgery. McArthur v. Morrison, 107 Ga. 796, 34 S.E. 205 (1899) (decided under former Civil Code 1895, § 3628).

For former statute to apply, deed must have been recorded in county in which land laid; it was not sufficient if the deed had been recorded in an adjoining county in which other land embraced in the deed laid. Kennedy v. Harden, 92 Ga. 230, 18 S.E. 542 (1893) (decided under former Code 1882, § 2712).

Evidence as to what specific persons said about marker is hearsay. — When the evidence offered is not as to the general reputation of a boundary pin or as to the witness's knowledge of the pin, but is what specific persons said about a specific pin, it is clear that such testimony, being hearsay and inadmissible, is properly ruled out. Collier v. Stokes, 213 Ga. 464, 99 S.E.2d 821 (1957) (decided under former Code 1933, § 85-1602).

2. Applicability to Instruments and Issues

Former statute had no application to an unregistered deed. Payne v. Ormond, 44 Ga. 514 (1871) (decided under former Code 1868, § 2670); Gorham v. Montfort, 137 Ga. 134, 72 S.E. 893 (1911) (decided under former Civil Code 1910, § 4210).

Former statute applied to any registered deed though more than 30 years old. Hill v. Nisbet, 58 Ga. 586 (1877) (decided under former Code 1873, § 2712); Patterson v. Collier, 75 Ga. 419, 54 Am. R. 472 (1885) (decided under former Code 1882, § 2712); Leverett v. Tift, 6 Ga. App. 90, 64 S.E. 317 (1909) (decided under former Civil Code 1895, § 3628).

Copy of a deed when admissible as proof may also be attacked for forgery. Patterson v. Collier, 75 Ga. 419, 54 Am. R. 472 (1885) (decided under former Code 1882, § 2712).

Copy of deed not properly recorded is not admissible into evidence. Thus, the question of forgery is immaterial. Kennedy v. Harden, 92 Ga. 230, 18 S.E. 542 (1893) (decided under former Code 1882, § 2712); Crummey & Hamilton v. Bentley, 114 Ga. 746, 40 S.E. 765 (1902) (decided under former Civil Code 1895, § 3628).

Only issue permissible under the former statute is that of forgery vel non. Roberts v. Roberts, 101 Ga. 765, 29 S.E. 271 (1897) (decided under former Civil Code 1895, § 3628).

Former statute, being a special statutory proceeding designed to answer the one purpose of calling in question and trying the one issue as to the execution of the deed, there is no authority of law for drawing into the trial of that issue questions foreign to the fact of execution, and which tend only to raise an estoppel against the alleged grantor. Richards v. Smith, 170 Ga. 398, 153 S.E. 44 (1930) (decided under former Civil Code 1910, § 4210).

Former statute applies only when recorded deed was collaterally introduced in evidence, and did not refer to instruments forming the basis of the action. Steiner v. Blair, 38 Ga. App. 753, 145 S.E. 471 (1928) (decided under former Civil Code 1910, § 4210).

3. Admissibility of Recorded Instrument

Recorded deed admissible without further proof of execution. — Deed attested by three witnesses, one of whom was an officer authorized by law to attest deeds, and recorded was admissible in evidence without further proof of the deed's execution, and all presumptions were in favor of the deed's genuineness. Guthrie v. Gaskins, 171 Ga. 303, 155 S.E. 185 (1930) (decided under former Civil Code 1910, § 4210).

When the deed to the plaintiff, on which

the plaintiff claimed title to the property in dispute, recited a valuable consideration and had been duly recorded, and no affidavit of forgery had been filed as required by the former statute, the court did not err in admitting the deed in evidence over the objection that there was no proof of the deed's execution. Page v. Brown, 192 Ga. 398, 15 S.E.2d 506 (1941) (decided under former Code 1933, § 29-415).

In a dispossessory action brought by a mortgage company against a possessor, the trial court properly granted the mortgage company a writ of possession as the company produced a recorded certified copy of the security deed, which the possessor failed to prove was a fraud since the possessor's signature on the deed matched that as appeared on the answer filed. The trial court properly rejected the possessor's attempt to examine the mortgage company's counsel regarding the authenticity of the deed since counsel represented the mortgage company and was, therefore, not competent to testify. Egana v. HSBC Mortg. Corp., 294 Ga. App. 456, 669 S.E.2d 159 (2008) (decided under former O.C.G.A. § 44-2-23).

Effect of deed question of law. — Generally, a registered deed is entitled to be admitted in evidence, and the effect of such a deed is a question of law for the court. Miles v. Blanton, 211 Ga. 754, 88 S.E.2d 273 (1955) (decided under former Code 1933, § 29-415).

Recorded bill of sale admissible without proof of execution. — In the absence of an attack on a properly witnessed and recorded bill of sale, placing upon a party the burden of proving the bill of sale's execution, it was not error to admit the bill of sale without proof of the bill of sale's execution. Watkins v. Muse, 78 Ga. App. 17, 50 S.E.2d 90 (1948) (decided under former Code 1933, § 29-415).

Bill of sale for an automobile was not inadmissible because it was not recorded prior to bringing this suit. Recordation has no effect on title to personalty, which is acquired by the grantee in the bill of sale upon the execution and delivery of the instrument by the grantor. Recording an absolute bill of sale to personalty has only the effect of making the instrument admissible in evidence without further proof of the bill of sale's execution. Jones v. Liberty Mut. Fire Ins. Co., 90 Ga. App. 667, 83 S.E.2d 837 (1954) (decided under former Code 1933, § 29-415).

Certified copy has same effect as original recorded instrument. — Certified copy must be considered the same instrument as the original recorded retention title contract so that the admissibility of one necessarily controls the admissibility of its twin, providing, of course, that some reason appears why it should be necessary to introduce both. Dawson v. General Disct. Corp., 82 Ga. App. 29, 60 S.E.2d 653 (1950) (decided under former Code 1933, § 29-415).

4. Procedure as to Proof of Genuineness

Presumption that alteration made at or before deed's execution. — Presumption is that any alteration was made at or before the time of the execution of the deed and, in the absence of an affidavit of forgery, the registered deed is admitted in evidence without an explanation of the alteration. Collins v. Boring, 96 Ga. 360, 23 S.E. 401 (1895) (decided under former Code 1882, § 2712); McConnell Bros. v. Slappey, 134 Ga. 95, 67 S.E. 440 (1910) (decided under former Civil Code 1895, § 3628). Gilmer v. Harrison, 146 Ga. 721, 92 S.E. 67 (1917) (decided under former Civil Code 1910, § 4210).

Presumption was sufficiently strong to admit a deed in evidence over objection that the deed had been altered since the deed's execution. Buck v. Kitchens, 155 Ga. 721, 118 S.E. 51 (1923) (decided under former Civil Code 1910, § 4210).

Burden of proof when affidavit of forgery filed. — Filing of the affidavit placed upon the party introducing the deed the burden of showing affirmatively what the law in case of a registered deed presumed in the party's favor: that it was in fact executed and delivered in accordance with what purported to be the facts as stated therein. Holland v. Carter, 79 Ga. 139, 3 S.E. 690 (1887) (decided under former Code 1882, § 2712); Collins v. Boring, 96 Ga. 360, 23 S.E. 401 (1895) (decided under former Code 1882, § 2712);

Interest in Property (Cont'd)
4. Procedure as to Proof of Genuineness (Cont'd)

Bentley v. McCall, 119 Ga. 530, 46 S.E. 645 (1904) (decided under former Civil Code 1895, § 3628); Sapp v. Cline, 131 Ga. 433, 62 S.E. 529 (1908) (decided under former Civil Code 1895, § 3628); Strickland v. Babcock Lumber Co., 142 Ga. 120, 82 S.E. 531 (1914) (decided under former Civil Code 1910, § 4210); James v. Steele, 147 Ga. 598, 95 S.E. 11 (1918) (decided under former Civil Code 1910, § 4210).

When the burden is upon the plaintiff to establish the genuineness of a deed, it will not suffice, after having shown the death of the two attesting witnesses to the deed, to prove the genuineness of the signature of the attesting witnesses, but, in order to carry the burden, one should go further and introduce primary evidence, that is, proof of the actual signing by the alleged maker of the deed, or of the genuineness of the maker's signature affixed thereto, or that such evidence is not attainable. Strickland v. Babcock Lumber Co., 142 Ga. 120, 82 S.E. 531 (1914) (decided under former Civil Code 1910, § 4210).

Filing an affidavit of forgery changes the burden of proof as to registered deeds, whereas primarily the party offering a deed has the burden of proving the deed's execution, the party may, in the absence of the affidavit, shift this burden by showing its regular registration, thereby making such a prima-facie case of genuineness that throughout the trial the deed is to be given the probative weight to which a genuine deed is entitled, unless further proof overcomes this presumption prima-facie raised in its favor. McCall v. Asbury, 190 Ga. 493, 9 S.E.2d 765 (1940) (decided under former Code 1933, § 29-415).

Proof of signing and signature may be done by circumstantial evidence. Bentley v. McCall, 119 Ga. 530, 46 S.E. 645 (1904) (decided under former Civil Code 1895, § 3628).

When no affidavit filed, burden of disputing genuineness upon party against whom deed admitted. — When no affidavit was filed, the burden was upon the party against whom the deed was admitted to disprove the deed's genuineness. Leverett v. Tift, 6 Ga. App. 90, 64 S.E. 317 (1909) (decided under former Civil Code 1895, § 3628); Haithcock v. Sargent, 145 Ga. 84, 88 S.E. 550 (1916) (decided under former Civil Code 1910, § 4210); Jett v. Hart, 152 Ga. 266, 109 S.E. 654 (1921) (decided under former Civil Code 1910, § 4210).

If a deed was duly recorded and no affidavit of forgery was filed, the burden of disputing the deed's genuineness rested upon the party against whom the deed had been admitted, though, in the ultimate sense, the burden of establishing the execution of the deed was upon the party offering the deed, throughout all the exigencies of the trial. McCall v. Asbury, 190 Ga. 493, 9 S.E.2d 765 (1940) (decided under former Code 1933, § 29-415).

Sufficiency of affidavit of forgery. — Affidavit must be made either by alleged maker of deed, the maker's heirs, or opposite party in the case. Kelly v. William Sharp Saddlery Co., 99 Ga. 393, 27 S.E. 741 (1896) (decided under former Civil Code 1895, § 3628).

Deed, when offered, may be attacked by an affidavit of forgery by the opposite party, whether the plaintiff or the defendant, and even by one who is not a party to the cause if one is the maker of the deed or an heir of the maker of the deed. Steiner v. Blair, 38 Ga. App. 753, 145 S.E. 471 (1928) (decided under former Civil Code 1910, § 4210).

In order to cast on the applicant for registration under the Land Registration Law (see § 44-2-40 et seq.) the burden of proving the genuineness of a deed shown in the preliminary report of the examiner, an affidavit of forgery must be filed, and written objections, though verified, which aver that certain deeds are forgeries, do not amount to an affidavit of forgery. McCall v. Asbury, 190 Ga. 493, 9 S.E.2d 765 (1940) (decided under former Code 1933, § 29-415).

No issue of genuineness when affidavit's purpose to show party induced to sign instrument. — When the alleged maker of a deed which is the basis of an action against the maker files an affidavit that the deed is a forgery, it is the

duty of the court to arrest the case and require an issue to be made and tried as to the genuineness of the alleged instrument. The court does not err in refusing to require such an issue to be made and in allowing the instrument to be admitted in evidence when the defendant admits the genuineness of the defendant's signature, and when it appears, from the defendant's testimony, that the purpose of the affidavit is not to enable the defendant to prove a material and fraudulent alteration of the instrument, subsequent to the instrument's execution, by the party claiming a benefit thereunder, but is merely to show that the defendant was induced to sign the instrument without reading the instrument, relying upon the good faith of the opposite party to incorporate therein the terms of the agreement previously arrived at. Ford v. Serenado Mfg. Co., 27 Ga. App. 535, 109 S.E. 415 (1921) (decided under former Civil Code 1910, § 4210); Odum v. Cotton States Fertilizer Co., 38 Ga. App. 46, 142 S.E. 470 (1928) (decided under former Civil Code 1910, § 4210).

Evidence admissible to show deed forged. — Affidavit of forgery was to be filed when the execution of a deed was denied, was in effect only a special pleading by which the factum of a deed may be determined in a special proceeding. Except for casting the burden of establishing the genuineness of the deed upon the party tendering the deed, the special plea was in effect no more than any other defense, for even though no affidavit of forgery was filed, if the defendant in the defendant's plea denied the execution of the deed, evidence was nevertheless admissible which tended to show that the deed is forged and fraudulent. United States v. 550.6 Acres of Land, 68 F. Supp. 151 (N.D. Ga. 1945), aff'd sub nom. Shropshire v. Hicks, 157 F.2d 767 (5th Cir. 1946) (decided under former Code 1933, § 29-415).

Notwithstanding that the deed had been recorded, the plaintiff was not required to file an affidavit of forgery, but could assail the deed's genuineness by allegation, thereby assuming the burden of disproving the deed's genuineness. Stow v. Hargrove, 203 Ga. 735, 48 S.E.2d 454 (1948) (decided under former Code 1933, § 29-415).

Possession of premises under forged deed. — It is possible to enter into possession of premises in good faith under forged deed, but the circumstances attendant upon the execution of the forgery are admissible in evidence as throwing light upon the bona fides of entry. Thorpe v. Atwood, 100 Ga. 597, 28 S.E. 287 (1897) (decided under former Civil Code 1895, § 3628).

Right to new trial. — Upon decision of forgery issue against the plaintiff, plaintiff has right to move for new trial. Vance v. Gamble, 95 Ga. 730, 22 S.E. 576 (1895) (decided under former Code 1882, § 2712).

5. Illustrative Cases

Reversible error not found in admission of deed. — In an action for trespass to land, it was not reversible error to admit in evidence a deed conveying to the defendant all of a certain land lot, when the entire controversy was with regard to only a portion of that lot, and the prevailing party relied for that party's claim to this portion of the lot not on this deed, but to other paper title and independent adverse possession. Anderson v. Black, 191 Ga. 627, 13 S.E.2d 650 (1941) (decided under former Code 1933, § 29-415).

Fraudulent deed was facially regular and operated to release security interest. — A 2003 warranty deed that operated to release a prior lender's security interest in the property was not a forgery but was signed by someone fraudulently assuming the authority of an officer of the prior lender and was regular on the deed's face. Therefore, a subsequent lender that foreclosed on the property and purchased the property at the foreclosure sale was a bona fide purchaser for value entitled to take the property free of the prior lender's security interest. Deutsche Bank Nat'l Trust Co. v. JP Morgan Chase Bank, N.A., 307 Ga. App. 307, 704 S.E.2d 823 (2010) (decided under former O.C.G.A. § 44-2-23).

Proof held sufficient to establish forgery. — Proof that a deed purporting to have been executed in 1835 was not recorded until 1883, when the subscribing witnesses were dead and shortly before

Interest in Property (Cont'd)
5. Illustrative Cases (Cont'd)

the action for the land was brought, and also that the alleged grantor could not, in fact, write the grantor's name, and signed interrogatories with the grantor's mark, denying the signature of the deed, while the deed purported to be signed in writing, was held sufficient to establish forgery. Walker v. Logan, 75 Ga. 759 (1885) (decided under former Code 1882, § 2712).

When the plaintiff, in an equitable proceeding seeking to enjoin the defendant from evicting the plaintiff from the premises, allege that the plaintiff was not a tenant of the defendant but was the owner of the premises, and that if the defendant claimed to have a deed to the premises, the deed was either a forgery or was fraudulently obtained, and the defendant in the defendant's answer claimed that the plaintiff was a tenant and that the defendant owned the title by virtue of the deed from the plaintiff, and the plaintiff testified that the plaintiff never executed a deed conveying the land to the defendant, this was sufficient (even though the recorded deed was introduced in evidence, and even though the subscribing witnesses testified as to its genuineness) to support a verdict and decree in favor of the plaintiff permanently enjoining the defendant from evicting the plaintiff from the premises involved. Hightower v. Phillips, 184 Ga. 532, 192 S.E. 26 (1937) (decided under former Code 1933, § 29-415).

6. Mortgages

Seal not necessary. — When the execution of a deed or mortgage has been admitted or proved, it is not a ground to exclude the deed or mortgage from evidence that the deed or mortgage is not under seal. Vizard v. Moody, 119 Ga. 918, 47 S.E. 348 (1904) (decided under former Civil Code 1895, § 2782).

Certified copy. — An original retention title contract, which was recorded, and a certified copy of this original must for purposes of admissibility, be considered as one and the same instrument, so that the admissibility of one necessarily controls the admissibility of its twin, providing, of course, that some reason appears why it should be necessary to introduce both. Dawson v. General Disct. Corp., 82 Ga. App. 29, 60 S.E.2d 653 (1950) (decided under former Code 1933, § 67-110).

Record in another state. — Recording of a mortgage in the proper office in another state does not make a certified copy of it admissible in evidence, or dispense with proof of the execution of the original. Baskin v. Vernon, 74 Ga. 370 (1884) (decided under former Code 1882, § 1954); Pepper v. James, 7 Ga. App. 518, 67 S.E. 218 (1910), later appeal, 10 Ga. App. 266, 73 S.E. 407 (1912) (decided under former Civil Code 1895, § 2782).

Record in another county. — Evidence that a mortgage on personal property was filed for record and recorded in Elbert County was not sufficient to dispense with proof of the execution of the mortgage when it appeared without contradiction that the mortgagor resided in Wilkes County. Williams v. State, 13 Ga. App. 338, 79 S.E. 207 (1913) (decided under former Code 1910, § 3261).

Bill of sale. — When recorded, a bill of sale is admissible in evidence under the same rules as govern the admission of registered mortgages. Anderson & Conley v. Leverette, 116 Ga. 732, 42 S.E. 1026 (1902) (decided under former Civil Code 1895, § 2782).

Ancient Documents

Proof without compliance. — An instrument may be properly admitted as having been sufficiently proved pursuant to former Code 1933, § 38-707 (see now O.C.G.A. § 24-9-903), irrespective of whether or not there was a sufficient compliance with former Code 1933, § 38-312. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937) (decided under former Code 1933, § 38-312).

Copy not admissible. — Copy was not admissible as an ancient document; the paper itself must be introduced. Jones v. Morgan, 13 Ga. 515 (1853) (decided under former law); Bryan v. Walton, 14 Ga. 185 (1853) (decided under former law).

Comparison of handwriting. — Deed proven to be 30 years of age, purporting to be signed by the alleged grantor

and under which the grantor surrendered possession to the person purporting to be the grantee who by the grantee and the grantee's privies in estate remained in possession, was so far proven to be the genuine deed of the alleged grantor, and so far established the genuineness of the grantor's signature thereto, as to authorize the deed's admission in evidence, for the purpose of a comparison of handwriting, upon the trial of a cause involving the question of the genuineness of the signature of such grantor to another instrument. Goza v. Browning, 96 Ga. 421, 23 S.E. 842 (1895) (decided under former Civil Code 1895, § 5184).

Bond for title to land, if 30 years old, accompanied with proof of possession under the bond, was held to be admissible in evidence. Beverly v. Burke, 9 Ga. 440, 54 Am. Dec. 351 (1851) (decided under former law).

Marriage contract was held to be admissible in evidence as an ancient document. Adams v. Dickson, 23 Ga. 406 (1857) (decided under former law).

Muniments of title proven to have been in existence for 40 years, with possession in conformity, and coming from the proper custody, were admissible as ancient documents. Bell v. McCawley, 29 Ga. 355 (1859) (decided under former law).

Will more than 50 years old, proven and recorded in the proper office, is admissible as an ancient paper or document, notwithstanding that probate is defective; provided, possession has been held of the property under and by virtue of that will. Jordan v. Cameron, 12 Ga. 267 (1852) (decided under former law).

Plat that does not show it was purportedly made by authority since it was shown to have been made before the city charter was ever issued does not meet the requirements of law, and could not be used in evidence without other testimony or evidence. Central of Ga. Ry. v. City of Metter, 222 Ga. 74, 148 S.E.2d 661 (1966) (decided under former Code 1933, § 38-312).

Ancient Boundaries and Landmarks

Metes and bounds description prevails over description as numbered lot. — If a deed describes land as being parts of certain numbered lots, and also contains a description of the tract of land by metes and bounds, calling for natural, visible, and ascertained objects and monuments, and such description by such metes and bounds includes a part of a lot not designated by number, such metes and bounds must govern. McCann v. Miller, 177 Ga. App. 53, 338 S.E.2d 509 (1985) (decided under former O.C.G.A. § 24-3-13).

Deed with overly vague description does not validly convey title. — Deed wherein the description of the property sought to be conveyed is so vague and indefinite as to afford no means of identifying any particular tract of land is inoperative either as a conveyance of title or as color of title. McCann v. Miller, 177 Ga. App. 53, 338 S.E.2d 509 (1985) (decided under former O.C.G.A. § 24-3-13).

Reputation as evidence. — An ancient boundary, corner, or station tree cannot, generally, be proved otherwise than by reputation; consequently, hearsay evidence is admissible for this purpose, from the necessity of the case. It is not the best testimony, however, to prove the identity of a lot of land, there being higher evidence of that fact in the power of the party. Martin v. Atkinson, 7 Ga. 228, 50 Am. Dec. 403 (1849) (decided under former law). See also Riley v. Griffin, 16 Ga. 141, 60 Am. Dec. 726 (1854) (decided under former law).

Present day reputation is not sufficient to establish a line or landmark. McAfee v. Newberry, 144 Ga. 473, 87 S.E. 392 (1915) (decided under former Civil Code 1910, § 5772); Patterson v. Baugh, 56 Ga. App. 660, 193 S.E. 364 (1937) (decided under former Code 1933, § 38-313).

Evidence sufficient to support plaintiff's boundaries. — In a boundary line dispute filed pursuant to O.C.G.A. § 23-3-61, the trial court properly entered judgment on a jury verdict in favor of the plaintiffs, two landowners, and against their neighbor, and then denied the neighbor a new trial, or alternatively a judgment notwithstanding the verdict as: (1) the boundary line indicated on a plat reflecting the locations of monuments on

Ancient Boundaries and Landmarks (Cont'd)

the parcel owned by two landowners complied with the monuments referenced in the original warranty deed; and (2) the neighbor agreed to a special verdict form allowing the jury to find that the plat submitted by the two landowners accurately and sufficiently showed the true boundary line. Dover v. Higgins, 287 Ga. App. 861, 652 S.E.2d 829 (2007), cert. denied, No. S08C0402, 2008 Ga. LEXIS 237 (Ga. 2008) (decided under former O.C.G.A. § 24-3-13).

Evidence of declarations of persons since deceased, relative to the location of a landmark, is admissible over an objection on the ground of hearsay. Deaton v. Swanson, 196 Ga. 833, 28 S.E.2d 126 (1943) (decided under former Code 1933, § 38-313); Phelps v. Huff, 214 Ga. App. 398, 448 S.E.2d 64 (1994) (decided under former O.C.G.A. § 24-3-13).

A witness's testimony to declarations made to the witness a number of years earlier by a now deceased predecessor in title regarding the disputed location of the line between the properties of the contesting parties is admissible as an exception to the hearsay rule. Gilman Paper Co. v. James, 235 Ga. 348, 219 S.E.2d 447 (1975) (decided under former Code 1933, § 38-313).

As evidence the owners of several parcels of land sought to introduce regarding an iron pin was not as to the general reputation of the pin but rather was what the original grantor (by then deceased) had said about that specific pin, the evidence was hearsay and was properly excluded from a quiet title trial. Gibson v. Rustin, 297 Ga. App. 169, 676 S.E.2d 799 (2009) (decided under former O.C.G.A. § 24-3-13).

Appraisals constitute opinions and are inadmissible as hearsay. — Appraisals of property by a deceased appraiser were not admissible in a wrongful foreclosure action since the appraisals represented the opinion of the appraiser and as such constituted hearsay. Dickens v. Calhoun First Nat'l Bank, 214 Ga. App. 490, 448 S.E.2d 237 (1994) (decided under former O.C.G.A. § 24-3-13).

That a smaller tract is located within a larger tract, if the boundaries of which larger tract are not located, cannot be shown by common reputation. McAfee v. Newberry, 144 Ga. 473, 87 S.E. 392 (1915) (decided under former Civil Code 1910, § 5772).

In locating land described in a deed it is competent to establish the land's boundaries by proof of traditional reputation in the neighborhood, derived from ancient sources or from the declarations of persons since deceased who had peculiar means of knowing what the reputation of the boundary was in an ancient day. McAfee v. Newberry, 144 Ga. 473, 87 S.E. 392 (1915) (decided under former Civil Code 1910, § 5772).

When land conveyed in a deed is described as a city lot "designated by stakes", extrinsic evidence may supply the location and shape of the particular tract of land. The test as to the sufficiency of the description in a deed is whether or not it discloses with sufficient certainty the intention of the grantor with respect to the quantity and location of the land therein described. Lankford v. Pope, 206 Ga. 430, 57 S.E.2d 538 (1950) (decided under former Code 1933, § 38-313).

Boundaries of political subdivisions. — When the location of the line between two counties was disputed, and the line between adjoining lands coincided with the county line, which was claimed by both sides to be a straight line, evidence was admissible to show that for a considerable distance south of the place where the line was in dispute owners of land in the two counties, whose lands were bounded by the county line, had built fences up to a certain line and recognized it as being the county line, and had so bounded their possessions for 20 years or more; and that the line run between the lands of the parties by processioners was a continuation of the line so recognized. Ivey v. Cowart, 124 Ga. 159, 52 S.E. 436, 110 Am. St. R. 160 (1905) (decided under former Civil Code 1895, § 5185).

As to the location of county lines and state lines and other boundaries, a witness is entitled to testify from what others have told the witness, from reputation in the community, and from hearsay. Green

v. State, 123 Ga. App. 286, 180 S.E.2d 564 (1971) (decided under former Code 1933, § 38-313).

Iron pipes, fence line, hedgerow, and acquiescence in boundary was sufficient evidence for court. — While no natural landmarks established the disputed boundary between property belonging to the parties, other evidence did, including iron pipes marking the corners of the property, a fence line, a hedgerow, and acquiescence in the boundary, and the failure in landowners' deed to reference the land lot where the disputed acreage was located did not determine the result; sufficient evidence supported the trial court's findings as to the location of the boundary line. Sledge v. Peach County, 276 Ga. App. 780, 624 S.E.2d 288 (2005) (decided under former O.C.G.A. § 24-3-13).

Venue. — Venue must be proved positively, and one of the methods of proving venue is by the testimony of witnesses as to their knowledge of a place, which the witnesses have learned from hearsay and from reputation. Green v. State, 123 Ga. App. 286, 180 S.E.2d 564 (1971) (decided under former Code 1933, § 38-313).

Instrument complying fully with provisions of the former statute proved itself. Matthews v. Castleberry, 43 Ga. 346 (1871) (decided under former Code 1868, § 2658).

Instrument must be right upon the instrument's face, or made so by proof, before the instrument's age alone will dispense with proof. Hill v. Nisbet, 58 Ga. 586 (1877) (decided under former Code 1873, § 2700); Ferrell v. Hurst, 68 Ga. 132 (1881) (decided under former Code 1873, § 2700).

There must be preliminary proof of deed coming from proper custody. Harrell v. Culpepper, 47 Ga. 635 (1873) (decided under former Code 1868, § 2658); Maddox v. Gray, 75 Ga. 452 (1885) (decided under former Code 1882, § 2700); Swicard v. Hooks, 85 Ga. 580, 11 S.E. 863 (1890) (decided under former Civil Code 1895, § 3610); Williamson v. Mosley, 110 Ga. 53, 35 S.E. 301 (1900) (decided under former Civil Code 1895, § 3610).

Rebuttal of preliminary proof by any competent evidence may be made. Albright v. Jones, 106 Ga. 302, 31 S.E. 761 (1898) (decided under former Civil Code 1895, § 3610).

Presumption of delivery rebutted when recording takes place after grantor's death. — Ordinarily the recording of a deed is prima facie evidence of delivery. This presumption is rebutted when the recording takes place after the death of the grantor as delivery must occur during the grantor's lifetime. Corley v. Parson, 236 Ga. 346, 223 S.E.2d 708 (1976) (decided under former Code 1933, § 29-112).

Jury to pass on genuineness. — When such deed as described in the former statute was apparently genuine, had come from the proper custody, and was shown not to be inconsistent with possession, or if other corroboration appeared, it should be admitted in evidence as prima facie established. But the jury had the right to finally pass on the deed's genuineness, after hearing all the testimony pro and con. Gaskins v. Guthrie, 162 Ga. 103, 132 S.E. 764 (1926) (decided under former Civil Code 1910, § 4190).

Jury may find from face of deed that it was a forgery, without resort to aliunde evidence. Pridgen v. Green, 80 Ga. 737, 7 S.E. 97 (1888) (decided under former Code 1882, § 2700); Daugharty v. Drawdy, 134 Ga. 650, 68 S.E. 472 (1910) (decided under former Civil Code 1895, § 3610).

Instrument may be properly admitted as having been sufficiently proved pursuant to former Code 1933, § 38-707 (see now O.C.G.A. § 24-9-903), irrespective of whether or not there was a sufficient compliance with the rule admitting ancient writings without proof. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937) (decided under former Code 1933, § 29-112).

Proof of Pedigree

1. In General

History generally. — Former statute did not arise from a legislative enactment, but from a codification of the general rule. Terry v. Brown, 142 Ga. 224, 82 S.E. 566 (1914) (decided under former Civil Code 1910, § 5764).

Proof of Pedigree (Cont'd)
1. In General (Cont'd)

Former statute was declaratory of the common law. Whigby v. Burnham, 135 Ga. 584, 69 S.E. 1114 (1911) (decided under former Civil Code 1910, § 5764).

Former statute provided one of the specified cases in which the general hearsay rule had been relaxed. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134 (1942) (decided under former Code 1933, § 38-303).

Rule as to proof of race-ancestry is not so strict as the rule as to proof of pedigree which confines evidence of reputation to general repute in the family. White v. Holderby, 192 F.2d 722 (5th Cir. 1951) (decided under former Code 1933, § 38-303).

Possession of land cannot be established by family repute. Luttrell v. Whitehead, 121 Ga. 699, 49 S.E. 691 (1905) (decided under former Civil Code 1895, § 5177).

2. Relationship

Relationship cannot be proved by reputation in community outside of family. Lamar v. Allen, 108 Ga. 158, 33 S.E. 958 (1899) (decided under former Civil Code 1895, § 5177).

Branches of same family. — When the question is whether any, or what, relationship exists between two supposed branches of the same family, it is sufficient to establish the connection of the deceased declarant with either branch in order to render such declaration admissible. Terry v. Brown, 142 Ga. 224, 82 S.E. 566 (1914) (decided under former Civil Code 1910, § 5764).

Next of kin. — It was competent for a caveatrix to support a contention that she was the next of kin of the decedent by proving declarations to that effect made by the latter while in life. Malone v. Adams, 113 Ga. 791, 39 S.E. 507, 84 Am. St. R. 259 (1901) (decided under former Civil Code 1895, § 5177).

Relationship to jurors. — In order for a new trial to be granted on the ground that the prosecutor was related to one of the jurors, it must be shown that the witness, testifying to such relationship, was testifying either from personal knowledge or from knowledge acquired by some means within the purview of the law. Davis v. State, 24 Ga. App. 776, 102 S.E. 378, cert. denied, 24 Ga. App. 816 (1920) (decided under former Civil Code 1910, § 5764); Davis v. State, 150 Ga. 19, 102 S.E. 445 (1920) (decided under former Civil Code 1910, § 5764).

Affidavits by relatives, showing relationship to challenged jurors, are properly admitted in support of motion for new trial. Harris v. State, 188 Ga. 745, 4 S.E.2d 651 (1939) (decided under former Code 1933, § 38-303).

Paternity of child. — When the paternity of a child is the issue involved, the declarations of the reputed father, since deceased, are admissible in evidence. The weight to be given the declarations is a matter for the jury. Estill v. Estill, 149 Ga. 384, 100 S.E. 365 (1919) (decided under former Civil Code 1910, § 5764).

Proof seeking indirectly to show that a child is illegitimate, by showing general reputation in the community that the father was a single man, was inadmissible. Gibson v. Mason, 31 Ga. App. 584, 121 S.E. 584 (1924) (decided under former Civil Code 1910, § 5764).

Evidence sufficient to prove relationship with deceased. — Husband of the plaintiff having testified that she was his wife and that she was the mother of the deceased child sufficiently proved the necessary relationship between the plaintiff and the deceased. Scoggins v. Hughes, 112 Ga. App. 777, 146 S.E.2d 134 (1965) (decided under former Code 1933, § 38-303).

3. Birth and Age

Births may be proved by general repute in the family. Luke v. Hill, 137 Ga. 159, 73 S.E. 345, 38 L.R.A. (n.s.) 559 (1911) (decided under former Civil Code 1910, § 5764); Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134 (1942) (decided under former Code 1933, § 38-303).

Witness may testify to the witness's age without first requiring the witness to show from what source the witness derived the witness's information, and when and where the witness was born. Central R.R. v. Coggin, 73 Ga. 689 (1884) (decided

under former Code 1882, § 3772); McCollum v. State, 119 Ga. 308, 46 S.E. 413, 100 Am. St. R. 171 (1904) (decided under former Civil Code 1895, § 5177).

Bible containing family record. — Bible containing a family record, in the handwriting of a deceased daughter, which remained in the possession of the mother until her death, and then went into the possession of daughters, from whom the witness got it, is competent evidence on the question of age of one of the children of that mother. Southern Life Ins. Co. v. Wilkinson, 53 Ga. 535 (1874) (decided under former Code 1873, § 3772).

4. Marriage

Proof of marriage. — Fact of marriage may be at least prima facie shown by proof of general repute in family, by proof of general reputation in the community, or by proof of the fact that the man or the woman, as the case may be, lives together with a person of the opposite sex as his or her spouse, with general recognition in the community of their being married to each other. Plummer v. State, 27 Ga. App. 185, 108 S.E. 128 (1921) (decided under former Civil Code 1910, § 5764). See also Drawdy v. Hesters, 130 Ga. 161, 60 S.E. 451 (1908) (decided under former Civil Code 1895, § 5177); Gibson v. Mason, 31 Ga. App. 584, 121 S.E. 584 (1924) (decided under former Civil Code 1910, § 5764).

Validity of marriage. — On an issue of validity of marriage, the declarations of the parties themselves that they were or were not married, made without view to litigation, are admissible evidence of the fact declared. But the declaration of such party as to a fact, evidentiary of the invalidity of the marriage, does not come within this exception to the rule of hearsay evidence. Whigby v. Burnham, 135 Ga. 584, 69 S.E. 1114 (1911) (decided under former Civil Code 1910, § 5764).

5. Death

Proof of death. — While, in a sense, hearsay was admissible to prove death, yet before the hearsay was admissible for that purpose, it must come up to the requirements of the former statute. Piedmont Hotel Co. v. Henderson, 9 Ga. App. 672, 72 S.E. 51 (1911) (decided under former Civil Code 1910, § 5764); Cone v. Lythgoe, 40 Ga. App. 491, 150 S.E. 465 (1929) (decided under former Civil Code 1910, § 5764).

Death could be established as provided by the former statute, by family repute, but by no other species of hearsay evidence. Ferguson v. Atlanta Newspapers, Inc., 91 Ga. App. 115, 85 S.E.2d 72 (1954) (decided under former Code 1933, § 38-303).

Source of information. — It was not competent for a witness to testify as to the death of a certain person, and who were the witness's heirs surviving at a certain date when a deed was executed, the witness testifying that the witness did not know these facts from the witness's own personal knowledge, but the witness knew the facts from family repute and from various other sources of information, such as a vast amount of correspondence from the decedent's family, and from the court records, and from wills and documents, which made the matter conclusive so far as could be ascertained by search. Imboden v. Etowah & Battle Branch Mining Co., 70 Ga. 86 (1883) (decided under former Code 1882, § 3772); Mobley v. Baxter & Co., 143 Ga. 565, 85 S.E. 859 (1915) (decided under former Civil Code 1910, § 5764); Mobley v. Pierce, 144 Ga. 327, 87 S.E. 24 (1915) (decided under former Civil Code 1910, § 5764).

After proof that a woman was married, her declaration that she had heard her husband was dead is not admissible to prove his death; it not appearing from whom her information was derived. Williams v. State, 86 Ga. 548, 12 S.E. 743 (1891) (decided under former Code 1882, § 3772).

Missing persons. — In an action brought by a wife upon a policy of insurance in her favor upon the life of her husband, the insurance being against death by accident within one year from the date of the policy, and he having disappeared within the year, that his family regarded him as dead, or recognized him as being dead, is not competent evidence in behalf of the plaintiff. Travelers Ins. Co. v. Sheppard, 85 Ga. 751, 12 S.E.

Proof of Pedigree (Cont'd)
5. Death (Cont'd)

18 (1890) (decided under former Code 1882, § 3772).

6. Requirements for Admission

Limitation on rule. — Former statute which permitted declarations to be received in proof of pedigree was limited to the extent that the declarations must have been made without view to litigation and under such circumstances that the person making the declarations could have no motive to misrepresent the facts. Mobley v. Pierce, 144 Ga. 327, 87 S.E. 24 (1915) (decided under former Civil Code 1910, § 5764); Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134 (1942) (decided under former Code 1933, § 38-303); Johnson v. Roberson, 88 Ga. App. 548, 77 S.E.2d 232 (1953) (decided under former Code 1933, § 38-303).

First-hand knowledge not required. — Witnesses must appear to have had fair knowledge, or fair opportunity for acquiring knowledge upon the subject. It is not required that the witnesses were present at the birth, marriage, or death to be competent to testify as to relationship. Wilson v. State, 173 Ga. 275, 160 S.E. 319 (1931) (decided under former Civil Code 1910, § 5764).

Declarations concerning pedigree, to be admissible, need not be upon the knowledge of the declarant. Thus, evidence is admissible that a deceased member of the family said that the deceased heard from others of the deceased's family the facts of family history which the deceased stated. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134 (1942) (decided under former Code 1933, § 38-303).

Family source required. — One of the conditions upon which family tradition is received in evidence is that it emanate from a source within the family, and from persons having such a connection with the party to whom it relates that it is natural and likely that they cannot be mistaken and will speak the truth. In the event it appears that the evidence offered does not emanate from such source, the presumption of the reliability of the source of information is rebutted and the evidence becomes inadmissible. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134 (1942) (decided under former Code 1933, § 38-303).

Presumption of knowledgeable source. — Declarations respecting pedigree do not stand upon the footing of secondary evidence to be excluded when a witness can be produced who speaks upon the subject from the witness's own knowledge. This rule of law rests upon the presumption that the declaration or family tradition comes from persons who have competent knowledge with respect to the subject matter of the declaration, and speak the truth with reference thereto. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134 (1942) (decided under former Code 1933, § 38-303).

Notwithstanding the declarant did not mention the source from which the declarant derived the declarant's information, facts of family history heard from other family members are admissible. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134 (1942) (decided under former Code 1933, § 38-303).

Proof of relationship required. — Before the declarations of deceased persons may be received in evidence, the fact of relationship must be shown by other evidence. Greene v. Almand, 111 Ga. 735, 36 S.E. 957 (1900) (decided under former Civil Code 1895, § 5177); Terry v. Brown, 142 Ga. 224, 82 S.E. 566 (1914) (decided under former Civil Code 1910, § 5764); Mobley v. Pierce, 144 Ga. 327, 87 S.E. 24 (1915) (decided under former Civil Code 1910, § 5764); Wilson v. State, 173 Ga. 275, 160 S.E. 319 (1931) (decided under former Civil Code 1910, § 5764); Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134 (1942) (decided under former Code 1933, § 38-303).

Only slight proof of relationship is required as a foundation for the admission of hearsay evidence regarding pedigree. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134 (1942) (decided under former Code 1933, § 38-303).

Family members as witness. — When a witness reports matters of general repute and tradition in the witness's own family, it is not necessary for the witness to first establish by independent evidence

the witness's relationship to the witness's family. Crawley v. Selby, 208 Ga. 530, 67 S.E.2d 775 (1951) (decided under former Code 1933, § 38-303).

No particular form of statement is required to render a declaration as to pedigree admissible. It may be oral or written, such as a letter or a recital in a deed. Hines v. Donaldson, 193 Ga. 783, 20 S.E.2d 134 (1942) (decided under former Code 1933, § 38-303).

Admission over objection. — When affidavit contained declarations tending to establish pedigree, and contained other statements which were inadmissible if properly objected to, and when the admissibility of such affidavit was objected to as a whole, upon the ground that it was hearsay and not binding upon the defendants, its admission over such objection is not ground for a new trial. Massell Realty Co. v. Hanbury, 165 Ga. 534, 141 S.E. 653 (1928) (decided under former Civil Code 1910, § 5764).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions under Ga. L. 1952, p. 177, §§ 1, 2, 3 are included in the annotations for this Code section.

Computer printout sheets. — Although computer printout sheets are generally classified as hearsay, and to be admissible into evidence the sheets must fall within an exception to the well-known hearsay rule, subject to the discretion of the court, computer printout sheets or records stored in an electronic computer may be admissible into evidence when such are permanent records made in the regular course of business. 1973 Op. Att'y Gen. No. 73-91 (decided under Ga. L. 1952, p. 177, §§ 1, 2, 3).

RESEARCH REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d, Coroners or Medical Examiners, § 13 et seq. 23 Am. Jur. 2d, Deeds, § 166. 29A Am. Jur. 2d, Evidence, §§ 154, 694, 874, 881, 1099, 1195 et seq. 42 Am. Jur. 2d, Inspection Laws, § 11. 81 Am. Jur. 2d, Witnesses, § 742.

Am. Jur. Proof of Facts. — Admissibility of Computerized Business Records, 14 POF2d 173.

Foundation for Offering Business Records in Evidence, 34 POF2d 509.

Routine Business Practice, 35 POF2d 589.

Recovery and Reconstruction of Electronic Mail as Evidence, 41 POF3d 1.

Establishing A Foundation to Admit Computer-Generated Evidence as Demonstrative or Substantive Evidence, 57 POF3d 455.

C.J.S. — 26A C.J.S., Deeds, §§ 507, 529. 31A C.J.S., Evidence, §§ 299, 310, 311, 332 et seq., 342, 345, 346, 349, 371, 548 et seq. 32 C.J.S., Evidence, §§ 885, 886, 916 et seq., 924, 939 et seq., 967, 971 et seq. 32A C.J.S., Evidence, §§ 978 et seq., 1029 et seq., 1072 et seq., 1296.

ALR. — Death certificate as evidence, 17 ALR 359; 42 ALR 1454; 96 ALR 324.

Effect of filing affidavit of forgery against ancient deed, 18 ALR 908.

Character and sufficiency of evidence to show that letter was mailed, 25 ALR 9; 86 ALR 541.

Entries in family Bible as evidence, 29 ALR 372.

Dispensing with proof of proper custody as condition of admission of ancient document, 29 ALR 630.

Illness after partaking of food or drink as evidence of negligence on part of one who prepared or sold it, 49 ALR 592.

Parol evidence as applied to escrow agreements, 49 ALR 1529.

Requirement of "positive" proof of death of insured as excluding circumstantial evidence, 60 ALR 592.

Extrajudicial admissions by principal as evidence against surety, 60 ALR 1500.

Necessity and manner of authenticating paper purporting to be act of private corporation, 65 ALR 329.

Validity, construction, and effect of statutory provision to effect that corporate stock book shall be evidence, 65 ALR 758.

Admissibility of opinion of medical expert as affected by his having heard the person in question give the history of his case, 65 ALR 1217; 51 ALR2d 1051.

Use of memorandum by witness to refresh recollection as affected by the time when it was made, 65 ALR 1478; 125 ALR 19.

Admissibility of declarations by one involved in an accident in relation to his employment by or agency for other person, 67 ALR 170; 150 ALR 623.

Forgery as affecting registration under Torrens Act, 68 ALR 357.

Admissibility of telephone conversations in evidence, 71 ALR 5; 105 ALR 326.

Admissibility of hospital chart or other hospital record, 75 ALR 378; 120 ALR 1124.

Admissibility of declarations of testator on issue of undue influence, 79 ALR 1447; 148 ALR 1225.

Admissibility of declarations by testator on issue of revocation of will, 79 ALR 1493; 172 ALR 354.

Admissibility of statements or declarations of plaintiff's spouse in an action for alienation of affections for the purpose of showing his or her mental state, 82 ALR 825.

Admissibility of loose-leaf systems of accounts, 83 ALR 806.

Admissibility of dying declarations in cases other than prosecution for homicide, 91 ALR 560.

Admissibility in favor of beneficiary of life or accident insurance of statements or declarations made by insured outside of his application, 93 ALR 413.

Admissibility and weight of evidence of defendant's attempt to secure release by bribing officer, 93 ALR 810.

Admissibility of memoranda made by one since deceased regarding matters in respect of which he acted for one of the parties to the present litigation, 103 ALR 1501.

Privilege against self-incrimination as justification for refusal to comply with order or subpoena requiring production of books or documents of private corporation, 120 ALR 1102.

Refreshment of recollection by use of memoranda or other writings, 125 ALR 19; 82 ALR2d 473.

Admissibility on issue of negligence or contributory negligence of statements warning one of danger, 125 ALR 645.

Admissibility as res gestae of declaration by nonparticipant as affected by evidence or lack of evidence that he actually observed the act or fact, 127 ALR 1030.

Admissibility of testimony of witness at former trial or in another case to cover gaps or omissions, due to faulty memory or other causes, in his present testimony given in person or by deposition, 129 ALR 843.

Admissibility of statements by one who claimed to have met with an accident, as evidence of fact of accident, 130 ALR 291.

Admissibility, on issue of negligence or contributory negligence, of statement or comment in respect of conduct of driver of car, or other person, shortly afterwards involved in an accident, 140 ALR 874.

Admissibility of books of account as affected by mutilation, erasures, or alterations, 142 ALR 1406.

Statute providing for admissibility as evidence of records or entries in the regular course of business (Model Act) as applicable to reports of accidents, 144 ALR 727; 10 ALR Fed 858.

Statute which disqualified one person as a witness because of death of another, as applicable to testimony as to statements or acts of deceased, offered as part of res gestae or to show mental condition ("verbal act" theory), 146 ALR 250.

Financial statement or report to stockholders as admissible in evidence on issue between seller and purchaser as to value of stock sold, 147 ALR 1150.

Admissibility of corporate books and records against officers or stockholders in criminal prosecutions against them, 154 ALR 279.

Admissibility of evidence of complaint or details of complaint by alleged victim of rape or other similar offense as affected by fact that she is not a witness or is incompetent to testify because of age or other reason, 157 ALR 1359.

Res gestae utterances in actions founded on accidents, 163 ALR 15.

Binding effect of party's own unfavorable testimony, 169 ALR 798.

Admissibility against beneficiary of life or accident insurance policy of statements

of third persons included in or with proof of death, 1 ALR2d 365.

Inability of person making utterance to recollect and narrate facts to which it relates as affecting its admissibility as part of res gestae, 7 ALR2d 1324.

Admissibility of declaration of persons other than members of family as to pedigree, 15 ALR2d 1412.

What constitutes books of original entry within rule as to admissibility of books of account, 17 ALR2d 235.

Verification and authentication of slips, tickets, bills, invoices, etc., made in regular course of business, under the Uniform Business Records as Evidence Act, or under similar "Model Acts," 21 ALR2d 773.

Proof of identity of person or thing where object, specimen, or part is taken from a human body, as basis for admission of testimony or report of expert or officer based on such object, specimen, or part, 21 ALR2d 1216.

Coroner's verdict or report as evidence on issue of suicide, 28 ALR2d 352.

Admissibility, on issue of child's legitimacy or parentage, of declarations of parents, relatives, or the child, deceased or unavailable, 31 ALR2d 989.

Carrier's issuance of bill of lading or shipping receipt, without notation thereon of visible damage or defects in shipment, as creating presumption or prima facie case of good condition when received, 33 ALR2d 867.

Right of prosecution, in homicide case, to introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased, 34 ALR2d 451.

Admissibility of declarations of grantor on issue of delivery of deed, 34 ALR2d 588.

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24-8-804. Hearsay rule exceptions; declarant unavailable.

(a) As used in this Code section, the term "unavailable as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the declarant's statement;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance or, in the case of exceptions under paragraph (2), (3), or (4) of subsection (b) of this Code section, the declarant's attendance or testimony, by process or other reasonable means.

A declarant shall not be deemed unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party

against whom the testimony is now offered, or, in a civil proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. If deposition testimony is admissible under either the rules stated in Code Section 9-11-32 or this Code section, it shall be admissible at trial in accordance with the rules under which it was offered;

(2) In a prosecution for homicide or in a civil proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death;

(3) A statement against interest. A statement against interest is a statement:

(A) Which a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate a claim by the declarant against another or to expose the declarant to civil or criminal liability; and

(B) Supported by corroborating circumstances that clearly indicate the trustworthiness of the statement if it is offered in a criminal case as a statement that tends to expose the declarant to criminal liability;

(4) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated or a statement concerning the foregoing matters and death also of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared; or

(5) A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. (Code 1981, § 24-8-804, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness, Fed. R. Evid. 804.

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

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Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, §§ 3697, 3704, 3705, and 3709, former Code 1868, §§ 3721, 3728, and 3729, former Code 1873, §§ 3774 and 3781, former Code 1882, §§ 3774, 3776, 3781, and 3782, former Civil Code 1895, §§ 5180, 5181, and 5186, former Penal Code 1895, §§ 1000 and 1001, former Civil Code 1910, §§ 5767, 5768, and 5773, former Penal Code 1910, §§ 1026 and 1027, former Code 1933, §§ 38-307, 38-308, 38-309, 38-314, and 38-405, and former O.C.G.A. §§ 24-3-6, 24-3-7, 24-3-8, 24-3-10, and 24-3-35 are included in the annotations for this Code section.

In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-8-803, which may also be applicable to this Code section.

For case discussing history of former statute, see Burns v. State, 191 Ga. 60, 11 S.E.2d 350 (1940) (decided under former O.C.G.A. § 24-3-10).

Constitutional right of confrontation. — Confrontation clause was not offended when the defendant waived at trial, through defendant's counsel at that time, the use of prior sworn testimony of an inaccessible witness and therefore cannot claim the waiver was error for the first time on appeal. Riley v. State, 237 Ga. 124, 226 S.E.2d 922 (1976) (decided under former Code 1933, § 38-314).

Former statute was really a rule of necessity. Herndon v. Chamberlain, 39 Ga. App. 207, 146 S.E. 503 (1929) (decided under former Civil Code 1910, § 5773); Parrott v. Edwards, 113 Ga. App. 422, 148 S.E.2d 175 (1966) (decided under former Code 1933, § 38-314).

Former statute has been uniformly applied to criminal as well as to civil

General Consideration (Cont'd)

cases. Burns v. State, 191 Ga. 60, 11 S.E.2d 350 (1940) (decided under former Code 1933, § 38-314).

Former O.C.G.A. § 24-3-10 was an exception to the hearsay rule to prove the testimony of a witness at a former trial under certain circumstances when the witness is unavailable at a later trial. Gottschalk v. State, 160 Ga. App. 769, 287 S.E.2d 107 (1982) (decided under former O.C.G.A. § 24-3-10).

Relationship of former O.C.G.A. § 24-3-10 to O.C.G.A. § 9-11-32(a)(5). — Specific and limited provision for the admission into evidence in a subsequent trial of depositions taken in a prior action is made by O.C.G.A. § 9-11-32(a)(5). All other issues relating to the admission into evidence in a subsequent trial of testimony taken in connection with a prior action must be resolved under former O.C.G.A. § 24-3-10. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566 (1981) (decided under former O.C.G.A. § 24-3-10).

Whether the party objecting had adequate opportunity to cross-examine the witness at the previous trial was the central issue in determining whether the former statute applied. Cates v. State, 245 Ga. 30, 262 S.E.2d 796 (1980) (decided under former Code 1933, § 38-314); Craft v. State, 154 Ga. App. 682, 269 S.E.2d 490 (1980) (decided under former Code 1933, § 38-314).

For prior testimony to be admissible, the party challenging the testimony must have had the opportunity at the earlier proceeding to cross-examine the witness on the issue to be decided in the later proceeding, which necessarily means that the earlier and later proceedings have to involve substantially the same issue. In re Spruell, 227 Ga. App. 324, 489 S.E.2d 48 (1997) (decided under former O.C.G.A. § 24-3-10).

Sole question determined by former statute was whether the party against whom the former testimony was now offered had an adequate opportunity by cross-examination to sift this testimony. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566 (1981) (decided under former Code 1933, 38-314).

When the issues and parties were identical and the party against whom the testimony was offered called the witness to the stand at the previous hearing or trial, the need for cross-examination is basically satisfied, and the requirement of former O.C.G.A. § 24-3-10 was met. Barnes v. State, 256 Ga. 370, 349 S.E.2d 387 (1986) (decided under former O.C.G.A. § 24-3-10).

Parties and issues in actions must be same. — Former O.C.G.A. § 24-3-10 required as the prerequisite to the admission in a subsequent action of the prior testimony of a since deceased witness that the parties and issues in the two actions be substantially the same. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566 (1981) (decided under former O.C.G.A. § 24-3-10); GMC v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302 (1994) (decided under former O.C.G.A. § 24-3-10).

Substantial compliance with former requirement. — Substantial and not a literal compliance with the conditions of the former statute was all that was required. Mitchell v. State, 71 Ga. 128 (1883) (decided under former Code 1882, § 3782).

Same issues required. — Evidence as to what a deceased witness testified on a previous trial is not admissible when it appears that the issue therein involved was not substantially the same as that in controversy on the trial at which such evidence is tendered. Lathrop v. Adkisson, 87 Ga. 339, 13 S.E. 517 (1891) (decided under former Code 1882, § 3782); Whitaker v. Arnold, 110 Ga. 857, 36 S.E. 231 (1900) (decided under former Civil Code 1895, § 5186).

Former statute did not require that all the issues in the two proceedings be the same; but the issue to which the former testimony was directed must be the same as the issue upon which the testimony is offered in the second. Craft v. State, 154 Ga. App. 682, 269 S.E.2d 490 (1980) (decided under former Code 1933, § 38-314).

Former statute did not demand that all the issues or parties be the same but requires only that the issue on which the

testimony was offered in the first suit be the same as the issue upon which the testimony is offered in the second. Vanhouten v. State, 193 Ga. App. 871, 389 S.E.2d 534 (1989) (decided under former O.C.G.A. § 24-3-10).

Companion case growing out of a common occurrence, though not wholly between the same parties, was a former trial within the meaning of the former statute. Myrick v. Sievers, 104 Ga. App. 95, 121 S.E.2d 185 (1961) (decided under former Code 1933, § 38-314).

Probative value. — Testimony admitted under the former statute had probative value as original testimony. Maynard v. Rawlins, 45 Ga. App. 91, 163 S.E. 269 (1932) (decided under former Civil Code 1910, § 5773).

Burden of proof. — Party seeking introduction of the testimony at a prior trial must show that the witness is inaccessible. Riley v. State, 237 Ga. 124, 226 S.E.2d 922 (1976) (decided under former Code 1933, § 38-314).

Party seeking to introduce testimony given at a prior trial must show that the witness is inaccessible. Whether a witness is inaccessible depends upon the diligence shown by the party seeking to use the witness's testimony in ascertaining the witness's whereabouts and the attempts made to bring the witness into court. Johnson v. State, 197 Ga. App. 384, 398 S.E.2d 432 (1990) (decided under former O.C.G.A. § 24-3-10).

Proof by parol evidence. — When a witness who testified at a committing trial subsequently died, on the final trial of the same case in the superior court the witness's testimony so given was admissible, and there being nothing to show that the testimony was reduced to writing, it was competent to prove such testimony by parol. Robinson v. State, 68 Ga. 833 (1882) (decided under former Code 1882, § 3782).

Testimony compelled by grant of immunity admissible. — Testimony may be admitted pursuant to former O.C.G.A. § 24-3-10 although that testimony was compelled by the state after a grant of immunity. Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217 (1983) (decided under former O.C.G.A. § 24-3-10).

Testimony at plea hearing properly excluded. — Trial court did not abuse the court's discretion in refusing to admit under former O.C.G.A. § 24-3-10 statements a co-indictee made during a plea hearing because the co-indictee's testimony at the plea hearing did not satisfy former § 24-3-10, and the defendant failed to establish a substantial similarity of issues between the defendant's trial and the co-indictee's plea hearing such as would ensure that the state had an opportunity for meaningful cross-examination at the plea hearing; the state questioned the co-indictee at the co-indictee's plea hearing to establish the factual basis for the co-indictee's plea and to show that the co-indictee was entering the plea freely and voluntarily, and as the purpose of the hearing was to protect the co-indictee, the state was not afforded an opportunity for meaningful crossexamination. Silverio v. State, 306 Ga. App. 438, 702 S.E.2d 717 (2010) (decided under former O.C.G.A. § 24-3-10).

Ineffective assistance of counsel. — Trial counsel was not ineffective for failing to challenge the admission of testimony regarding the victim's dying declaration because the statement satisfied the requirements for admission of a dying declaration under former O.C.G.A. § 24-3-6; the defendant identified no valid basis for objection. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661 (2012) (decided under former O.C.G.A. § 24-3-6).

Former Testimony

1. Deceased Witnesses

Deceased witness's testimony from preliminary hearing admissible. — Recounting of deceased's preliminary hearing testimony which had been given subject to cross-examination by the defendant's attorney does not violate the defendant's right of confrontation. Littles v. Balkcom, 245 Ga. 285, 264 S.E.2d 219 (1980) (decided under former Code 1933, § 38-314).

Error to admit testimony from deceased witness. — Because defendant had no opportunity to confront a deceased witness at an accomplice's trial, the trial court erred in admitting the witness's

Former Testimony (Cont'd)
1. Deceased Witnesses (Cont'd)

statements at defendant's trial pursuant to former O.C.G.A. § 24-3-10; in addition, the statements were testimonial and violated defendant's confrontation rights. Willingham v. State, 279 Ga. 886, 622 S.E.2d 343 (2005) (decided under former O.C.G.A. § 24-3-10).

Deceased codefendant's entire testimony at defendant's first trial was admissible at retrial even though defendant's character was incidentally placed in issue. Chambers v. State, 213 Ga. App. 414, 444 S.E.2d 820 (1994) (decided under former O.C.G.A. § 24-3-10).

Deceased witness testimony from sentencing proceeding admissible. — Prior testimony of a deceased witness at a sentencing trial held before the defendant withdrew the defendant's guilty plea was admissible at the defendant's guilt/innocence trial. The state sought the admission of this testimony, which included the witness's account of the witness's rape and the murders of family members to help meet the state's burden to prove beyond a reasonable doubt that the defendant was guilty of these crimes; furthermore, there was no limitation on the defendant's cross-examination of the witness at the sentencing trial. Martin v. State, 284 Ga. 504, 668 S.E.2d 685 (2008) (decided under former O.C.G.A. § 24-3-10).

2. Inaccessible Witnesses

Whether a witness is inaccessible depends upon the diligence shown by the party seeking to use the witness's testimony of a former trial in ascertaining where the witness is and in attempting to bring the witness into court. Gaither v. State, 227 Ga. 668, 182 S.E.2d 434 (1971) (decided under former Code 1933, § 38-314); Robertson v. State, 124 Ga. App. 119, 183 S.E.2d 47 (1971) (decided under former Code 1933, § 38-314); Smith v. State, 247 Ga. 453, 276 S.E.2d 633 (1981) (decided under former O.C.G.A. § 24-3-10).

Prima facie showing of inaccessibility is sufficient. Williams v. Wolff, 3 Ga. App. 737, 60 S.E. 357 (1908) (decided under former Civil Code 1895, § 5186); Savannah Bank & Trust Co. v. Estill, 142 Ga. 447, 83 S.E. 137 (1914) (decided under former Civil Code 1910, § 5773); Estill v. Citizens & S. Bank, 153 Ga. 618, 113 S.E. 552 (1922) (decided under former Civil Code 1910, § 5773); Goodwin v. Allen, 83 Ga. App. 615, 64 S.E.2d 212 (1951) (decided under former Code 1933, § 38-314).

Mere contention insufficient. — State is allowed to use a transcript of testimony of an absent witness upon the state's showing, and not mere contention, that after diligent search, the state could not locate the witness. Hewell v. State, 136 Ga. App. 420, 221 S.E.2d 219 (1975), later appeal, 139 Ga. App. 622, 229 S.E.2d 92 (1976), rev'd on other grounds, 238 Ga. 578, 234 S.E.2d 497 (1977) (decided under former Code 1933, § 38-314).

Proof of inability to find a witness after diligent search may be sufficient to establish that such witness was inaccessible within the meaning of the former statute. Robinson v. State, 128 Ga. 254, 57 S.E. 315 (1907) (decided under former Penal Code 1895, § 1001); Goodwin v. State, 49 Ga. App. 223, 174 S.E. 742 (1934) (decided under former Code 1933, § 38-314); Jones v. State, 250 Ga. 166, 296 S.E.2d 598 (1982) (decided under former O.C.G.A. § 24-3-10).

Parties never inaccessible. — Party to a pending case was not, though beyond the jurisdiction of the court when the case was tried, inaccessible within the meaning of the former statute. Crumm v. Allen & Co., 11 Ga. App. 203, 75 S.E. 108 (1912) (decided under former Civil Code 1910, § 5773).

Sufficiency of the search for the witness who testified previously is a matter left to the discretion of the trial judge, whose judgment will not be reversed unless a manifest abuse of discretion appears. Robinson v. State, 128 Ga. 254, 57 S.E. 315 (1907) (decided under former Penal Code 1895, § 1001); Goodwin v. State, 49 Ga. App. 223, 174 S.E. 742 (1934) (decided under former Code 1933, § 38-314); Norris v. State, 58 Ga. App. 399, 198 S.E. 714 (1938) (decided under former Code 1933, § 38-314); Gaither v. State, 227 Ga. 668, 182 S.E.2d 434 (1971) (decided under former Code 1933, § 38-314).

Pre-trial testimony of witness three (W3) was properly excluded as W3 was not an inaccessible witness under former O.C.G.A. § 24-3-10 since the subpoena obtained by the state, combined with the attempts to locate W3 on the day that the defendant intended to call W3 as a witness and on the following day, did not demand a finding of due diligence in obtaining W3's presence; the defendant's delay in attempting to contact W3 and the defendant's failure to have any investigator go to W3's known address were contrary to the requirements of diligence. Hill v. State, 291 Ga. 160, 728 S.E.2d 225 (2012) (decided under former O.C.G.A. § 24-3-10).

Witness beyond the limits of the state is inaccessible. Adair v. Adair, 39 Ga. 75 (1869) (decided under former Code 1868, § 3729); Smith v. State, 72 Ga. 114 (1883) (decided under former Code 1882, § 3782); Swift v. Oglesby & Smith, 8 Ga. App. 540, 70 S.E. 97 (1911) (decided under former Civil Code 1910, § 5773); Brinson Ry. v. Beard, 11 Ga. App. 737, 76 S.E. 76 (1912) (decided under former Civil Code 1910, § 5773); Brown v. Matheson, 142 Ga. 396, 83 S.E. 98 (1914) (decided under former Civil Code 1910, § 5773); Smith v. State, 147 Ga. 689, 95 S.E. 281 (1918) (decided under former Civil Code 1910, § 5773); Estill v. Citizens & S. Bank, 153 Ga. 618, 113 S.E. 552 (1922) (decided under former Civil Code 1910, § 5773); Taylor v. State, 155 Ga. 785, 118 S.E. 675 (1923) (decided under former Civil Code 1910, § 5773); Carswell, Moxley & Son v. Harrison, 33 Ga. App. 140, 126 S.E. 293 (1924) (decided under former Civil Code 1910, § 5773); Norris v. State, 58 Ga. App. 399, 198 S.E. 714 (1938) (decided under former Code 1933, § 38-314); Goodwin v. Allen, 83 Ga. App. 615, 64 S.E.2d 212 (1951) (decided under former Code 1933, § 38-314).

Word "inaccessible" does not apply to a witness who, though absent from the county of the trial, is nevertheless at the time of the trial, a resident of a different county in the same state. Broach v. Kelly, 71 Ga. 698 (1883), overruled on other grounds, Ward v. Hudco Loan Co., 254 Ga. 294, 328 S.E.2d 729 (1985) (decided under former Code 1882, § 3782); Taylor v. State, 126 Ga. 557, 55 S.E. 474 (1906) (decided under former Penal Code 1895, § 1001); Brinson Ry. v. Beard, 11 Ga. App. 737, 76 S.E. 76 (1912) (decided under former Civil Code 1910, § 5773).

In the case of a witness who may be difficult to locate, the state should begin to look for the witness sooner than the date of the beginning of the trial. Gaither v. State, 227 Ga. 668, 182 S.E.2d 434 (1971) (decided under former Code 1933, § 38-314).

Disability of witness. — In criminal prosecutions, according to the weight of authority, the mere temporary illness or disability of a witness is not sufficient to justify the reception of the witness's former testimony; it must appear that the witness is in such a state, either mentally or physically, that in reasonable probability the witness will never be able to attend the trial. Tanner v. State, 213 Ga. 820, 102 S.E.2d 176 (1958) (decided under former Code 1933, § 38-314).

Privilege as constituting inaccessibility. — Inaccessibility of witness has been construed to include assertion of privilege by a witness. Wiseman v. State, 249 Ga. 559, 292 S.E.2d 670 (1982) (decided under former O.C.G.A. § 24-3-10).

Testimony from escaped prisoner admissible. — In trial for murder, where witness from preliminary hearing was not available at time of trial, having had escaped from prison, defendant's right of confrontation under U.S. Const., amend. 6 was not violated by admission of transcript of witness's testimony at defendant's preliminary hearing, at which defendant was represented by counsel and witness was cross-examined. Stidem v. State, 246 Ga. 637, 272 S.E.2d 338 (1980) (decided under former Code 1933, § 38-314).

Failure to grant continuance proper. — Trial court did not err in admitting the testimony given by an inaccessible witness under oath in a former trial on substantially the same issue and between the same parties, and, thus, did not err in denying defendant's motion for a continuance as the former testimony was deemed "inherently reliable", its use did not violate the accused's right of confrontation, and defendant did not show that

Former Testimony (Cont'd)
2. Inaccessible Witnesses (Cont'd)

the witness could have been located if a continuance had been granted as diligent attempts had already been undertaken, without success, to locate the witness. Dillingham v. State, 275 Ga. 665, 571 S.E.2d 777 (2002) (decided under former O.C.G.A. § 24-3-10).

Testimony from probation revocation hearing admissible when witness unavailable. — When a witness made it clear that the witness would not testify about the shooting at trial, the witness's sworn testimony at the defendant's probation revocation hearing, which concerned substantially the same issue and where the witness was subject to cross-examination, was admissible under former O.C.G.A. § 24-3-10. Hardeman v. State, 277 Ga. App. 180, 626 S.E.2d 138 (2006) (decided under former O.C.G.A. § 24-3-10).

Evidence sufficient to show inaccessibility of witnesses in the following cases. — See Armstrong Furn. Co. v. Nickle, 110 Ga. App. 686, 140 S.E.2d 72 (1964) (decided under former Code 1933, § 38-314); Hewell v. State, 139 Ga. App. 622, 229 S.E.2d 92 (1976), rev'd on other grounds, 238 Ga. 578, 234 S.E.2d 497 (1977) (decided under former Code 1933, § 38-314); Tolbert v. State, 239 Ga. App. 703, 521 S.E.2d 827 (1999) (decided under former O.C.G.A. § 24-3-10); Walton v. State, 272 Ga. 73, 526 S.E.2d 333 (2000) (decided under former O.C.G.A. § 24-3-10).

Evidence insufficient to show inaccessibility of witnesses in the following cases. — See Herndon v. Chamberlain, 39 Ga. App. 207, 146 S.E. 503 (1929) (decided under former Penal Code 1910, § 1027); Standridge v. Standridge, 224 Ga. 102, 160 S.E.2d 377 (1968) (decided under former Code 1933, § 38-314); Whatley v. State, 230 Ga. 523, 198 S.E.2d 176 (1973) (decided under former Code 1933, § 38-314); Century Dodge, Inc. v. Mobley, 155 Ga. App. 712, 272 S.E.2d 502 (1980) (decided under former Code 1933, § 38-314).

Inaccessibility not shown. — Trial court's ruling that defendant failed to show inaccessibility of a witness upon the exercise of due diligence was affirmed since defendant had six months after defendant's arraignment attempted three times to serve a subpoena on the witness prior to trial, and since defendant declined the trial court's offer of a continuance for the purpose of further searching for the witness. Carter v. State, 266 Ga. App. 691, 598 S.E.2d 76 (2004) (decided under former O.C.G.A. § 24-3-10).

Inaccessibility of a witness is to be determined within the sound discretion of the court and will not be disturbed unless there is a manifest abuse of discretion. Estill v. Citizens & S. Bank, 153 Ga. 618, 113 S.E. 552 (1922) (decided under former Civil Code 1910, § 5773); Brooks v. State, 69 Ga. App. 697, 26 S.E.2d 549 (1943) (decided under former Code 1933, § 38-314); Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765 (1952) (decided under former Code 1933, § 38-314); Tanner v. State, 213 Ga. 820, 102 S.E.2d 176 (1958) (decided under former Code 1933, § 38-314); Robertson v. State, 124 Ga. App. 119, 183 S.E.2d 47 (1971) (decided under former Code 1933, § 38-314); Riley v. State, 237 Ga. 124, 226 S.E.2d 922 (1976) (decided under former Code 1933, § 38-314); LaCount v. State, 237 Ga. 181, 227 S.E.2d 31 (1976), cert. denied, 429 U.S. 1046, 97 S. Ct. 753, 50 L. Ed. 2d 761 (1977) (decided under former Code 1933, § 38-314); Hewell v. State, 139 Ga. App. 622, 229 S.E.2d 92 (1976), rev'd on other grounds, 238 Ga. 578, 234 S.E.2d 497 (1977) (decided under former Code 1933, § 38-314); Smith v. State, 247 Ga. 453, 276 S.E.2d 633 (1981) (decided under former O.C.G.A. § 24-3-10); Gibson v. State, 160 Ga. App. 615, 287 S.E.2d 595 (1981) (decided under former O.C.G.A. § 24-3-10); Jones v. State, 250 Ga. 166, 296 S.E.2d 598 (1982) (decided under former O.C.G.A. § 24-3-10); Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217 (1983) (decided under former O.C.G.A. § 24-3-10); Thomas v. State, 192 Ga. App. 744, 386 S.E.2d 402 (1989) (decided under former O.C.G.A. § 24-3-10); Barry v. State, 214 Ga. App. 418, 448 S.E.2d 243 (1994) (decided under former O.C.G.A. § 24-3-10); Palmer v. Taylor, 215 Ga. App. 546, 451 S.E.2d 486 (1994) (decided under

former O.C.G.A. § 24-3-10).

Standard on appeal of question of inaccessibility. — Primary consideration on appeal is not whether the Court of Appeals agrees with the trial court's finding that a witness was inaccessible, but whether that finding constitutes an abuse of discretion. Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217 (1983) (decided under former O.C.G.A. § 24-3-10).

3. Proceedings

Survival of action. — When a parent began suit against a railroad for damages for a personal injury to the parent, and subsequently died from the results of the injury, and a suit for the homicide was brought by the parent's child, answers of the decedent to interrogatories taken during the decedent's life in the suit were admissible in the action by the child. Atlanta & W.P.R.R. v. Venable, 67 Ga. 697 (1881) (decided under former Code 1873, § 3782).

Substantial similarity not found. — Suit for personal injuries to a minor, brought in the minor's behalf by the minor's father as next friend, is not, either as to cause of action or as to parties, actually or substantially the same as a suit by the father in the father's own right for loss of the minor's services, occasioned by those injuries. Hooper v. Southern Ry., 112 Ga. 96, 37 S.E. 165 (1900) (decided under former Civil Code 1895, § 5186).

Preliminary hearings. — Introduction of testimony previously taken of a witness at a preliminary hearing is permitted if it is shown either that the witness is out of the jurisdiction or that the witness cannot with due diligence be found within the state. LaCount v. State, 237 Ga. 181, 227 S.E.2d 31 (1976), cert. denied, 429 U.S. 1046, 97 S. Ct. 753, 50 L. Ed. 2d 761 (1977) (decided under former Code 1933, § 38-314).

When the victim died before trial, the victim's preliminary hearing testimony identifying defendant as a burglar was admissible. Igle v. State, 223 Ga. App. 498, 478 S.E.2d 622 (1996) (decided under former O.C.G.A. § 24-3-10).

Trial court did not err in allowing an unavailable witness's preliminary hearing testimony to be read to the jury pursuant to former O.C.G.A. § 24-3-10 because the state exercised due diligence in seeking to locate the witness; despite efforts by state officials, the witness could not be located. Thomas v. State, 290 Ga. 653, 723 S.E.2d 885 (2012) (decided under former O.C.G.A. § 24-3-10).

Testimony given at hearing on suppression of evidence. — Transcript of the testimony of an unavailable witness who testified for the defendant at the hearing on defendant's motion to suppress evidence was admissible since the testimony involved essentially the same issue as in the trial. Williams v. State, 214 Ga. App. 280, 447 S.E.2d 676 (1994), aff'd, 265 Ga. 471, 457 S.E.2d 665 (1995) (decided under former O.C.G.A. § 24-3-10).

Testimony given at coroner's inquest. — Testimony as to the substance of evidence given at a coroner's inquest by a witness since deceased was admissible when offered for impeachment purposes. Darby v. Moore, 144 Ga. 758, 87 S.E. 1067 (1916) (decided under former Civil Code 1910, § 5773).

Production of articles present at former trial. — When the testimony of a deceased witness who had testified at the former trial contained references to certain physical objects, which at the former trial were in court, this fact did not stop the operation of the former statute on the ground that such articles were not produced in court at the trial now under review nor offered in evidence, even though the state did not account for their absence. Bloodworth v. State, 161 Ga. 332, 131 S.E. 80 (1925) (decided under former Penal Code 1910, § 1027).

Agreed writing. — Evidence of a witness, since deceased, given on a former trial, on the same case, between the same parties, reduced to writing and agreed upon by counsel, is admissible on a subsequent trial. Walker v. Walker, 14 Ga. 242 (1853) (decided under former Code 1863, § 3705); Smith v. State, 28 Ga. 19 (1859) (decided under former law); Adair v. Adair, 39 Ga. 75 (1869) (decided under former Code 1868, § 3729); Lathrop v. Adkisson, 87 Ga. 339, 13 S.E. 517 (1891) (decided under former Code 1882, § 3782).

Ex parte affidavits. — Former statute did not authorize the admission in evi-

Former Testimony (Cont'd)
3. Proceedings (Cont'd)

dence on the final trial of the case an ex parte affidavit made by a witness since deceased for use on the hearing of an application for interlocutory injunction in the same case. Fender v. Ramsey & Phillips, 131 Ga. 440, 62 S.E. 527 (1908) (decided under former Civil Code 1895, § 5186); Byrd v. Prudential Ins. Co. of America, 185 Ga. 625, 196 S.E. 72 (1938) (decided under former Code 1933, § 38-314).

Testimony given at execution of an affidavit for an arrest warrant. — In a probation revocation proceeding, a court clerk's testimony regarding a wife's statements at the time of an application for an arrest warrant was not admissible since the party against whom the warrant was offered had not had the opportunity to cross-examine the wife. Farmer v. State, 266 Ga. 869, 472 S.E.2d 70 (1996) (decided under former O.C.G.A. § 24-3-10).

"Former trial" includes a commitment hearing. Wiseman v. State, 249 Ga. 559, 292 S.E.2d 670 (1982) (decided under former O.C.G.A. § 24-3-10).

Guilty plea to a reduced criminal charge is proper evidence as an admission in a subsequent civil action, despite the fact that the admission was the result of a compromise in the criminal case. Kesler v. Veal, 165 Ga. App. 475, 300 S.E.2d 217 (1983) (decided under former O.C.G.A. § 24-3-10).

Statement of child witness about abuse of victim not admissible. — Out-of-court statements of a child witness who observes the physical abuse of another child, but who is not personally a victim of such abuse, may not be admitted as an exception to the hearsay rule under former O.C.G.A. § 24-3-10. Thornton v. State, 264 Ga. 563, 449 S.E.2d 98 (1994) (decided under former O.C.G.A. § 24-3-10).

Testimony in probation revocation hearings. — Trial court erred in considering the prior testimony of witnesses who were not shown to be dead, disqualified, or otherwise inaccessible in a probation revocation hearing; nevertheless, any inadmissible hearsay was merely cumulative of the admissible probative testimony which was sufficient to show by a preponderance of the evidence that defendant committed the offense of aggravated assault. Wolcott v. State, 278 Ga. 664, 604 S.E.2d 478 (2004) (decided under former O.C.G.A. § 24-3-10).

Admission of cumulative testimony denied. — Defendant's reading into evidence the prior testimony of an unavailable witness was properly denied since the testimony would have been cumulative of other testimony, except as to a nonprobative matter. Pickens v. State, 225 Ga. App. 792, 484 S.E.2d 731 (1997) (decided under former O.C.G.A. § 24-3-10).

Former testimony was properly admitted in the following cases. — See Banks v. Bradwell, 140 Ga. 640, 79 S.E. 572 (1913) (decided under former Civil Code 1910, § 5773); Hunter v. State, 147 Ga. 823, 95 S.E. 668 (1918) (decided under former Penal Code 1910, § 1027); Sheppard v. State, 167 Ga. 326, 145 S.E. 654 (1928) (decided under former Penal Code 1910, § 1027); Georgia Chem. Works v. Malcolm, 186 Ga. 275, 197 S.E. 763 (1938) (decided under former Code 1933, § 38-314); Pacific Nat'l Fire Ins. Co. v. Beavers, 87 Ga. App. 294, 73 S.E.2d 765 (1952) (decided under former Code 1933, § 38-314); National Life & Accident Ins. Co. v. Fender, 146 Ga. App. 545, 247 S.E.2d 195 (1978) (decided under former Code 1933, § 38-314); Gibson v. State, 160 Ga. App. 615, 287 S.E.2d 595 (1981) (decided under former O.C.G.A. § 24-3-10); Knight v. State, 210 Ga. App. 63, 435 S.E.2d 276 (1993) (decided under former O.C.G.A. § 24-3-10); Ortiz v. State, 222 Ga. App. 432, 474 S.E.2d 300 (1996) (decided under former O.C.G.A. § 24-3-10); Pope v. Fields, 273 Ga. 6, 536 S.E.2d 740 (2000) (decided under former O.C.G.A. § 24-3-10).

Testimony properly excluded in the following cases. — See Brooks v. State, 69 Ga. App. 697, 26 S.E.2d 549 (1943) (decided under former Code 1933, § 38-314); Elders v. State, 145 Ga. App. 139, 253 S.E.2d 817 (1979) (decided under former Code 1933, § 38-314); Smith v. State, 247 Ga. 453, 276 S.E.2d 633 (1981) (decided under former O.C.G.A. § 24-3-10); Troy v. Interfinancial, Inc., 171

Ga. App. 763, 320 S.E.2d 872 (1984) (decided under former O.C.G.A. § 24-3-10); Green v. State, 207 Ga. App. 800, 429 S.E.2d 169 (1993) (decided under former O.C.G.A. § 24-3-10); Adams v. State, 231 Ga. App. 279, 499 S.E.2d 105 (1998) (decided under former O.C.G.A. § 24-3-10).

Testimony improperly excluded in the following cases. — See Parrott v. Edwards, 113 Ga. App. 422, 148 S.E.2d 175 (1966) (decided under former Code 1933, § 38-314); Rini v. State, 236 Ga. 715, 225 S.E.2d 234, cert. denied, 429 U.S. 924, 97 S. Ct. 326, 50 L. Ed. 2d 293 (1976) (decided under former Code 1933, § 38-314).

Declarations Against Interest

1. Deceased Persons

History generally. — Former statute was a mere codification of a well-settled principle in the law. While such evidence was hearsay, it was admitted as one of the exceptions to the rule against hearsay evidence on the ground of the extreme improbability of its falsity. Massee-Felton Lumber Co. v. Sirmans, 122 Ga. 297, 50 S.E. 92 (1905) (decided under former Civil Code 1895, § 5181).

Former Code 1933, § 38-309 had no application since the party seeking to give hearsay evidence was not a competent witness under former Code 1933, § 38-1603 (see now O.C.G.A. § 24-6-601). Bloodworth v. Taylor, 208 Ga. 770, 69 S.E.2d 747 (1952) (decided under former Code 1933, § 38-309); Dye v. Richards, 210 Ga. 601, 81 S.E.2d 820 (1954) (decided under former Code 1933, § 38-309).

Prerequisites. — To render declaration or entries admissible, it must appear that the declarant is deceased, that the declarant possessed competent knowledge of the facts, or that it was his duty to know them, and the declarations were at variance with the declarant's interests. Field v. Boynton, 33 Ga. 239 (1862) (decided under former law); Murdock v. Adamson, 12 Ga. App. 275, 77 S.E. 181 (1913) (decided under former Civil Code 1910, § 5768).

Declarations of persons since deceased must be trustworthy before the declarations are admissible under the rule of necessity, and self-serving declarations are not admissible. Chrysler Motors Corp. v. Davis, 226 Ga. 221, 173 S.E.2d 691 (1970) (decided under former Code 1933, § 38-309).

Declarations of a decedent to others are admissible if there are no other witnesses to the alleged occurrence, it being for the jury, under appropriate instructions, to determine their weight and credibility. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566 (1981) (decided under former O.C.G.A. § 24-3-8).

Time of making declarations. — Declarations are not admissible in behalf of a claimant, if made after the judgment was obtained or while the litigation was pending and with reference thereto. James v. Taylor, 93 Ga. 275, 20 S.E. 309 (1893) (decided under former law).

Nature of declarations. — Declarations of one, whether verbal or in writing, of a matter which is against one's interest at the time, and who is since deceased, is admissible as evidence in a suit between third persons, whether such declaration relates to the present or past occurrences. Field v. Boynton, 33 Ga. 239 (1862) (decided under former law); Barbre v. Scott, 75 Ga. App. 524, 43 S.E.2d 760 (1947) (decided under former Code 1933, § 38-309).

Declaration containing statements both for and against declarant's interest. — If the declaration or entry contains statements both in favor of the declarant and against the declarant's interest, the statements are to be balanced, and if those in favor of interest equal or preponderate over those against interest the declaration is not admissible; otherwise it is. Massee-Felton Lumber Co. v. Sirmans, 122 Ga. 297, 50 S.E. 92 (1905) (decided under former Civil Code 1895, § 5181).

If a declaration or entry contains statements both in favor of the declarant and against the declarant's interest, the statements are to be balanced, and if those in favor of interest equal or preponderate over those against interest, the declaration is not admissible. Mattison v. Travelers Indem. Co., 167 Ga. App. 521, 307 S.E.2d 39 (1983) (decided under former O.C.G.A. § 24-3-8).

Declarations Against Interest (Cont'd)
1. Deceased Persons (Cont'd)

Weight of evidence. — Declarations or entries when admitted are evidence as to any fact stated therein which was within the knowledge of the declarant or which it was the declarant's duty to know. Massee-Felton Lumber Co. v. Sirmans, 122 Ga. 297, 50 S.E. 92 (1905) (decided under former Civil Code 1895, § 5181).

Cause of injury. — Declaration by an injured party tending to exonerate the defendant is admissible. Georgia R.R. & Banking v. Fitzgerald, 108 Ga. 507, 34 S.E. 316, 49 L.R.A. 175 (1899) (decided under former Civil Code 1895, § 5181); Murdock v. Adamson, 12 Ga. App. 275, 77 S.E. 181 (1913) (decided under former Civil Code 1910, § 5768).

Declaration as to marriage. — When equivocal conduct such as cohabitation is relied upon as a circumstance material to the issue to prove marriage, declarations of one of the parties since deceased, made pending the period of cohabitation, disaffirming the marriage, are admissible. Drawdy v. Hesters, 130 Ga. 161, 60 S.E. 451 (1905) (decided under former Civil Code 1895, § 5181).

Insurance. — When an insurance policy is sued on by a creditor who was a beneficiary, a letter of the insured to a third person stating that the insured had not applied for any insurance is admissible. Chandler v. Mutual Life & Indus. Ass'n, 131 Ga. 82, 61 S.E. 1036 (1908) (decided under former Civil Code 1895, § 5181).

It was permissible for the defendant to prove that a few months before applying for the insurance the insured made to third persons declarations contrary to the facts stated in the application, the same being admissible as declarations of a person, since deceased, against the deceased's interest, and not made with a view to pending litigation. Henderson v. Jefferson Std. Life Ins. Co., 39 Ga. App. 609, 147 S.E. 901 (1929), overruled on other grounds, Lawler v. Life Ins. Co. of Ga., 90 Ga. App. 481, 83 S.E.2d 281 (1954) (decided under former Civil Code 1910, § 5768).

Parties to contracts. — Testimony of a person other than the party to the contract that the person heard the deceased state that the person was going to will the deceased's property to the plaintiff is admissible. Brewer v. Mackey, 177 Ga. 813, 171 S.E. 273 (1933) (decided under former Code 1933, § 38-309).

In a personal injury case, to the extent that an employer implied or stated that a deceased employee agreed to make certain deliveries, those statements were admissible because alleged oral agreements by the decedent were considered against the decedent's interest. Thompson v. Club Group, Ltd., 251 Ga. App. 356, 553 S.E.2d 842 (2001) (decided under former O.C.G.A. § 24-3-8).

Proffer of declaration by beneficiary thereof. — Decedent's declarations in disparagement of decedent's title would be admissible pursuant to former O.C.G.A. § 24-3-8, as the declarations negate the existence of a gift and are, therefore, against the decedent's pecuniary interest; that such declarations are proffered by one who would benefit from their admission into evidence is not a valid ground for excluding the declarations from the jury's consideration. Cole v. Cole, 205 Ga. App. 332, 422 S.E.2d 230 (1992) (decided under former O.C.G.A. § 24-3-8).

Parties and their privities. — It is not necessary for purposes of former O.C.G.A. § 24-3-8 that a declarant be a party or in privity with a party. Horan v. Pirkle, 197 Ga. App. 151, 397 S.E.2d 734 (1990) (decided under former O.C.G.A. § 24-3-8).

Pending litigation. — While a confessor to a crime may believe that litigation is impending, that one might well become involved in criminal proceedings as a result of one's confession, the possibility or probability of litigation does not translate into "pending" litigation as the term is used in former O.C.G.A. § 24-3-8. State Farm Auto. Ins. Co. v. Great Am. Ins. Co., 164 Ga. App. 457, 297 S.E.2d 355 (1982) (decided under former O.C.G.A. § 24-3-8).

When defendant's deceased brother had been fingerprinted and booked at the time he was interviewed by police, his statement, made with a view to litigation, was

inadmissible. Jones v. State, 196 Ga. App. 842, 397 S.E.2d 181 (1990) (decided under former O.C.G.A. § 24-3-8).

Rule of necessity. — Since deceased was the only eyewitness to events leading up to a fire, the deceased's out-of-court declarations in the form of the deceased's "trustworthy" deposition testimony are admissible as coming within the rule of necessity. Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566 (1981) (decided under former O.C.G.A. § 24-3-8).

Declarations held inadmissible. — See Hollis v. Sales, 103 Ga. 75, 29 S.E. 482 (1897) (decided under former Civil Code 1895, § 5181); State Banking Co. v. Miller, 185 Ga. 653, 196 S.E. 47 (1938) (decided under former Code 1933, § 38-309); Martin v. Turner, 235 Ga. 35, 218 S.E.2d 789 (1975) (decided under former Code 1933, § 38-309); Crowder v. State, 237 Ga. 141, 227 S.E.2d 230 (1976) (decided under former Code 1933, § 38-309); Cobb v. Garner, 158 Ga. App. 110, 279 S.E.2d 280 (1981) (decided under former O.C.G.A. § 24-3-8); Boehm v. Abi-Sarkis, 211 Ga. App. 181, 438 S.E.2d 410 (1993) (decided under former O.C.G.A. § 24-3-8).

Declarations held properly admitted. — See Elwell v. New England Mtg. Sec. Co., 101 Ga. 496, 28 S.E. 833 (1897) (decided under former Civil Code 1895, § 5181); Holland v. Gunn, 171 Ga. 204, 154 S.E. 887 (1930) (decided under former Civil Code 1910, § 5768).

Trial counsel was not ineffective for failing to challenge the admission of testimony regarding the victim's dying declaration because the statement satisfied the requirements for admission of a dying declaration under former O.C.G.A. § 24-3-6; the defendant identified no valid basis for objection. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661 (2012) (decided under former O.C.G.A. § 24-3-6).

2. As to Title by Possessors

Presumption. — Until the contrary appears, every man is presumed to be cognizant of the law; and whenever admissions are made, as to the title of property, by the party in possession, the presumption is, that the statements were made, not only with a knowledge of the facts, but of the party's legal rights, also, growing out of those facts. Butler v. Livingston, 15 Ga. 565 (1854) (decided under former law).

Possession required. — Statement by the alleged predecessor in title was properly rejected because it did not appear that at the time of making the admission referred to the party making the statement was in possession of the land. George v. Williams, 177 Ga. 630, 170 S.E. 790 (1933) (decided under former Code 1933, § 38-308).

Proof of privity required. — Before the sayings of one person should be received in evidence against another, it ought to be clear beyond a reasonable doubt, that the other claims under him, or bears to him some relation of privity. Aiken v. Cato, 23 Ga. 154 (1857) (decided under former law).

Tax returns. — Tax returns were held in the nature of declarations to show adverse possession. Smith v. Haire, 58 Ga. 446 (1877) (decided under former Code 1873, § 3774).

County property inventory purporting to include all property belonging to the county is in the nature of such a declaration. Ogden v. Dodge County, 97 Ga. 461, 25 S.E. 321 (1895) (decided under former Civil Code 1895, § 5180).

Testimony held not admissible. — See Ehrlich v. Mills, 203 Ga. 600, 48 S.E.2d 107 (1948) (decided under former Code 1933, § 38-308); Turner v. McKee, 97 Ga. App. 531, 103 S.E.2d 658 (1958) (decided under former Code 1933, § 38-308).

3. Disparagement of Own Title

Competency depends on time of making. — Whether admissions made by defendant, while in possession of land levied on and claimed, in disparagement of defendant's title, are competent, depends, in some measure, upon the time when the admissions were made. If made before the commencement of the plaintiff's suit, the admissions would be admissible even in favor of the claimant. Powell v. Watts, 72 Ga. 770 (1884) (decided under former Code 1882, § 3774). See also Rountree v. Gaulden, 128 Ga. 737, 58 S.E.

Declarations Against Interest (Cont'd)
3. Disparagement of Own Title (Cont'd)

346 (1907) (decided under former Civil Code 1895, § 5180).

Party privity required. — While declarations by a person in possession of property, in disparagement of the person's own title, shall be admissible in evidence in favor of anyone and against privies, it was error to admit the testimony of a witness as to a statement made by someone else involved, which adjoined him, neither of these persons being in possession of the land and neither being in privity with either of the parties to the present proceeding. Morgan v. Lester, 215 Ga. 570, 111 S.E.2d 228 (1959) (decided under former Code 1933, § 38-308).

Declarations of a deceased person in disparagement of the deceased's title to land, made while in possession thereof, are admissible in evidence, not only against the declarant and those claiming under the declarant, but also for or against strangers. McLeod v. Swain, 87 Ga. 156, 13 S.E. 315 (1891) (decided under former Code 1882, § 3774); Hall v. Collier, 146 Ga. 815, 92 S.E. 536 (1917) (decided under former Civil Code 1910, § 5767); McCrea v. Georgia Power Co., 179 Ga. 1, 174 S.E. 798 (1934), later appeal, 187 Ga. 708, 15 S.E.2d 664 (1939) (decided under former Code 1933, § 38-308); Kimbrough v. Rutherford, 70 Ga. App. 294, 28 S.E.2d 370 (1943) (decided under former Code 1933, § 38-308).

Party having two distinct titles to property may disclaim one and rely entirely on the other, and after such election is made, the admissions of one's privies in the disclaimed title are not evidence against that one. Oliver v. Persons, 30 Ga. 391, 76 Am. Dec. 657 (1860) (decided under former Code 1863, § 3697).

Possessor of personal property. — Declarations of one in possession of personal property, adverse to one's title, are evidence against a party holding under one by purchase subsequent to the making of such declarations. Doughty v. McMillan, 92 Ga. 818, 19 S.E. 59 (1894) (decided under former Code 1882, § 3774).

Party declaring against part interest. — Declaration of one in possession of a lot of land, with a deed to the whole lot, that one did not claim a particular part of the land, is admissible in evidence against a privy of the declarant. Callaway v. Beauchamp, 147 Ga. 17, 92 S.E. 538 (1917) (decided under former Civil Code 1910, § 5767).

Declarations by a donor of land in favor of the donor's own title, made after the donor has delivered possession of the land to the donee, are not admissible in evidence against the latter. Declarations of a donor against the donor's title and in favor of that of the donee bind the donor and donor's privies in estate, and consequently are admissible in the donee's favor against one who derived title from the donor after the declarations were made. Ogden v. Dodge County, 97 Ga. 461, 25 S.E. 321 (1895) (decided under former Civil Code 1895, § 5180).

Admissions of trustee. — If one was a continuing trustee, holding the legal title for the cestui que trust, one's admissions, while actually handling the subject matter of the trust, would be admissible. Knorr v. Raymond, 73 Ga. 749 (1884) (decided under former Code 1882, § 3774).

Declarations of an assignor were admissible if the declarations were made in disparagement of the assignor's title while the assignor was in possession. Wright v. Zeigler Bros., 70 Ga. 501 (1883) (decided under former Code 1882, § 3774).

Claim cases. — In a claim case, the sayings of the defendant in execution while in possession, or of any other person in possession of the land, are evidence for the plaintiff in execution to show that the defendant, or such third person, was not the tenant of the claimant. Ozmore v. Hood & Kiddoo, 53 Ga. 114 (1874) (decided under former Code 1873, § 3774).

4. Adverse Possession

Declarations are admissible to characterize the possession as bearing on whether the possession was permissive or adverse, when that fact is relevant, but

not to show the truth of the statements, without more. Sausey v. White, 143 Ga. 7, 84 S.E. 58 (1915) (decided under former Civil Code 1910, § 5767).

Declarations of a person in possession of land are admissible to characterize the possession as bearing on whether the possession was permissive or adverse, when that fact is relevant, but not to show the truth of the statements without more. Higdon v. Dixon, 203 Ga. 67, 45 S.E.2d 423 (1947) (decided under former Code 1933, § 38-308).

Declarations admissible for limited purpose. — Declarations in favor of one's own title are admissible for no other purpose than to prove adverse possession. Rucker v. Rucker, 136 Ga. 830, 72 S.E. 241 (1911) (decided under former Civil Code 1910, § 5767).

Nature of predecessor's title. — When a claimant relies upon statements of the claimant's father to show that the latter had purchased land with money of his wife, taking title thereto in his own name, declarations made by the father, while in possession of the land, that the land was not bought with money of his wife, but with his own funds, are admissible to show his adverse possession. Wallace v. Mize, 153 Ga. 374, 112 S.E. 724 (1922) (decided under former Civil Code 1910, § 5767).

Deceased Persons

1. In General

Constitutionality. — Admission of dying declarations does not contravene that provision of the Constitution of the United States which provides that the accused shall be confronted with the witnesses against the accused. Jones v. State, 130 Ga. 274, 60 S.E. 840 (1908) (decided under former Penal Code 1895, § 1000). See Campbell v. State, 11 Ga. 353 (1852) (decided under former law).

If the declarant did not die, the statement is not admissible as a dying declaration. Stembridge v. Georgia, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952).

Must be in prosecution for homicide of deceased. — Declarations made by a person in extremis are not admissible as dying declarations except where the defendant is on trial for killing declarant. Wooten v. Wilkins, 39 Ga. 223, 99 Am. Dec. 456 (1869) (decided under former Code 1863, § 3704); Miliken v. State, 8 Ga. App. 478, 69 S.E. 915 (1910) (decided under former Penal Code 1895, § 1000).

Declarations, though made by a person in extremis, are not admissible as dying declaration in a homicide case since the defendant is not on trial for killing the declarant, though the declarant may have been killed in the transaction to which the trial relates. Westberry v. State, 175 Ga. 115, 164 S.E. 905 (1932) (decided under former Penal Code 1910, § 1026).

Dying declarations can be used by the accused for the purpose of showing the accused's innocence. Johnson v. State, 169 Ga. 814, 152 S.E. 76 (1930) (decided under former Penal Code 1910, § 1026).

Credibility of declarations. — Even though all the conditions be satisfied still dying declarations should be received with great caution. Carter v. State, 2 Ga. App. 254, 58 S.E. 532 (1907) (decided under former Penal Code 1895, § 1000); Smith v. State, 9 Ga. App. 403, 71 S.E. 606 (1911) (decided under former Penal Code 1910, § 1026).

Evidence of a dying declaration should be received with great caution because first, the declarant is not under oath second, because the declarant is not subject to cross-examination third, because of the likelihood of its being misquoted and fourth, because although it is of a species of proof spoken of as an anomaly, and contrary to all the general rules of evidence, yet it has, where it is received, the greatest weight with juries. Hardy v. State, 76 Ga. App. 488, 46 S.E.2d 536 (1948) (decided under former Code 1933, § 38-307).

Ambiguous statements. — When a statement is susceptible of two constructions, one that the declarant realized the declarant was in a dying condition and the other that the declarant might recover, and when the other circumstances are sufficient to show prima facie that the declarant was in the article of death and conscious of the declarant's condition, a declaration as to the cause of the

Deceased Persons (Cont'd)
1. In General (Cont'd)

declarant's death and the person who killed the declarant is not to be excluded because of such ambiguity. Parker v. State, 197 Ga. 340, 29 S.E.2d 61 (1944) (decided under former Code 1933, § 38-307).

Subsequent affirmations. — Declarations not admissible because, at the time of making, the declarant did not believe declarant was going to die, may become admissible by subsequent affirmation since the declarations were referred to and affirmed as to their truth at the time when the declarant was conscious the declarant was dying. Cooper v. State, 182 Ga. 42, 184 S.E. 716 (1936) (decided under former Code 1933, § 38-307).

When victim makes same statement before and after awareness of impending death. — There was no error in permitting the state's witnesses to testify about the victim's statement, made prior to the time that the victim was aware of the victim's impending death, about who had beaten the victim, since there was evidence that the victim later made the same statement while fully aware of the victim's impending death. Wright v. State, 254 Ga. 484, 330 S.E.2d 358 (1985) (decided under former O.C.G.A. § 24-3-6).

Former dead man's statute rendered a witness incompetent to testify as to a conversation with a person since deceased regardless of whether the testimony might be admissible under other rules of evidence. Willis v. Kennedy, 267 Ga. 165, 476 S.E.2d 246 (1996) (decided under former O.C.G.A. § 24-3-9).

Testimony of friend of deceased murder victim admissible. — In a malice murder case, the trial court did not abuse the court's discretion by finding that a statement by a murder victim's close, personal friend that the victim told the friend that the victim intended and was making arrangements to separate from the defendant and force the defendant to move out of their home was admissible under the necessity exception to the hearsay rule because the victim shared personal confidences with the friend and, therefore, the statement exhibited a particularized guarantee of trustworthiness. McNaughton v. State, 290 Ga. 894, 725 S.E.2d 590 (2012) (decided under former O.C.G.A. § 24-3-1).

2. Declarations

a. Completeness

Exclusion as fragmentary and incomplete. — Dying declaration which was uncompleted because the declarant' became unconscious before finishing the declarant's statement is not thereby rendered inadmissible. But if it appears that the statement was intended by the declarant to be connected with and qualified by other statements which from any cause the declarant was prevented from making, the statement should be excluded as fragmentary and incomplete. Kalb v. State, 195 Ga. 544, 25 S.E.2d 24 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-307).

Telling of less than full knowledge. — If a dying person finishes the statement the person wishes to make, it is no objection to the statement's admissibility as a dying declaration that the person told only a portion of what the person might have been able to tell. A distinct statement of facts meets the requirement of completeness. Kalb v. State, 195 Ga. 544, 25 S.E.2d 24 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-307).

Failure to use full name. — Dying declarations sought to be admitted were not objectionable because the full name of the defendant was not stated, there being other evidence to show that the name used by the deceased referred to the accused. Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-307).

Fact that the deceased in the deceased's dying declaration did not call the full name of the defendant does not render this evidence inadmissible when taken in connection with the other evidence that there was no other person present at the

time of the homicide with such name. Patterson v. State, 199 Ga. 773, 35 S.E.2d 504 (1945) (decided under former Code 1933, § 38-307).

Since the victim's dying declaration referred to a woman at the scene of a crime, and since the state established that the defendant was the only woman present when the victim was killed, the victim's failure to use her name does not render the victim's statement inadmissible. Dixon v. State, 243 Ga. 46, 252 S.E.2d 431 (1979) (decided under former Code 1933, § 38-307).

b. Factual Requirements

Reason for admission is based on the fact that a man in a dying condition would not misrepresent a fact. Hill v. State, 41 Ga. 484 (1871) (decided under former Code 1868, § 3728); Solomon v. State, 2 Ga. App. 92, 58 S.E. 381 (1907) (decided under former Penal Code 1910, § 1026).

Must be certain and definite. — All vague and indefinite expressions, all language that does not distinctly point to the cause of death, and death's attending circumstances, but requires to be aided by supposition or inference in order to establish facts tending to criminate the respondent should be held inadmissible. Mitchell v. State, 71 Ga. 128 (1883) (decided under former Code 1882, § 3781); Odom v. State, 13 Ga. App. 687, 79 S.E. 858 (1913) (decided under former Penal Code 1910, § 1026).

Must be as to facts. — Dying declarations are competent, provided the declarations do not amount to the mere expression of an opinion by the deceased as to the cause and manner of the declarant's death. The rule of law is that a dying declaration to be admissible must consist of a statement of a matter of fact, and a declaration which amounts to the mere expression of an opinion by the person making it should not be received in evidence. White v. State, 100 Ga. 659, 28 S.E. 423 (1897) (decided under former Penal Code 1895, § 1000).

Presumption of personal knowledge. — When want of knowledge does not appear either from the statement itself or from other evidence in the case, it must be presumed that the declarant stated a fact within the declarant's knowledge. In these circumstances, it was a question for the jury whether the declaration represented the primary knowledge of the deceased or merely the deceased's opinion. Strickland v. State, 167 Ga. 452, 145 S.E. 879 (1928) (decided under former Penal Code 1910, § 1026); Hawkins v. State, 213 Ga. 749, 101 S.E.2d 710 (1959) (decided under former Code 1933, § 38-307).

c. Scope of Declarations

Declarations should be limited to the cause of death and the person who killed the victim. Harris v. State, 142 Ga. 627, 83 S.E. 514 (1914) (decided under former Penal Code 1910, § 1026).

But not strictly limited. — Dying declaration is not strictly limited to the physical cause of death and the identity of the killer but may include the res gestae of the homicide as part of the cause of death. McAllister v. State, 246 Ga. 246, 271 S.E.2d 159 (1980) (decided under former Code 1933, § 38-307).

Dying declarations admissible to prove any relevant fact embraced in the res gestae of the killing. Wilkerson v. State, 91 Ga. 729, 17 S.E. 990, 44 Am. St. R. 63 (1893) (decided under former Code 1882, § 3781). See Bush v. State, 109 Ga. 120, 34 S.E. 298 (1899) (decided under former Penal Code 1895, § 1000); Rozier v. State, 197 Ga. 420, 29 S.E.2d 602 (1944) (decided under former Code 1933, § 38-307).

Relation required. — Dying declarations must relate to the cause of death or the person who killed the deceased in order to be admissible. Rozier v. State, 197 Ga. 420, 29 S.E.2d 602 (1944) (decided under former Code 1933, § 38-307).

Proper parts of res gestae. — Every fact or circumstance shedding light upon the transaction, including such conversation and conduct of the parties as are properly parts of the res gestae of the homicide, may lawfully go to the jury in a dying declaration made by the deceased. Taylor v. State, 120 Ga. 857, 48 S.E. 361 (1904) (decided under former Penal Code 1895, § 1000); Harris v. State, 142 Ga. 627, 83 S.E. 514 (1914) (decided under

Deceased Persons (Cont'd)
2. Declarations (Cont'd)
c. Scope of Declarations (Cont'd)

former Penal Code 1910, § 1026); Rozier v. State, 197 Ga. 420, 29 S.E.2d 602 (1944) (decided under former Code 1933, § 38-307).

d. Identity of Assailant

Mere expression of opinion as to who assailant was, when it was manifestly impossible that the deceased could have seen the assailant or known certainly who the assailant was, is not admissible as a dying declaration. Strickland v. State, 167 Ga. 452, 145 S.E. 879 (1928) (decided under former Penal Code 1910, § 1026).

Conclusions based on appearances. — When a declaration by the declaration's terms, taken in connection with the circumstances, merely expresses the declarant's belief as to the identity of the guilty person, it should be excluded; however, if the declarant sees the declarant's assailant or assailants, and from appearances which the declarant may describe the declarant draws a conclusion as to the assailant's identity, it is admissible. Hawkins v. State, 213 Ga. 749, 101 S.E.2d 710 (1958) (decided under former Code 1933, § 38-307).

Question of fact. — When the evidence did not show that it was impossible for the deceased to have seen the person who shot the deceased, it was a question of fact for the jury to determine whether the deceased had personal knowledge of the assailant's identity. Hawkins v. State, 213 Ga. 749, 101 S.E.2d 710 (1958) (decided under former Code 1933, § 38-307).

e. Elicited by Questions

Admissibility is not affected by the fact that the statements may have been elicited in response to questions put to the deceased by the bystanders. Brinson v. State, 22 Ga. App. 649, 97 S.E. 102 (1918) (decided under former Penal Code 1910, § 1026); Davis v. State, 204 Ga. 467, 50 S.E.2d 604 (1948) (decided under former Code 1933, § 38-307).

Not rebuttal of other evidence. — If preliminary statement made by the deceased as to the deceased's condition, in answer to questions, could be construed as lacking definiteness as a statement that the deceased was conscious of the fact that the deceased was going to die, this would not necessarily rebut the other evidence and circumstances from which it could have been inferred that the deceased believed the deceased would die. Davis v. State, 204 Ga. 467, 50 S.E.2d 604 (1948) (decided under former Code 1933, § 38-307).

Officer's questioning of dying victim. — Trial court did not abuse the court's discretion in overruling the defendant's objection to an officer's testimony that the victim said that the victim thought that the defendant had shot the victim since they had been in a relationship that ended because the officer responded to the emergency situation, found the fatally wounded victim, and asked the victim what happened in order to assess the exigencies; also, the officer wanted to keep the victim talking in order to keep the victim from losing consciousness before emergency responders arrived. Sanford v. State, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, U.S. , 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011) (decided under former O.C.G.A. § 24-3-6).

3. Conscious of Condition

Must be conscious of condition. — It must appear to the court that there was a probability that the deceased was conscious of the deceased's impending death at the time of making the dying declarations. Walton v. State, 79 Ga. 446, 5 S.E. 203 (1887) (decided under former Code 1882, § 3781); Young v. State, 114 Ga. 849, 40 S.E. 1000 (1902) (decided under former Penal Code 1895, § 1000); Crews v. State, 44 Ga. App. 546, 162 S.E. 146 (1932) (decided under former Penal Code 1910, § 1026). Gibbs v. State, 190 Ga. 207, 9 S.E.2d 248 (1940) (decided under former Code 1933, § 38-307); Freeman v. State, 233 Ga. 745, 213 S.E.2d 643 (1975) (decided under former Code 1933, § 38-307).

Means unimportant. — It does not matter how or by what means the deceased becomes conscious that the deceased is dying. Smith v. State, 9 Ga. App. 403, 71 S.E. 606 (1911) (decided under

former Penal Code 1910, § 1026).

Declarations of a person since deceased are admissible to show that the person was conscious of the person's dying condition. Jenkins v. State, 190 Ga. 556, 9 S.E.2d 909 (1940) (decided under former Code 1933, § 38-307).

Statement of recovery hopes most common. — Most common way to determine whether or not the deceased was conscious of impending death at the time of making the declaration is to look at the deceased's statement concerning the deceased's hope of recovery. Wallace v. State, 90 Ga. 117, 15 S.E. 700 (1892) (decided under former Code 1882, § 3781).

Consciousness may be inferred. — Consciousness on the part of the deceased that the deceased was dying and was actually in extremis may be inferred, not only from the deceased's statements, but also from the nature of the wound and other circumstances. Smith v. State, 110 Ga. 255, 34 S.E. 204 (1899) (decided under former Penal Code 1895, § 1000); Young v. State, 114 Ga. 849, 40 S.E. 1000 (1902) (decided under former Penal Code 1895, § 1000); Jefferson v. State, 137 Ga. 382, 73 S.E. 499 (1912) (decided under former Penal Code 1910, § 1026); Johnson v. State, 169 Ga. 814, 152 S.E. 76 (1930) (decided under former Penal Code 1910, § 1026); Crews v. State, 44 Ga. App. 546, 162 S.E. 146 (1932) (decided under former Penal Code 1910, § 1026); Keith v. State, 175 Ga. 385, 165 S.E. 262 (1932) (decided under former Penal Code 1910, § 1026); McCullough v. State, 177 Ga. 315, 170 S.E. 220 (1933) (decided under former Penal Code 1910, § 1026); Simmons v. State, 181 Ga. 761, 184 S.E. 291 (1936) (decided under former Code 1933, § 38-307); Rouse v. State, 183 Ga. 551, 188 S.E. 904 (1936); Etheridge v. State, 187 Ga. 30, 199 S.E. 185 (1938), for comment, see 1 Ga. B.J. 49 (1939) (decided under former Code 1933, § 38-307); Satterfield v. State, 68 Ga. App. 7, 21 S.E.2d 861 (1942); Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, Howard v. State, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-307); Patterson v. State, 199 Ga. 773, 35 S.E.2d 504 (1945) (decided under former Code 1933, § 38-307); Hardy v. State, 76 Ga. App. 488, 46 S.E.2d 536 (1948) (decided under former Code 1933, § 38-307); Davis v. State, 204 Ga. 467, 50 S.E.2d 604 (1948) (decided under former Code 1933, § 38-307); Stembridge v. State, 82 Ga. App. 214, 60 S.E.2d 491 (1950) (decided under former Code 1933, § 38-307); Norris v. State, 258 Ga. 889, 376 S.E.2d 653 (1989) (decided under former O.C.G.A. § 24-3-6).

With regard to a defendant's conviction for malice murder, the trial court did not err by admitting into evidence statements that the victim made to friends who found the victim wounded that the same person who had accused the victim of committing a robbery earlier in the day (the defendant) was the same person who shot the victim. The victim had lost consciousness after no longer being able to walk after having suffered a gunshot wound to the chest and was found several hours later fully knowing of the need of immediate medical attention; therefore, a prima facie showing for the admission of the victim's statements as dying declarations was established. Ventura v. State, 284 Ga. 215, 663 S.E.2d 149 (2008) (decided under former O.C.G.A. § 24-3-6).

Identification testimony of murder victim who had suffered third-degree burns over 95 percent of the victim's body, and was aware of the victim's impending death at the time the identification was made, was properly admitted. Norris v. State, 258 Ga. 889, 376 S.E.2d 653 (1989) (decided under former O.C.G.A. § 24-3-6).

Consciousness of impending death may be inferred from the declarant's statements, the nature of declarant's wounds, and other circumstances. Early v. State, 170 Ga. App. 158, 316 S.E.2d 527 (1984) (decided under former O.C.G.A. § 24-3-6).

Asking for physician. — Fact that the deceased whose last statements were sought to be admitted, might have asked for a doctor does not establish, and might not of itself be taken in the mind of the jury as in any way indicating that the deceased was unaware of the deceased's dying condition, since it is but natural that even a dying man could wish to be attended by a physician. Patterson v.

Deceased Persons (Cont'd)
3. Conscious of Condition (Cont'd)

State, 199 Ga. 773, 35 S.E.2d 504 (1945) (decided under former Code 1933, § 38-307).

Notwithstanding that a physician informed the declarant that there was a chance for the declarant to recover, declarations were held admissible. Bryant v. State, 80 Ga. 272, 4 S.E. 853 (1887) (decided under former Code 1882, § 3781).

Officer's reassurance to victim did not preclude admission. — Fact that victim asked whether the victim was going to die, the victim's knowledge of the serious gunshot wound, the occurrence of the victim's death within a matter of hours, and the victim's great pain established a prima facie case that the victim realized that death was impending and, therefore, the ultimate determination was for the jury; the police officer's reassurance of the victim did not preclude admission of the dying declaration. Morgan v. State, 275 Ga. 222, 564 S.E.2d 192 (2002) (decided under former O.C.G.A. § 24-3-6).

Victim conscious of critical condition. — Trial court did not err in admitting into evidence statements the victim made to an officer that the defendant shot the victim because the circumstances made a prima facie showing for the admission of the statements as the victim's dying declarations when the victim was conscious of the victim's critical condition at the time the victim made the statements; it was apparent that the victim's wounds were extremely serious, the victim was clutching a pillow to the victim's abdomen for comfort, the victim's breathing was "stressed", the victim was in great pain, and the victim appeared to be overwhelmed with fear. Sanford v. State, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, U.S. , 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011) (decided under former O.C.G.A. § 24-3-6).

4. Time Requirements

Dying declaration need not be made at the time of the transaction or immediately thereafter. McAllister v. State, 246 Ga. 246, 271 S.E.2d 159 (1980) (decided under former Code 1933, § 38-307).

Although life may have continued longer than was expected despair of dying may exist and be sufficiently proved. Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-307).

Actual period of survival after making the declarations is not controlling. The necessary element is the declarant's expectation; and the subsequent duration of life, whatever it may turn out to be, has no relation to the declarant's state of mind when the declarant made the declaration. Johnson v. State, 169 Ga. 814, 152 S.E. 76 (1930) (decided under former Penal Code 1910, § 1026); Crews v. State, 44 Ga. App. 546, 162 S.E. 146 (1932) (decided under former Penal Code 1910, § 1026); Rouse v. State, 183 Ga. 551, 188 S.E. 904 (1936) (decided under former Code 1933, § 38-307); Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-307); Kalb v. State, 195 Ga. 544, 25 S.E.2d 24 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-307); Davis v. State, 204 Ga. 467, 50 S.E.2d 604 (1948) (decided under former Code 1933, § 38-307); Stembridge v. State, 82 Ga. App. 214, 60 S.E.2d 491 (1950) (decided under former Code 1933, § 38-307); Ayers v. State, 215 Ga. 325, 110 S.E.2d 669 (1959) (decided under former Code 1933, § 38-307); Ward v. State, 226 Ga. 724, 177 S.E.2d 378 (1970) (decided under former Code 1933, § 38-307).

Declarations were held admissible despite length of survival in the following cases. — See Johnson v. State, 169 Ga. 814, 152 S.E. 76 (1930) (survived three weeks after declaration) (decided under former Penal Code 1910, § 1026); Cooper v. State, 182 Ga. 42, 184 S.E. 716 (1936) (survived several days after declaration which was made 11 months after shooting) (decided under former Code

1933, § 38-307); Miles v. State, 182 Ga. 75, 185 S.E. 286 (1936) (survived 33 or 34 days after declaration) (decided under former Code 1933, § 38-307); Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-307).

Long intervals evidence of state of mind. — Fact that death does not immediately follow the declaration will not render evidence of the declaration inadmissible as a matter of law; although, if the interval is long, this fact may be some evidence that the declarant had not despaired of recovery. Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-307).

Lapse of time between the declaration and the time of death may be some evidence that the declarant has not despaired of recovery, but it is not controlling. Early v. State, 170 Ga. App. 158, 316 S.E.2d 527 (1984) (decided under former O.C.G.A. § 24-3-6).

Fact that victim survived 54 days following the victim's declaration did not make declaration inadmissible. Early v. State, 170 Ga. App. 158, 316 S.E.2d 527 (1984) (decided under former O.C.G.A. § 24-3-6).

5. Procedure

a. Evidentiary Foundation

Affirmative proof not required. — It is not, in order to render dying declarations admissible in evidence upon a trial for murder, essential for the state to show that the declarant affirmatively said the declarant was in a dying condition or used language of like import. Gibson v. State, 52 Ga. App. 297, 183 S.E. 83 (1935) (decided under former Code 1933, § 38-307); Parker v. State, 197 Ga. 340, 29 S.E.2d 61 (1944) (decided under former Code 1933, § 38-307); Ayers v. State, 215 Ga. 325, 110 S.E.2d 669 (1959) (decided under former Code 1933, § 38-307).

Only prima facie evidence needed. — In order to submit a dying declaration to the jury it is only necessary for the state to submit facts which prima facie prove that the deceased was in the article of death at the time of the statement and that the deceased was conscious of impending death. Dumas v. State, 62 Ga. 58 (1878) (decided under former Code 1873, § 3781); Mitchell v. State, 71 Ga. 128 (1883) (decided under former Code 1882, § 3781); Walton v. State, 79 Ga. 446, 5 S.E. 203 (1887) (decided under former Code 1882, § 3781); Bird v. State, 128 Ga. 253, 57 S.E. 320 (1907) (decided under former Penal Code 1895, § 1000); Moody v. State, 1 Ga. App. 772, 58 S.E. 262 (1907) (decided under former Penal Code 1895, § 1000); Hawkins v. State, 141 Ga. 212, 80 S.E. 711 (1914) (decided under former Penal Code 1910, § 1026); Green v. State, 154 Ga. 117, 113 S.E. 536 (1922) (decided under former Penal Code 1910, § 1026); Faulkner v. State, 166 Ga. 645, 144 S.E. 193 (1928) (decided under former Penal Code 1910, § 1026); Johnson v. State, 169 Ga. 814, 152 S.E. 76 (1930) (decided under former Penal Code 1910, § 1026); Gibbs v. State, 41 Ga. App. 574, 153 S.E. 613 (1930) (decided under former Penal Code 1910, § 1026); Crews v. State, 44 Ga. App. 546, 162 S.E. 146 (1932) (decided under former Penal Code 1910, § 1026); Rounds v. State, 174 Ga. 308, 162 S.E. 696 (1932) (decided under former Penal Code 1910, § 1026); McCullough v. State, 177 Ga. 315, 170 S.E. 220 (1933) (decided under former Penal Code 1910, § 1026); Cooper v. State, 182 Ga. 42, 184 S.E. 716 (1936) (decided under former Code 1933, § 38-307); Sisk v. State, 182 Ga. 448, 185 S.E. 777 (1936) (decided under former Code 1933, § 38-307); Etheridge v. State, 187 Ga. 30, 199 S.E. 185 (1938), for comment, see 1 Ga. B.J. 49 (1939) (decided under former Code 1933, § 38-307); Simmons v. State, 181 Ga. 761, 184 S.E. 291 (1939); Satterfield v. State, 68 Ga. App. 7, 21 S.E.2d 861 (1942) (decided under former Code 1933, § 38-307); Parker v. State, 197 Ga. 340, 29 S.E.2d 61 (1944) (decided under former Code 1933, § 38-307); Stembridge v. State, 82 Ga. App. 214, 60 S.E.2d 491 (1950) (decided under former Code 1933, § 38-307);

Deceased Persons (Cont'd)
5. Procedure (Cont'd)
a. Evidentiary Foundation (Cont'd)

Carter v. State, 227 Ga. 788, 183 S.E.2d 392 (1971) (decided under former Code 1933, § 38-307).

Decedent's declarations admissible as foundation. — While testimony of decedent's spouse as to decedent's declarations to the spouse did not indicate the cause of the decedent's death or the person who killed the decedent, but strongly tended to show that the decedent was in a dying condition and was conscious thereof, the statements were admissible to support other declarations made by the decedent to other persons in which the decedent had indicated, not only consciousness of the decedent's dying condition, but facts going to show the cause of the decedent's death and the person who killed the decedent. Gibbs v. State, 190 Ga. 207, 9 S.E.2d 248 (1940) (decided under former Code 1933, § 38-307).

Evidence was sufficient to authorize admission of statements as dying declarations in the following cases. — White v. State, 100 Ga. 659, 28 S.E. 423 (1897) (decided under former Penal Code 1895, § 1000); Lee v. State, 2 Ga. App. 481, 58 S.E. 676 (1907) (decided under former Penal Code 1895, § 1000); Faulkner v. State, 166 Ga. 645, 144 S.E. 193 (1928) (decided under former Penal Code 1910, § 1026); Etheridge v. State, 187 Ga. 30, 199 S.E. 185 (1938) (decided under former Code 1933, § 38-307); Jenkins v. State, 190 Ga. 556, 9 S.E.2d 909 (1940) (decided under former Code 1933, § 38-307); Davis v. State, 204 Ga. 467, 50 S.E.2d 604 (1948) (decided under former Code 1933, § 38-307); Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562 (1951) (decided under former Code 1933, § 38-307); Lee v. State, 211 Ga. 170, 84 S.E.2d 353 (1954) (decided under former Code 1933, § 38-307); Phillips v. State, 260 Ga. 742, 399 S.E.2d 202 (1991) (decided under former O.C.G.A. § 24-3-6).

Declarations were erroneously admitted in the following cases. — See Lyens v. State, 133 Ga. 587, 66 S.E. 792 (1909) (decided under former Penal Code 1895, § 1000); Howard v. State, 144 Ga. 169, 86 S.E. 540 (1915) (decided under former Penal Code 1910, § 1026).

b. Witnesses

All evidence from same witness not required. — It is not necessary that the testimony relating to declarations by the deceased as to the cause of the deceased's death, the person who killed the deceased, the deceased's dying condition, and the deceased's consciousness of such fact at the time the declarations were made, should come from the same witness. Gibbs v. State, 190 Ga. 207, 9 S.E.2d 248 (1940) (decided under former Code 1933, § 38-307).

Individual testimony requirements. — It was not necessary that the testimony of each witness should disclose that the deceased was in a dying condition and conscious thereof, in order for such testimony to be admissible, but it was permissible to lay the foundation by other witnesses. Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-307).

c. Impeachment

Bad character of deceased. — On a trial for murder, when dying declarations of the deceased have been introduced against the accused, it is competent for the latter to impeach these declarations by showing that the deceased, because of general bad character, was unworthy of belief. Redd v. State, 99 Ga. 210, 25 S.E. 268 (1896) (decided under former Penal Code 1895, § 1000); Johnson v. State, 169 Ga. 814, 152 S.E. 76 (1930) (decided under former Penal Code 1910, § 1026).

Conflicting statements. — Statements of the deceased in conflict with proved dying declarations, if any have been made, are admissible. Johnson v. State, 169 Ga. 814, 152 S.E. 76 (1930) (decided under former Penal Code 1910, § 1026); Keith v. State, 175 Ga. 385, 165 S.E. 262 (1932) (decided under former Penal Code 1910, § 1026).

d. Instructions

Contents of instructions. — Better practice when charging on the question of

dying declarations to charge substantially in the language of the former statute, without explaining to the jury why such declarations were admitted. Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562 (1951) (decided under former Code 1933, § 38-307).

Decedent's condition. — Jury should be instructed that the statements attributed to the deceased should be received and considered with great caution, and should have no weight unless the jury is satisfied from the evidence that such statements were made by the deceased at a time when the deceased was in a dying condition, and that the deceased was at that time conscious that the deceased was dying. Cooper v. State, 182 Ga. 42, 184 S.E. 716 (1936) (decided under former Code 1933, § 38-307).

When defendant made no objection to the admission of testimony as to statements of murder victim on the ground that it was not shown that such declarations of the deceased were conscious utterances in the apprehension and immediate prospect of death, and the witness who testified to the statement also testified that victim was in a dying condition and knew that the victim was, court did not err in refusing a new trial merely because the court made no reference in the court's charge to dying declarations, and did not charge the jury that the alleged dying statement was admitted by the court prima facie and that before the jury could receive it and act upon the declaration they must believe that the declaration was made by the deceased in the article of death and when the deceased was conscious of the deceased's condition. Allen v. State, 187 Ga. 178, 200 S.E. 109 (1938) (decided under former Code 1933, § 38-307).

Credibility. — While the testimony of a witness, whose evidence goes to the jury through the medium of dying declarations, is to be considered under the same rules that govern them in determining the credibility of other witnesses who testify from the stand, the failure of the judge to charge upon the subject of such rules will not be a sufficient reason for granting a new trial, in the absence of an appropriate and timely written request asking instructions upon the subject. Carter v. State, 227 Ga. 788, 183 S.E.2d 392 (1971) (decided under former Code 1933, § 38-307).

Admission over objection. — When testimony relating to a dying declaration of the decedent is received in evidence and no objection is made thereto, it is not error for the court to give in charge to the jury the legal principles applicable to dying declarations. Craig v. State, 55 Ga. App. 207, 189 S.E. 727 (1937) (decided under former Code 1933, § 38-307).

Proof beyond reasonable doubt. — It was error for the court, when the defendant personally introduced dying declarations as an affirmative defense, to instruct the jury in effect that the jury would have to be satisfied beyond a reasonable doubt that the deceased was, at the time the deceased made such declarations, in the article of death and conscious of the deceased's condition. Poole v. State, 47 Ga. App. 303, 170 S.E. 309 (1933) (decided under former Penal Code 1910, § 1026).

Failure to instruct. — Failure of the court to add, in addition to other instructions given upon the subject of dying declarations, the further instruction that the dying declaration must be received with caution, is not reversible error. Key v. State, 177 Ga. 329, 170 S.E. 230 (1933) (decided under former Penal Code 1910, § 1026).

When in a homicide prosecution during colloquy between counsel and the trial judge with reference to admission of dying declaration the court stated that the court would charge the jury on dying declarations, but nothing further was said by counsel or the court pertaining to the evidence of a dying declaration, it was not reversible error to fail to charge the former statute. Dudley v. State, 67 Ga. App. 256, 19 S.E.2d 833 (1942) (decided under former Code 1933, § 38-307).

Failure of the court to instruct the jury as to the jury's consideration of dying declarations is not cause for a new trial since the state does not rely for conviction solely on dying declarations, and since there is no appropriate and timely written request for instructions as to dying declarations. Murray v. State, 214 Ga. 350, 104 S.E.2d 905 (1958) (decided under former Code 1933, § 38-307).

Deceased Persons (Cont'd)
5. Procedure (Cont'd)
d. Instructions (Cont'd)

When the state relies solely on a dying declaration, it is error to fail to instruct the jury thereon. Holcomb v. State, 249 Ga. 658, 292 S.E.2d 839 (1982) (decided under former O.C.G.A. § 24-3-6).

When the trial court fails to properly instruct the jury as to the jury's consideration of statements preliminarily admitted by the court as dying declarations, the error is not cause for a new trial since the state does not rely for conviction solely on dying declarations and since there is no appropriate and timely written request for instructions as to the declarations. Kitchens v. State, 256 Ga. 1, 342 S.E.2d 320 (1986) (decided under former O.C.G.A. § 24-3-6).

e. Duty of Jury

Ultimate determination. — When the foundation for a declaration has been prima facie established, the evidence is properly admitted, and the ultimate determination as to whether the person making the declaration was in articulo mortis and realized that death was impending, is a matter for the jury. Freeman v. State, 112 Ga. 48, 37 S.E. 172 (1900) (decided under former Penal Code 1895, § 1000); Darby v. State, 22 Ga. App. 606, 96 S.E. 707 (1918) (decided under former Penal Code 1910, § 1026); Gibbs v. State, 41 Ga. App. 574, 153 S.E. 613 (1930) (decided under former Penal Code 1910, § 1026); McCullough v. State, 177 Ga. 315, 170 S.E. 220 (1933) (decided under former Penal Code 1910, § 1026); Cooper v. State, 182 Ga. 42, 184 S.E. 716 (1936) (decided under former Code 1933, § 38-307); Etheridge v. State, 187 Ga. 30, 199 S.E. 185 (1938), for comment, see 1 Ga. B.J. 49 (1939) (decided under former Code 1933, § 38-307); Simmons v. State, 181 Ga. 761, 184 S.E. 291 (1939); Satterfield v. State, 68 Ga. App. 7, 21 S.E.2d 861 (1942) (decided under former Code 1933, § 38-307); Emmett v. State, 195 Ga. 517, 25 S.E.2d 9, cert. denied, 320 U.S. 774, 64 S. Ct. 76, 88 L. Ed. 464 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-307); Carter v. State, 227 Ga. 788, 183 S.E.2d 392 (1971) (decided under former Code 1933, § 38-307).

Weight of declarations. — Circumstances surrounding a dying declaration are matters which may properly be considered by the jury in determining the weight to be given to the declaration. Hubbard v. State, 208 Ga. 472, 67 S.E.2d 562 (1951).

Statements by Deceased Persons in Civil Matters

Boundary lines. — Declarations of deceased individuals who do not appear to have any motive to misrepresent are properly received in evidence, at least in the case of private boundaries. Waddell v. Cole, 138 Ga. App. 15, 225 S.E.2d 491 (1976) (decided under former Code 1933, § 38-311).

Declarations as to the location of the property line by the deceased husband were competent evidence of the line and landmarks thereon since this line had been claimed as the true line and was at least impliedly agreed to by the deceased husband. Banks v. Myrick, 149 Ga. App. 252, 253 S.E.2d 873 (1979) (decided under former Code 1933, § 38-311).

Actions to quiet title. — In an action to quiet title to real property, testimony about a rock foundation being the location of the family home was admissible under former O.C.G.A. § 24-3-9 (see now O.C.G.A. § 24-8-803). Resseau v. Bland, 268 Ga. 634, 491 S.E.2d 809 (1997) (decided under former O.C.G.A. § 24-3-9).

Statements by Third Parties

In general. — Sayings of one who is not a party to the case, or in privity with a party, are not admissible as evidence against either party. Bailey v. E.F. Wood & Co., 24 Ga. 164 (1858) (decided under former law); Chastain & Luck v. Robinson, 30 Ga. 55 (1860) (decided under former law).

When admission by person not a party to action is admissible. — Rule, as to parties to a suit, is that a plea of guilty may be shown as an admission against interest; admissions by persons

not a party to an action, however, are admissible in evidence only if the party making the admission is the real party in interest, although not a party to the record, or if a party to the record refers another to such third party for information, or if there is an admission by a third person against that person's interest as to a fact collateral to the main issue between the litigants but essential to the adjudication of the cause. Cobb v. Garner, 158 Ga. App. 110, 279 S.E.2d 280 (1981) (decided under former Code 1933, § 38-405).

Third party's plea was admissible under former O.C.G.A. § 24-3-35(2) as a third-party admission because the third party's fault had properly been made an issue under O.C.G.A. § 51-12-33. Woods v. Allied Van Lines, Inc., 316 Ga. App. 548, 730 S.E.2d 35 (2012) (decided under former O.C.G.A. § 24-3-35).

Referral for information. — When certain documentary evidence is offered, which upon its face is not admissible, but is claimed to be admissible, it is not error to exclude such evidence when there is no evidence to show that either party had referred the other to the author of the evidence for information. Myers v. Adcock, 198 Ga. 180, 31 S.E.2d 160 (1944) (decided under former Code 1933, § 38-405).

Information sought to be elicited from a witness as to the location of boundary line, having been obtained from another at the suggestion of one not a party to the case, was properly rejected by the trial court as hearsay, and was not admissible. Palmer v. Jackson, 86 Ga. App. 642, 72 S.E.2d 130 (1952) (decided under former Code 1933, § 38-405).

Collateral to main issue. — Whatever may be meant by the language "collateral to the main issue but essential to the adjudication," it is certainly not applicable if the statement bears directly upon the main issue in the case. Lewis v. American Rd. Ins. Co., 119 Ga. App. 507, 167 S.E.2d 729 (1969) (decided under former Code 1933, § 38-405).

Collateral to main issue not found. — Extrajudicial admission of employee, who was not a party to the indemnity contract, nor a party to the suit, was not admissible as an admission by a stranger to the suit bearing upon a collateral issue essential to the adjudication as the admission was not collateral to the main issue involved, but bore directly upon the issue. Glens Falls Indem. Co. v. Gottlieb, 80 Ga. App. 634, 56 S.E.2d 799 (1949) (decided under former Code 1933, § 38-405).

Letters. — There being evidence to authorize a finding by the jury that a conspiracy had existed as alleged, and it appearing from the uncontradicted testimony of the plaintiff that, during the existence of the conspiracy, one of the conspirators had referred the plaintiff to a third person, a stranger to the suit, for certain information connected with the subject matter of the conspiracy, it was not error to admit in evidence letters from the third person, pertaining to such information. Hill v. Reynolds, 19 Ga. App. 334, 91 S.E. 434 (1917) (decided under former Civil Code 1910, § 5778).

Carbon copies of two letters written by parties to a case to one not a party, which were not otherwise admissible, were not admissible when there was nothing to show that either of the parties had referred the other to the letter's recipient for information. The fact that one of the parties was seeking information about the other did not bring the letter within the former statute, and the letter would merely constitute hearsay evidence. Myers v. Adcock, 198 Ga. 180, 31 S.E.2d 160 (1944) (decided under former Code 1933, § 38-405).

Title to account. — Plaintiff's contention being that the account sued upon was plaintiff's account, and the defendants contending that it was contracted with and belonged to others who were not parties to the suit, and there being no assignment of the account in writing, it was not competent for the plaintiff to prove oral admissions made by these strangers to the suit that the account belonged to the plaintiff, and that these strangers had no interest in the account. Churchman, Williams & Co. v. Robinson, 93 Ga. 731, 20 S.E. 215 (1894) (decided under former Code 1882, § 3786).

Entry on minutes of third party insurance company. — In an action upon a benefit certificate, an entry upon the minutes of another association to which the deceased had applied for a benefit

Statements by Third Parties (Cont'd)

certificate was not, in such a trial, admissible against the plaintiff, it not being shown that the deceased had anything to do with the making of this entry. Supreme Conclave Knights of Damon v. O'Connell, 107 Ga. 97, 32 S.E. 946 (1899) (decided under former Civil Code 1895, § 5191).

An affidavit by a shooting victim urging nonprosecution of her defendant husband was not competent evidence. Freeman v. State, 233 Ga. 745, 213 S.E.2d 643 (1975) (decided under former Code 1933, § 38-405).

Criminal confessions. — Statements by a third party to the effect that the third party, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused upon the accused's trial, nor does the fact that the party, whose confession is sought to be introduced, is in another state and unavailable as a witness, or that there is testimony tending to establish the guilt of the one making such confession, change the foregoing rule. Bryant v. State, 197 Ga. 641, 30 S.E.2d 259 (1944) (decided under former Code 1933, § 38-405).

Declarations to third persons against the declarant's penal interest to the effect that the declarant, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused at the accused's trial, or to procure a new trial on the basis of newly discovered evidence. Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980) (decided under former Code 1933, § 38-405).

Witness's testimony as to a conversation the witness had with a child's mother was properly excluded as the mother testified and defendant did not ask the mother about the conversation. Georgia does not recognize a third party's admission against penal interest when that admission exculpates the defendant. Hood v. State, 273 Ga. App. 430, 615 S.E.2d 244 (2005) (decided under former O.C.G.A. § 24-3-35).

Guilty pleas. — As to parties to a civil action, a guilty plea constitutes an admission against interest which is prima facie evidence of the facts admitted. Tomlinson, Inc. v. Roberts, 142 Ga. App. 134, 235 S.E.2d 721 (1977) (decided under former Code 1933, § 38-405).

Party disclaiming title. — If the defendant in trover relies, amongst other things, upon paramount outstanding title in another, the acts and declarations of the third person, disclaiming title in oneself and acquiescing in the plaintiff's title, are admissible in evidence. White v. Dinkins, 19 Ga. 285 (1856) (decided under former law).

Declaration of holder of negotiable instrument. — Party who acquires title to a bill or note, by endorsement, delivery, or otherwise, before due, but with express notice of any defect or incumbrance, insofar identified with the previous owner, that the previous owner's declarations or admissions while owner, may be received in evidence against such party. Glanton v. Griggs, 5 Ga. 424 (1848) (decided under former law).

Affidavit of guarantor's attorney. — In an action by lessors against guarantors, the affidavit of an attorney representing the guarantors, recalling a conversation she had with an officer of the lessee, was not admissible because the statements therein were not against the interest of the officer, were self-serving, and were not collateral to the main issue. Athens Int'l, Inc. v. Venture Capital Properties, Inc., 230 Ga. App. 286, 495 S.E.2d 900 (1998) (decided under former O.C.G.A. § 24-3-35).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 813, 838, 841, 842, 843, 904 et seq.

C.J.S. — 31A C.J.S., Evidence, §§ 299, 312 et seq., 342, 350 et seq., 447, 482, 537 et seq.

ALR. — Death of adverse party as affecting evidence with respect to book account, 6 ALR 756.

Admissibility of dying declaration with respect to transaction prior to homicide, 14 ALR 757.

Use in criminal case of testimony given on former trial, or preliminary examina-

tion, by witness not available at present trial, 15 ALR 495; 79 ALR 1392; 122 ALR 425; 159 ALR 1240.

Impeaching or discrediting dying declarations, 16 ALR 411.

Dying declarations involving an opinion or conclusion, 25 ALR 1370; 86 ALR2d 905.

Admissibility in favor of accused in criminal case of extrajudicial confession by stranger, 35 ALR 441; 48 ALR 348.

When transfer deemed to be one in contemplation of death within the meaning of the Inheritance Tax Law, 41 ALR 989; 75 ALR 544; 120 ALR 170; 148 ALR 1051.

Admissibility of dying declarations in cases not involving homicide, 49 ALR 1282; 91 ALR 560; 47 ALR2d 526.

Admissibility of dying declarations inculpating defendant in murder of one other than victim named in indictment, 69 ALR 1221.

Admissibility in behalf of defendant in action for libel or slander of similar charges made by other persons against plaintiff, 74 ALR 732.

When one deemed to be beyond jurisdiction of court within meaning of statute relating to admissibility of testimony given on former trial, 87 ALR 891.

Admissibility of dying declarations in cases other than prosecution for homicide, 91 ALR 560.

Admissibility of dying declarations as affected by their incompleteness, 94 ALR 679.

Quantum of proof of preliminary facts necessary to admissibility of dying declarations, 96 ALR 621.

Constitutionality, construction, and application of statutes making statements of deceased persons admissible in evidence, 96 ALR 686.

Admissibility of memoranda made by one since deceased regarding matters in respect of which he acted for one of the parties to the present litigation, 103 ALR 1501.

Admissibility in connection with dying declarations of other declarations by deceased not made in circumstances entitling them to admission as independent dying declarations, 104 ALR 1319.

Admissibility of admissions against title to tangible personal property made by one subsequent to executing chattel mortgage thereon, 106 ALR 1296.

Admissibility of oral testimony as to dying declarations which had been reduced to writing, 112 ALR 43.

Permitting dying declarations to be taken into jury room, 114 ALR 1519.

Adverse possession as affected by attempt during period thereof to change, or make more specific, the tract claimed, 115 ALR 1299.

Effect of war on litigation pending at the time of its outbreak, 137 ALR 1335; 147 ALR 1298; 148 ALR 1384; 149 ALR 1451; 149 ALR 1452; 150 ALR 1417; 150 ALR 1418; 151 ALR 1453; 152 ALR 1450; 154 ALR 1447.

Admissibility of oral or written statement by deceased as to fact or terms of an antenuptial or postnuptial agreement which cannot be found, 140 ALR 1133.

Identity of parties as condition of admissibility in civil case of testimony or deposition in former action or proceeding of witness not available in present action or proceeding, 142 ALR 673.

Admissibility on question of constructive trust of declarations made by grantor after execution and delivery of deed absolute on its face, 156 ALR 1335.

Weight and value of dying declarations as evidence, 167 ALR 147.

Binding effect of party's own unfavorable testimony, 169 ALR 798.

Use of interpreter in court proceedings, 172 ALR 923.

Mode of proof of testimony given at former examination, hearing, or trial, 11 ALR2d 30.

Right of prosecution, in homicide case, to introduce evidence in rebuttal to show good, quiet, and peaceable character of deceased, 34 ALR2d 451.

Admissibility of declarations of grantor on issue of delivery of deed, 34 ALR2d 588.

Adverse possession of landlord as affected by tenant's recognition of title of third person, 38 ALR2d 826.

Reputation as to ownership or claim as admissible on question of adverse possession, 40 ALR2d 770.

Admissibility of dying declaration in civil case, 47 ALR2d 526.

Opinion of doctor or other attendant as

to declarant's consciousness of imminent death so as to qualify his statement as dying declaration, 48 ALR2d 733.

Declarations or admissions of person in control of vehicle as admissible against or binding upon owner, lien claimants, or the like, of a vehicle subjected to forfeiture proceedings, 55 ALR2d 1280.

Admissibility, in action on employee fidelity bond or policy, of confessions or declarations of such employee no longer available as witness, 65 ALR2d 631.

Identity of subject matter or of issues as condition of admissibility in civil case of testimony or deposition in former proceeding of witness not now available, 70 ALR2d 494.

Use in civil case of testimony given in criminal case by witness no longer accessible, 70 ALR2d 1179.

Admissibility in evidence of receipt of third person, 80 ALR2d 915.

Admissibility in criminal trial of dying declarations involving an asserted opinion or conclusion, 86 ALR2d 905.

Admissibility of homicide victim's statements exculpating the accused, 95 ALR2d 637.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide, 98 ALR2d 6.

Admissibility, as part of res gestae, of accusatory utterances made by homicide victim after act, 4 ALR3d 149.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 ALR3d 671.

Statements of declarant as sufficiently showing consciousness of impending death to justify admission of dying declaration, 53 ALR3d 785.

Sufficiency of showing of consciousness of impending death, by circumstances other than statements of declarant, to justify admission of dying declaration, 53 ALR3d 1196.

Admissibility, as against interest, in civil case of declaration of commission of criminal act, 90 ALR3d 1173.

Sufficiency of efforts to procure missing witness's attendance to justify admission of his former testimony — state cases, 3 ALR4th 87.

Disqualification, for bias, of one offered as interpreter of testimony, 6 ALR4th 158.

Fence as factor in fixing location of boundary line — modern cases, 7 ALR4th 53.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter, 12 ALR4th 1016.

Former testimony used at subsequent trial as subject to ordinary objections and exceptions, 40 ALR4th 514.

When do corroborating circumstances clearly indicate trustworthiness of hearsay statement tending to expose declarant to criminal liability and offered to exculpate accused, so as to permit admission of statement under Rule 804(b)(3) of Federal Rules of Evidence (28 USCS Appx), 125 ALR Fed. 477.

Admissibility under Rules 804(b)(1) and 807 of Federal Rules of Evidence (Fed. Rules Evid. Rules 804(b)(1) and 807, 28 USCA) of grand jury testimony of unavailable witness, 149 ALR Fed. 231.

24-8-805. Hearsay within hearsay.

Hearsay included within hearsay shall not be excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. (Code 1981, § 24-8-805, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Hearsay within hearsay, Fed. R. Evid. 805.

JUDICIAL DECISIONS

Editor's notes. — In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Sections 24-8-803 and 24-8-804 for notes on hearsay exceptions and their applicability. In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-3-1 are included in the annotations for this Code section.

Double hearsay inadmissible in property action. — Trial court did not err in granting a property owner's motion in limine to exclude evidence that a father of a record title holder's descendant told the descendant that the father told the owner's brother that the brother could not build a house on property because the evidence was double hearsay and inadmissible. DeFoor v. DeFoor, 290 Ga. 540, 722 S.E.2d 697 (2012) (decided under former O.C.G.A. § 24-3-1).

24-8-806. Attacking and supporting credibility of a declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, shall not be subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party shall be entitled to examine the declarant on the statement as if under cross-examination. (Code 1981, § 24-8-806, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Attacking and supporting the declarant's credibility, Fed. R. Evid. 806.

Editor's notes. — In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-8-803 for notes on hearsay declarants.

24-8-807. Residual exception.

A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that:

(1) The statement is offered as evidence of a material fact;

(2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this Code section unless the proponent of it makes known to the adverse party, suffi-

ciently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. (Code 1981, § 24-8-807, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Residual exception, Fed. R. Evid. 807.

JUDICIAL DECISIONS

Editor's notes. — In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-8-804 for notes on admissibility of statements by unavailable or deceased declarants. In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-301 and former O.C.G.A. § 24-3-1 are included in the annotations for this Code section.

Necessity. — Under former O.C.G.A. § 24-3-1, hearsay evidence was admitted in specified cases from necessity. There were three prerequisites for admission of hearsay because of necessity: (1) necessity; (2) particularized guarantees of trustworthiness; and (3) the evidence must be relevant to a material fact and more probative on that material fact than other evidence that may be procured or offered. Booth v. State, 264 Ga. App. 393, 590 S.E.2d 789 (2003) (decided under former O.C.G.A. § 24-3-1).

The two underlying reasons for any exception to the hearsay rule are a necessity for the exception and a circumstantial guaranty of the trustworthiness of the offered evidence which is that there must be something present which the law considers a substitute for the oath of the declarant and the declarant's cross-examination by the party against whom the hearsay is offered. Gale v. State, 138 Ga. App. 261, 226 S.E.2d 264 (1976); Irby v. Brooks, 246 Ga. 794, 273 S.E.2d 183 (1980), overruled on other grounds, Swain v. Citizens & S. Bank, 258 Ga. 547, 372 S.E.2d 423 (1988) (decided under former Code 1933, § 38-801).

Requirements for necessity exception. — To meet the necessity exception, the state had to show that the declarant was unavailable to testify and that it made reasonable efforts to locate the declarant and secure the declarant's presence. Holmes v. State, 271 Ga. 138, 516 S.E.2d 61 (1999) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion in deeming a witness to be unavailable when the evidence showed that investigators for both the state and a codefendant could not locate the witness after diligent and extensive efforts conducted over a month and a half before trial. Holmes v. State, 271 Ga. 138, 516 S.E.2d 61 (1999) (decided under former O.C.G.A. § 24-3-1).

In a malice murder prosecution, statements made by the victim in the months before death were admissible under the necessity exception to hearsay as the statements were made to investigating police officers shortly after the events involving defendant and the victim. Peterson v. State, 274 Ga. 165, 549 S.E.2d 387 (2001) (decided under former O.C.G.A. § 24-3-1).

"Necessity" exception applied only when witness unavailable. — "Necessity" exception to the hearsay rule, set forth in former O.C.G.A. § 24-3-1, applied only when the witness was unavailable, usually because of death or in cases in which the witness could not be compelled to testify, as in the case of a wife who could not be compelled to testify against her husband. Glisson v. State, 188 Ga. App. 152, 372 S.E.2d 462 (1988) (decided under former O.C.G.A. § 24-3-1).

Necessity exception was inapplicable when declarant incompetent. — Necessity exception most commonly applied when the out-of-court declarant was unavailable to testify because of death or

the exercise of a privilege not to testify, and the circumstances surrounding the statement provided a guaranty of trustworthiness, not when the declarant was unavailable because the declarant failed to qualify as a competent witness. Shaver v. State, 199 Ga. App. 428, 405 S.E.2d 281, cert. denied, 199 Ga. App. 907, 405 S.E.2d 281 (1991) (decided under former O.C.G.A. § 24-3-1).

Materiality and probative value. — Death or unavailability of the declarant cannot alone satisfy the necessity component without allowing the exception to swallow the rule; additionally, the proponent of the evidence must show that the statement is relevant to a material fact and that the statement is more probative on that material fact than other evidence that may be procured and offered. Chapel v. State, 270 Ga. 151, 510 S.E.2d 802 (1998) (decided under former O.C.G.A. § 24-3-1).

Testimony by a friend of the victim, that the victim planned to meet with defendant, was not sufficiently trustworthy to be admissible under the "necessity" exception to the hearsay rule in light of the fact that the victim made a contradictory statement to the victim's son as to where the victim was going on the night the victim was killed. State v. Mallory, 261 Ga. 625, 409 S.E.2d 839 (1991). But see Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (1999) (decided under former Code 1933, § 38-505).

Requirement of particularized guarantees of trustworthiness has not been met as to witnesses who had known the deceased victim for only a short time before the deceased began confiding in them about the problems in the marriage to defendant. Slakman v. State, 272 Ga. 662, 533 S.E.2d 383 (2000) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in admitting a friend's testimony as to the statements the murder victim made to the friend about the murder victim's relationship with defendant and the way defendant treated the murder victim since sufficient guarantees of trustworthiness existed to warrant admission of that testimony; the evidence showed that the friend and the murder victim worked together for a year and that the murder victim confided in the friend on a daily basis about the details of the murder victim's relationship with defendant, and, thus, the testimony was admissible under the necessity exception to the rule prohibiting hearsay evidence because the declarant was deceased and the testimony was more probative on the issues of motive and intent than other evidence offered at trial. Brinson v. State, 276 Ga. 671, 581 S.E.2d 548 (2003) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in admitting the testimony of a long-time friend of the deceased wife about prior difficulties between the deceased wife and defendant as such testimony was admissible under the necessity exception to the hearsay rule; the deceased wife was unavailable, the testimony contained particular guarantees of trustworthiness, and the testimony was relevant to the relationship between the deceased wife and defendant, and was more probative of that than other evidence that could be procured and offered. Rowe v. State, 276 Ga. 800, 582 S.E.2d 119 (2003) (decided under former O.C.G.A. § 24-3-1).

Admission of victim's statement made two months before the victim's death was not error since it was established that the declarant was unavailable due to death; that the declarant's statement regarding gang membership was relevant to a material fact — the motive for the shooting; and that the most probative evidence of the declarant's gang membership was the declarant's admission of that fact. Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (1999) (decided under former O.C.G.A. § 24-3-1).

Although the statements were not dying declarations, statements by the murdered victim to the victim's friends regarding death threats made by the victim's spouse carried sufficient indicia of reliability to be admissible. Morris v. State, 275 Ga. 601, 571 S.E.2d 358 (2002) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in allowing a deceased witness's sister to testify, pursuant to the necessity exception to the hearsay rule, regarding statements the decedent made to the sister prior to the murder, which implicated the defendant, as the decedent was unavailable, the

statements were relevant to show motive, and the statements were trustworthy because the decedent was confiding in the sister regarding a fear of being associated with the robbery defendant committed. Grimes v. State, 280 Ga. 363, 628 S.E.2d 580 (2006) (decided under former O.C.G.A. § 24-3-1).

Admission of statements made by the defendant's cousin prior to the cousin's murder were proper under the necessity exception to the hearsay rule pursuant to former O.C.G.A. § 24-3-1(b) because the statements indicated that the cousin was going to tell the defendant to move out of a shared apartment and the statements were probative on the issues of the defendant's motive and intent; the statements were trustworthy because the statements were made to the cousin's family members, whom the cousin confided in. Jackson v. State, 284 Ga. 826, 672 S.E.2d 640 (2009) (decided under former O.C.G.A. § 24-3-1).

Statement to show defendant's motive. — Trial court did not abuse the court's discretion in admitting a victim's statements to the victim's close friends as to defendant's threats against the victim, defendant's physical and mental abuse, and other difficulties under the necessity exception to the hearsay rule as the victim was dead, the statements were relevant to defendant's intent, motive, and state of mind, and the statements had particularized guarantees of trustworthiness. Watson v. State, 278 Ga. 763, 604 S.E.2d 804 (2004) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err by allowing the victim's parent to testify that the victim told the parent that the defendant had threatened to kill the victim if the victim sought a divorce under the necessity exception to the hearsay rule as: (1) the victim was the declarant; (2) the victim was unavailable because the victim had been murdered; (3) the victim's statement was uniquely relevant to show the defendant's motive, intent, and bent of mind; and (4) the victim's statement was trustworthy because the victim made the statement while confiding in the victim's parent. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006) (decided under former O.C.G.A. § 24-3-1).

Admission of necessity. — When statements explaining the circumstances of the murder were spontaneous and unsolicited, and made immediately after the shooting, after the defendant fled the scene, the statements satisfied the criteria for an admission out of necessity. White v. State, 276 Ga. 583, 581 S.E.2d 18 (2003) (decided under former O.C.G.A. § 24-3-1).

Because the testimony of two witnesses recounting what the victim said to the witnesses prior to the victim's death was relevant to demonstrate the prior difficulties between defendant and the victim, and was accompanied by particular guarantees of trustworthiness, the trial court did not err in admitting the testimony under the "necessity" exception to the hearsay rule. Mathis v. State, 279 Ga. 100, 610 S.E.2d 62 (2005) (decided under former O.C.G.A. § 24-3-1).

In defendant's prosecution for murdering defendant's former girlfriend, the girlfriend's statements to two friends were properly admitted under former O.C.G.A. § 24-3-1(b) because the statements were uncontradicted statements made to people the victim had known for over a year, in whom the girlfriend placed great confidence and to whom the girlfriend regularly turned for advice with personal problems and to discuss personal matters, so the trial court could find the statements contained particularized guarantees of trustworthiness. Williams v. State, 279 Ga. 731, 620 S.E.2d 816 (2005) (decided under former O.C.G.A. § 24-3-1).

Parent's statement that the parent's child, a passenger in the defendant's car, came to the parent sick and vomiting after a sleepless night and told the parent that the passenger witnessed a murder was nontestimonial in nature and fell within the necessity exception to the hearsay rule. Testimony by the parent and by a police investigator who was looking for the passenger showed that the passenger was unavailable, and this was a situation where a declarant made a statement to a person in whom the declarant placed great confidence and to whom the declarant turned for help with problems. Shipman v. State, 288 Ga. App. 134, 653 S.E.2d 383 (2007) (decided under former O.C.G.A. § 24-3-1).

Testimony by a friend of the decedent that, before the death of the decedent, the decedent had told the friend that the decedent had been beaten in a fight by the defendant was admissible evidence under the necessity exception to the hearsay rule. The statements by the decedent were made to a friend (not an agent of law enforcement) in seeking help with an ongoing emergency and preventing immediate harm to the decedent. Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion by finding that uncontradicted statements by a murder victim's daughters and sister exhibited particularized guarantees of trustworthiness when the evidence showed that the daughters and the sister had a close familial relationship with the victim and the victim regularly confided in the daughters and the sister about personal matters. McNaughton v. State, 290 Ga. 894, 725 S.E.2d 590 (2012) (decided under former O.C.G.A. § 24-3-1).

Hearsay statements by a murder victim were necessary, as the victim was deceased and unavailable. Bryant v. State, 282 Ga. 631, 651 S.E.2d 718 (2007) (decided under former O.C.G.A. § 24-3-1).

Statements of deceased witness admitted. — Statements of deceased witness were properly admitted out of necessity under former O.C.G.A. § 24-3-1. Jackson v. State, 202 Ga. App. 582, 414 S.E.2d 905, cert. denied, 202 Ga. App. 906, 414 S.E.2d 905 (1992) (decided under former O.C.G.A. § 24-3-1).

Statements of a deceased juvenile made to a police detective in the course of an official investigation were admissible under the "necessity" exception to the rule against the admission of hearsay. White v. State, 268 Ga. 28, 486 S.E.2d 338 (1997) (decided under former O.C.G.A. § 24-3-1).

At defendant's trial for incest and child molestation, testimony from one of defendant's daughters, which was read from a transcript from a 1985 trial at which defendant was also convicted of child molestation, was hearsay evidence properly admitted under former O.C.G.A. § 24-3-1 based on necessity since the daughter was now deceased; there were sufficient guarantees of trustworthiness in the daughter's testimony when it was made under oath during trial and the testimony was corroborated by her sister and medical records; and the testimony was clearly relevant to and more probative than other testimony the state could present on the issue of whether defendant sexually abused and committed incest with one of defendant's daughters when she reached a certain age when it demonstrated defendant's plan, scheme, bent of mind, and course of conduct, whereby defendant would subject defendant's daughters to the defendant's acts of sexual abuse. Booth v. State, 264 Ga. App. 393, 590 S.E.2d 789 (2003) (decided under former O.C.G.A. § 24-3-1).

Assertion of spousal privilege meets the necessity requirement for admission of hearsay under the former O.C.G.A. § 24-3-1(b) necessity exception. Herring v. State, 252 Ga. App. 4, 555 S.E.2d 233 (2001) (decided under former O.C.G.A. § 24-3-1).

Defendant's spouse's statement necessary and trustworthy. — Defendant's spouse's statement was properly admitted in defendant's criminal trial under the necessity exception to the hearsay rule, pursuant to former O.C.G.A. § 24-3-1(b) (see now O.C.G.A. §§ 24-8-801 and 24-8-802), since it was necessary and it evidenced a guarantee of sufficient trustworthiness; the spouse was unavailable because the spouse refused to testify, the statements were trustworthy because the statements were made to police during their investigation of the criminal incident, and the statements were necessary because the statements provided insight into defendant's state of mind. Scott v. State, 261 Ga. App. 756, 583 S.E.2d 579 (2003) (decided under former O.C.G.A. § 24-3-1).

Admission of an audio tape of an out-of-court interview of the defendant's wife under the necessity exception to the bar against hearsay testimony, former O.C.G.A. § 24-3-1(b), violated the confrontation clause of U.S. Const., amend. 6 however, the content of the wife's speech was barely discernible on the tape, and, to the extent that the tape was audible, the wife's statements were cumulative of other testimony, so there was no

reasonable possibility that the tape contributed to the convictions, and the error in admitting the tape was harmless. Daniels v. State, 280 Ga. 349, 628 S.E.2d 110 (2006) (decided under former O.C.G.A. § 24-3-1).

Testimony regarding statement by defendant's former spouse. — Georgia Bureau of Investigation agent's testimony regarding a statement by defendant's former spouse implicating defendant in a killing was admissible as an exception to the general hearsay rule, since the former spouse remarried defendant before refusing to testify at defendant's trial, and there was a "necessity" that the finder of fact be acquainted with the statement of the only eyewitness to the homicide. Higgs v. State, 256 Ga. 606, 351 S.E.2d 448 (1987) (decided under former O.C.G.A. § 24-3-1); Wallace v. State, 216 Ga. App. 718, 455 S.E.2d 615 (1995) (decided under former O.C.G.A. § 24-3-1).

Statement by deceased victim to fiancé. — Trial court did not err in admitting the testimony of the victim's fiancé that the victim had told her about his desire for a restraining order against the defendant and about a prior difficulty with the defendant earlier on the day of the shooting because the victim was unavailable due to his murder, the statements were relevant to material facts and more probative thereof than other available evidence, and the statements had particular guarantees of trustworthiness because the victim and the fiancé had been living together for over a year and had a very close relationship; in light of the overwhelming evidence of the defendant's involvement in the crimes, it was highly probable that the admission of the contested testimony did not contribute to the verdicts, and, therefore, any error in admitting the statements was not harmful. McIlwain v. State, 287 Ga. 115, 694 S.E.2d 657 (2010) (decided under former O.C.G.A. § 24-3-1).

Trial court did not improperly allow the victim's girlfriend to testify about certain statements uttered by the victim concerning the defendant's personality and demeanor as: (1) the declarant-victim died and was thus unavailable; (2) the statements were relevant to the defendant's relationship with the victim, and the defendant's apparent motive, pattern of conduct, and opportunity to commit the crimes; and (3) the statements had particular guarantees of trustworthiness because of the close relationship between the victim and the defendant. Lyons v. State, 282 Ga. 588, 652 S.E.2d 525 (2007), overruled on other grounds, Garza v. State, 2008 Ga. LEXIS 865 (Ga. 2008) (decided under former O.C.G.A. § 24-3-1).

Testimony of defendant's mother. — Even assuming the statements of the defendant's mother were admissible under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), the statements' exclusion was harmless error as the statements were cumulative of other evidence admitted at trial, making it highly probable that the statements' exclusion did not affect the verdict. Nix v. State, 280 Ga. 141, 625 S.E.2d 746 (2006) (decided under former O.C.G.A. § 24-3-1).

Sibling relationship satisfied guarantees of trustworthiness. — Trial court did not abuse the court's discretion in determining that sisters had the sort of relationship which held guarantees of trustworthiness, such that the victim's statements to the sister concerning her finances were admissible under the necessity exception to hearsay, former O.C.G.A. § 24-3-1(b). Todd v. State, 274 Ga. 98, 549 S.E.2d 116 (2001) (decided under former O.C.G.A. § 24-3-1).

Out-of-court statement of close friend of defendant was not admissible under the necessity exception since there was no indicia of reliability and the statement lacked any spontaneity or timeliness. Atwater v. State, 233 Ga. App. 339, 503 S.E.2d 919 (1998) (decided under former O.C.G.A. § 24-3-1).

Victim's statements to a divorce attorney regarding the victim's spouse's violence were not admissible since there was insufficient indicia of reliability to admit the statements under the necessity exception. Dix v. State, 267 Ga. 429, 479 S.E.2d 739 (1997) (decided under former O.C.G.A. § 24-3-1).

Statement of confidential informant. — Informant's written statement to an attorney made two weeks after de-

fendant's arraignment was insufficiently trustworthy to be admissible under the "necessity" exception. Nelson v. State, 226 Ga. App. 93, 485 S.E.2d 582 (1997) (decided under former O.C.G.A. § 24-3-1).

Necessity requirement held satisfied. — See Patterson v. State, 202 Ga. App. 440, 414 S.E.2d 895 (1992) (decided under former O.C.G.A. § 24-3-1); Jones v. State, 240 Ga. App. 723, 524 S.E.2d 773 (1999) (decided under former O.C.G.A. § 24-3-1); Battle v. State, 244 Ga. App. 771, 536 S.E.2d 761 (2000) (decided under former O.C.G.A. § 24-3-1).

Evidence admissible under necessity exception. — Hearsay statements were admissible under the necessity exception despite the fact that some of the statements were made during the pendency of separations or a divorce action; the statements were made over a 10-year period and many of the statements were not made during the separations or the divorce action. Watson v. State, 278 Ga. 763, 604 S.E.2d 804 (2004) (decided under former O.C.G.A. § 24-3-1).

Any error in admitting a victim's statements to a deputy responding to a 9-1-1 call under the necessity exception to the hearsay rule was harmless as the hearsay portion of the deputy's testimony consisted of no more than two sentences, was cumulative of the other properly admitted evidence, and did not go to the core issue of the case. Watson v. State, 278 Ga. 763, 604 S.E.2d 804 (2004) (decided under former O.C.G.A. § 24-3-1).

In a defendant's prosecution for malice murder and cruelty to children, testimony by the five-year-old victim's grandmother as to prior difficulties between the victim and the defendant, including a statement by the victim to the grandmother that the defendant had hit the victim in the stomach on the day prior to the fatal incident, was properly admitted under the necessity exception as the grandmother took care of the victim on a regular basis and was concerned for the victim's welfare. Wright v. State, 285 Ga. 57, 673 S.E.2d 249 (2009) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion in admitting out-of-court statements a victim made to the victim's sister under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), because the specific indicia of reliability did not have to be established by the testifying witness alone, and in the defendant's own testimony, the defendant described the relationship between the victim and the victim's sister as "real close;" even if the trial court did err, the error was harmless because the other evidence of the defendant's guilt was overwhelming and was corroborated by the defendant's own testimony, so it was highly probable that any error did not contribute to the verdict. Mills v. State, 287 Ga. 828, 700 S.E.2d 544 (2010) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err by allowing the victim's parent to testify that the victim told the parent a few days before the victim died that the victim was going to go to the defendant's house in a few days because the evidence was properly admitted under the necessity exception to the rule against hearsay; because the victim was deceased, the victim was unavailable to testify, and the testimony offered was relevant to explain the state of feelings between the defendant and the victim and when and why the victim would have been at the defendant's apartment, which was where the victim's body was found. Jennings v. State, 288 Ga. 120, 702 S.E.2d 151 (2010) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in admitting statements the defendant made to the defendant's spouse under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), because the court properly concluded that the defendant and the defendant's spouse maintained a confidential relationship and that the out-of-court statements were trustworthy, and the statements were relevant to show the defendant's bent of mind on the day the defendant shot the victim; although the defendant's spouse moved to California where the spouse lived with the spouse's parents, the defendant and the defendant's spouse continued to speak to each other regularly by telephone, and they spoke several times on the day in question. Herrera v. State, 288 Ga. 231, 702 S.E.2d 854 (2010) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err in admitting the testimony of the victim's roommate under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), because the confidential nature of their relationship, coupled with the roommate's identification of bruises the victim sustained at the time of the beating, were sufficient to attribute veracity to the hearsay declarations. Jeffers v. State, 290 Ga. 311, 721 S.E.2d 86 (2012) (decided under former O.C.G.A. § 24-3-1).

Any claim as to the admissibility of a witness's testimony under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), was waived because while a pretrial motion in limine sought to exclude the testimony on hearsay grounds, it was agreed that counsel would renew any objection counsel had to the witness' testimony at trial, and the defendant did not timely object at trial; the untimely motion for mistrial was based on improper character evidence, not on hearsay grounds as asserted on appeal. Jeffers v. State, 290 Ga. 311, 721 S.E.2d 86 (2012) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion by allowing the admission of hearsay evidence by three witnesses concerning statements that the victim made about the victim's relationship with the defendant because such admissions were proper under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b) (see now O.C.G.A. §§ 24-8-803 and 24-8-807), as the witnesses showed the close relationship between the defendant and the victim, the statements were uncontradicted, found reliable, and bore sufficient indicia of trustworthiness to be admissible. Bunnell v. State, 292 Ga. 253, 735 S.E.2d 281 (2013) (decided under former O.C.G.A. § 24-3-1).

Requirements of necessity and guaranty of trustworthiness satisfied. — In a murder prosecution, when defendant's common-law wife asserted the privilege not to testify against the husband, statements the wife made during the official investigation and confirmed at a subsequent pre-trial hearing were admissible as an exception to the hearsay rule without conducting an additional hearing on their reliability. Drane v. State, 265 Ga. 663, 461 S.E.2d 224 (1995). But see Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (1999) (decided under former O.C.G.A. § 24-3-1).

Wife's out-of-court statement containing a reference to defendant's inculpatory admission was admissible pursuant to the "necessity" hearsay exception. Quijano v. State, 271 Ga. 181, 516 S.E.2d 81 (1999) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion in admitting testimony of the victim's cousin regarding the victim's statement that the defendant had "jumped him" because the victim's statement satisfied all three prerequisites for the admission of hearsay under the necessity exception, former O.C.G.A. § 24-3-1(b); the victim had been murdered and was not available, the statements had the appropriate indicia of trustworthiness because the statements were made when the victim was confiding in the victim's cousin, whom the victim had known all the victim's life and had lived with for some time, and the victim's statement was highly probative of the combative nature of the victim's relationship with the defendant. Evans v. State, 288 Ga. 571, 707 S.E.2d 353 (2011) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion by holding that the testimony of the victim's friend regarding the victim's statements bore sufficient indicia of trustworthiness to be admissible under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), because the victim was deceased and unavailable to testify, and the statements were relevant to show the defendant's intent, motive, and bent of mind and were more probative of the facts than other evidence that could be procured and offered; the friend and the victim were close personal friends who frequently worked together and regularly confided in each other about personal matters including the fact that the victim was involved in an extra-marital affair. Gibson v. State, 290 Ga. 6, 717 S.E.2d 447 (2011) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse the court's discretion by concluding that the wit-

nesses' testimony regarding statements the victim made about a relationship with the defendant bore sufficient indicia of trustworthiness to be admissible under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), because the victim was deceased and unavailable to testify, the statements were relevant to show the defendant's intent, motive, and bent of mind, and the statements were more probative of the facts than other evidence that could be procured and offered; both witnesses stated that the witnesses discussed personal and confidential matters with the victim. Butler v. State, 290 Ga. 425, 721 S.E.2d 889 (2012) (decided under former O.C.G.A. § 24-3-1).

Under the necessity exception to hearsay, former O.C.G.A. § 24-3-1(b), the testimony of four individuals about the victim's statements regarding the subletting of the townhouse, the problems the victim was having about retrieving the mail, and the missing furniture and checks were admissible because the victim's statements were necessary and sufficiently trustworthy since they were made to the individuals in whom the victim placed a great deal of confidence. Thomas v. State, 274 Ga. 156, 549 S.E.2d 359 (2001) (decided under former O.C.G.A. § 24-3-1).

Statements failed to meet necessity exception. — When the prosecution asked only how long each witness had known the murder victim and whether each witness was familiar with the relationship between defendant and the victim, there was no showing of the required particularized guarantees of trustworthiness to permit admission of the hearsay statements of the victim under the necessity exception of former O.C.G.A. § 24-3-1(b); there was no testimony about the nature of the relationships between the witnesses and the victim. Mote v. State, 277 Ga. 429, 588 S.E.2d 748 (2003), cert. denied, 541 U.S. 1066, 124 S. Ct. 2395, 158 L. Ed. 2d 968 (2004) (decided under former O.C.G.A. § 24-3-1).

In a will contest action, the trial court did not err by refusing the challenger's proffer of having a grandchild for the decedent testify that the decedent was unaware of a change in a medical appointment as the testimony did not fit the hearsay necessity exception. The trial court did not abuse the court's discretion by finding that the alleged statement to the grandchild, who certainly had an interest in seeing that the objector, the grandchild's parent, benefited from the admission of the testimony and, therefore, the testimony lacked sufficient trustworthiness. Horton v. Hendrix, 291 Ga. App. 416, 662 S.E.2d 227 (2008), cert. denied, No. S08C1574, 2008 Ga. LEXIS 780 (Ga. 2008) (decided under former O.C.G.A. § 24-3-1).

Requirements of necessity and guaranty of trustworthiness not satisfied. — Victim's declarations to an army medic before the crimes in question that the defendant had injured the victim were inherently untrustworthy, and thus were improperly admitted under the necessity exception to the hearsay doctrine: (1) the victim was intoxicated when the victim made the statements; and (2) the victim also stated that the victim would lie to the victim's chain of command about the injury. The error was harmless, however, because the evidence could not have contributed to the verdict as two eyewitnesses implicated the defendant as a party to the crimes. Navarrete v. State, 283 Ga. 156, 656 S.E.2d 814 (2008), cert. denied, 129 S. Ct. 104, 172 L.Ed.2d 33 (2008) (decided under former O.C.G.A. § 24-3-1).

Trial court did not err when it declined to admit hearsay after finding that the party seeking to use the hearsay had not made the necessary proffer because, although defense counsel asserted that the persons who would testify to the utterances purportedly made by the victims were friends of the victims who reported the utterances to police shortly after the victims were killed, such a presentation was insufficient to authorize the admission of hearsay pursuant to the necessity exception found in former O.C.G.A. § 24-3-1(b) since there was no showing of the required special relationship between the deceased declarants and the proffered witnesses. Coleman v. State, 286 Ga. 291, 687 S.E.2d 427 (2009) (decided under former O.C.G.A. § 24-3-1).

Trial court did not abuse its discretion in refusing to allow testimony under the

necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), that the victim had told her sister that her neighbor had raped her several months prior to her murder because the hearsay testimony was not proper impeachment evidence when it was not relevant to the crimes for which the defendant was on trial, and it was also not relevant to the neighbor's motive or interest in testifying; although the victim, the declarant, was deceased and unavailable, the defendant failed to prove that the hearsay testimony was relevant to and probative of a material fact since the alleged rape occurred several months prior to the victim's murder, there was no evidence connecting either the rape or the neighbor to it, and even assuming the proffered testimony's trustworthiness, the fact that the neighbor had raped the victim in the past did not directly connect him to the victim's murder or show that he committed the murder or a similar crime. Arrington v. State, 286 Ga. 335, 687 S.E.2d 438 (2009), cert. denied, 131 S. Ct. 112, 178 L. Ed. 2d 69 (U.S. 2010) (decided under former O.C.G.A. § 24-3-1).

Evidence lacked reliability. — Trial court did not abuse the court's discretion by excluding from the evidence an out-of-court statement by one of the men convicted for the home invasion and a letter from another man who was convicted of the home invasion because the statement and the letter lacked any indicia of reliability. Thus, the defendant was not entitled to introduce the evidence under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b). Pope v. State, 266 Ga. App. 658, 598 S.E.2d 48 (2004) (decided under former O.C.G.A. § 24-3-1).

Failure to object and acquiescence to curative instruction waived claim of error. — Any claim of error as to the admissibility of the testimony of the victim's coworker under the necessity exception to the hearsay rule, former O.C.G.A. § 24-3-1(b), that the defendant had been harassing and stalking the victim was waived for purposes of appeal because defense counsel acquiesced in the curative instruction that the defendant was on trial for the charges contained in the indictment only, and the jury could not consider allegations of any other crimes because it was introduced without any hearsay objections from the defendant. Jeffers v. State, 290 Ga. 311, 721 S.E.2d 86 (2012) (decided under former O.C.G.A. § 24-3-1).

ARTICLE 2

ADMISSIONS AND CONFESSIONS

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-8-820. Testimony as to child's description of sexual contact or physical abuse.

A statement made by a child younger than 16 years of age describing any act of sexual contact or physical abuse performed with or on such child by another or with or on another in the presence of such child shall be admissible in evidence by the testimony of the person to whom made if the proponent of such statement provides notice to the adverse party prior to trial of the intention to use such out-of-court statement and such child testifies at the trial, unless the adverse party forfeits or waives such child's testimony as provided in this title, and, at the time of the testimony regarding the out-of-court statements, the person to whom the child made such statement is subject to cross-examination

regarding the out-of-court statements. (Code 1981, § 24-8-820, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 222, § 13/HB 349.)

The 2013 amendment, effective July 1, 2013, substituted the present provisions of this Code section for the former provisions, which read: "A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another shall be admissible in evidence by the testimony of the person to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability." See editor's note for applicability.

Cross references. — Competency of children generally, § 24-6-601 et seq.

Editor's notes. — Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense."

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For article, "Domestic Relations Law," see 53 Mercer L. Rev. 265 (2001). For article, "Evidence," see 53 Mercer L. Rev. 281 (2001). For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

For note, "Admissibility of Video-taped Testimony: What is the Standard After Maryland v. Craig and How Will the Practicing Defense Attorney be Affected?," see 42 Mercer L. Rev. 883 (1991). For note, "The Georgia Child Hearsay Statute, and the Sixth Amendment: Is There a Confrontation?," see 10 Ga. St. U.L. Rev. 367 (1994).

For comment, "Maryland v. Craig: The Constitutionality of Closed Circuit Testimony in Child Sexual Abuse Cases," see 25 Ga. L. Rev. 167 (1990).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the reenactment of this title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-4-414, for annotations on admissibility of similar acts in child molestation cases, which may also be applicable to this Code section. In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-3-16 are included in the annotations for this Code section.

In light of the similarity of the statutory provisions, annotations decided when the statute concerned statements from children aged 14 years or younger are included in the annotations for this Code section.

Constitutionality. — Former O.C.G.A. § 24-3-16 was not constitutionally deficient. Rayburn v. State, 194 Ga. App. 676, 391 S.E.2d 780 (1990), cert. denied, 498 U.S. 969, 111 S. Ct. 434, 112 L. Ed. 2d 417 (1990) (decided under former O.C.G.A. § 24-3-16); Toledo v. State, 216 Ga. App. 480, 455 S.E.2d 595 (1995) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 was not unconstitutional for allowing the state to bolster the testimony of the victim while denying the same opportunity to the defendant. Weathersby v. State, 262 Ga. 126,

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414 S.E.2d 200 (1992) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 did not violate the due process clause of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec. I, Para. I, on its face and was not void for vagueness and uncertainty. Weathersby v. State, 262 Ga. 126, 414 S.E.2d 200 (1992) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 was not violative of the federal Sixth Amendment. McLelland v. State, 203 Ga. App. 93, 416 S.E.2d 340, cert. denied, 203 Ga. App. 907, 416 S.E.2d 340 (1992) (decided under former O.C.G.A. § 24-3-16); Fuller v. State, 211 Ga. App. 104, 438 S.E.2d 183 (1993) (decided under former O.C.G.A. § 24-3-16).

Applicability at date of trial. — Testimony concerning an outcry made by the victim some four months after the last incident of child molestation was properly admitted under former O.C.G.A. § 24-3-16. While the outcry occurred prior to the effective date of former § 24-3-16, the determinative date as to the applicability of former § 24-3-16 was the date of trial. Vargas v. State, 184 Ga. App. 650, 362 S.E.2d 461 (1987) (decided under former O.C.G.A. § 24-3-16).

Defendant's constitutional rights not violated. — Admission of videotapes in child molestation cases did not infringe upon a defendant's Sixth Amendment right to confront witnesses if the child victim testified. Frazier v. State, 195 Ga. App. 109, 393 S.E.2d 262 (1990) (decided under former O.C.G.A. § 24-3-16); Toledo v. State, 216 Ga. App. 480, 455 S.E.2d 595 (1995) (decided under former O.C.G.A. § 24-3-16).

Admission of a child molestation victim's out-of-court statements did not violate the defendant's Sixth Amendment right to confrontation since the statements bore sufficient "indicia of reliability." Smith v. State, 199 Ga. App. 378, 405 S.E.2d 78, cert. denied, 199 Ga. App. 907, 405 S.E.2d 78 (1991) (decided under former O.C.G.A. § 24-3-16).

Constitutional right of confrontation. — Former O.C.G.A. § 24-3-16 was not constitutionally deficient. The defendant did not need to be placed in the position of calling the alleged victim to the stand in order to exercise the defendant's rights under the Sixth Amendment. Rather, the court will call the alleged victim at the request of either party, informing the jury that it was the court which had called the child and that both parties would have an opportunity to examine the child. Eberhardt v. State, 257 Ga. 420, 359 S.E.2d 908 (1987), cert. denied, 484 U.S. 1069, 108 S. Ct. 1036, 98 L. Ed. 2d 999 (1988) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 contemplated testimony about what a child victim said and did relevant to the alleged sexual contact from both the child and those witnessing the child's later reaction. The purpose of this procedure was to allow a defendant to exercise the defendant's right to confrontation without requiring the defendant to be cast unfavorably before the jury for forcing the child to testify; any "bolstering" by other witnesses could be explored by the defendant on cross-examination. Rayburn v. State, 194 Ga. App. 676, 391 S.E.2d 780 (1990), cert. denied, 498 U.S. 969, 111 S. Ct. 434, 112 L. Ed. 2d 417 (1990) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16, as construed by the Supreme Court in Sosebee v. State, 257 Ga. 298 (1987) and in other appellate cases, could not pass constitutional muster because the statute failed to put the onus on the prosecution to put the child victim on the witness stand to confront the defendant, and any cases suggesting the contrary were overruled; however, the former statute could be construed to survive a confrontation clause attack because the right of confrontation could be satisfied by construing the former statute to require pretrial notice of the state's intent to use a child victim's hearsay statements. Hatley v. State, 290 Ga. 480, 722 S.E.2d 67 (2012) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 required the prosecution to notify the defendant within a reasonable period of time prior to trial of the prosecutor's intent to use a child victim's hearsay statements and to give the

defendant an opportunity to raise a confrontation clause objection; if the defendant objected, and the state wished to introduce hearsay statements, the state needed to present the child witness at trial; if the defendant did not object, the state could introduce the child victim's hearsay statements subject to the trial court's determination that the circumstances of the statements provided sufficient indicia of reliability, and the trial court should have taken reasonable steps to ascertain, and put on the record, whether the defendant waived the defendant's right to confront the child witness. Hatley v. State, 290 Ga. 480, 722 S.E.2d 67 (2012) (decided under former O.C.G.A. § 24-3-16).

Defendant's right of confrontation was not violated by the introduction of the victim's hearsay statements because the victim's statements to the victim's mother were non-testimonial, whereas the victim's statement to the forensic interviewer, made several weeks after the crimes, was testimonial; but even if the victim's statement to the forensic examiner, and the statements made by the victim and the victim's mother to the police were admitted erroneously, the errors were harmless beyond a reasonable doubt. The victim's statement to the forensic interviewer was the same as the victim's statement to the victim's mother, and the statements made by the victim and the victim's mother to police were cumulative of the victim's statement to the victim's mother, as well as the mother's testimony and the forensic interviewer's evidence was properly admitted against the defendant. Hatley v. State, 290 Ga. 480, 722 S.E.2d 67 (2012) (decided under former O.C.G.A. § 24-3-16).

Former statute valid despite equal protection challenge. — Defendant asserted that defendant was similarly situated to all other criminal and civil litigants and that former O.C.G.A. § 24-3-16 created an irrational and arbitrary class of litigants because only persons charged with physical and/or sexual abuse of a child under the age of 14 were subject to the exception contained therein. These assertions were not enough to overcome the presumptive validity of former O.C.G.A. § 24-3-16. Dobbins v. State, 262 Ga. 161, 415 S.E.2d 168 (1992) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. §§ 24-3-16 and 24-9-5 (see now O.C.G.A. §§ 24-8-820, 24-6-601, and 24-6-603) needed to be construed together. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18 (1990) (decided under former O.C.G.A. § 24-3-16); McGarity v. State, 212 Ga. App. 17, 440 S.E.2d 695 (1994) (decided under former O.C.G.A. § 24-3-16).

Competency of children to testify in a divorce action could be established only by demonstrating that the children understood the nature of an oath, as required by former O.C.G.A. § 24-9-5. Woodruff v. Woodruff, 272 Ga. 485, 531 S.E.2d 714 (2000) (decided under former O.C.G.A. § 24-3-16).

Procedure upon invocation of former O.C.G.A. § 24-3-16. — If the prosecution invoked former O.C.G.A. § 24-3-16 to introduce out-of-court declarations by the alleged victim, the court was required to do as follows: before the state rests, the court shall, at the request of either party, cause the alleged victim to take the stand. The court shall then inform the jury that it is the court who has called the child as a witness, and that both parties have the opportunity to examine the child. The court shall then allow both parties to examine and cross-examine the child as though former O.C.G.A. § 24-3-16 had not been invoked. Sosebee v. State, 257 Ga. 298, 357 S.E.2d 562 (1987) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 did not require the court to make a finding of necessity before admitting into evidence the statement of a child under the age of 14 describing sexual contact. Newberry v. State, 184 Ga. App. 356, 361 S.E.2d 499 (1987) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 did not require that a hearing to determine indicia of reliability be held prior to receiving the testimony. Moreover, there is no requirement that the trial court make a specific finding of sufficient indicia of reliability in order for the out-of-court statements of child victims to be admissible. Xulu v. State, 256 Ga. App. 272, 568 S.E.2d 74

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(2002) (decided under former O.C.G.A. § 24-3-16).

Defendant must deal with child hearsay. — If it is rational to imprison a defendant who causes a child to witness sexual contact or physical abuse, it is surely rational to make the defendant merely deal with hearsay from such a child, whom the defendant may require to appear in court to testify and face cross-examination; the fact that the General Assembly loosened the hearsay rule for child witnesses to crimes involving only sexual contact and physical abuse, as opposed to all crimes or all violent crimes, should pose no problem under a rational basis review. Bunn v. State, 291 Ga. 183, 728 S.E.2d 569 (2012) (decided under former O.C.G.A. § 24-3-16).

Court of appeals properly held that children's out-of-court statements about sexual conduct that happened to each other in their presence were admissible under the Child Hearsay Statute, O.C.G.A. § 24-3-16, because the court did not err in declining to extend the holding of Woodard v. State, 269 Ga. 317 (1998), which was overruled to the defendant's case; there is nothing irrational about creating disparate classes of criminal defendants based on the young age of the witnesses to their crimes. Bunn v. State, 291 Ga. 183, 728 S.E.2d 569 (2012) (decided under former O.C.G.A. § 24-3-16).

Double jeopardy did not bar retrial. — Trial court properly denied the defendant's plea in bar that alleged that the admission of the child victim's out-of-court statements violated the Georgia Child Hearsay Statute, former O.C.G.A. § 24-3-16, and U.S. Const., amend. VI as: (1) a retrial was not barred by the Double Jeopardy Clause, U.S. Const., amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, because the evidence against the defendant was not insufficient; (2) the child hearsay testimony could be properly introduced on retrial if the state proceeded under Hatley v. State, 722 SE2d 67 (Ga. 2012); and (3) the child hearsay evidence could be made admissible at re-trial by laying the proper foundation, and could be considered when examining whether the evidence was sufficient. Wadley v. State, 317 Ga. App. 333, 730 S.E.2d 536 (2012) (decided under former O.C.G.A. § 24-3-16).

Recordings

Admission of videotape. — In a child molestation case, defendant knew that the videotaped interview of one of the children was to be played for the jury, that the child would not be testifying for the state, and that defendant had the opportunity to call the child, but defendant did not inquire about the child's availability to testify at trial, nor did defendant request that the child be produced to testify; thus, the failure of the child to testify at trial did not make the videotaped statements inadmissible at trial. Baker v. State, 252 Ga. App. 238, 555 S.E.2d 899 (2001) (decided under former O.C.G.A. § 24-3-16).

State proffered substantial evidence to establish the reliability of children's videotaped statements accusing defendant of molestation, and the proffer was then supported by evidence presented at trial; thus, the state fulfilled its burden in demonstrating that the children's statements had the "requisite degree of trustworthiness" to be admitted at trial and the trial court did not abuse the court's discretion in admitting the videotapes. Baker v. State, 252 Ga. App. 238, 555 S.E.2d 899 (2001) (decided under former O.C.G.A. § 24-3-16).

Reliability of a child's videotaped statement was established since the child was not subjected to repeated questioning by different people, nor was evidence presented that the child was coached, the child's mother called the police almost immediately after discovering the molestation, and the fact that an interview took place some time after the incident, did not, without more, make the statement unreliable; the juvenile had ample opportunity to cross-examine the victim and question the child about the child's memory of and the circumstances surrounding the child's statement. In the Interest of A.H., 259 Ga. App. 608, 578 S.E.2d 247 (2003) (decided under former O.C.G.A. § 24-3-16).

Trial court did not abuse the court's discretion when the court allowed the

state to show the jury videotapes of interviews police made with children who accused defendant of touching their genitals, or when the court allowed the children's parents to testify about statements their children made to them, and the appellate court held that evidence which showed that defendant touched the genitals of several children who were enrolled in tae kwon do classes defendant taught and sodomized three children was sufficient to sustain defendant's convictions on 18 counts of child molestation and three counts of aggravated child molestation. Fiek v. State, 266 Ga. App. 523, 597 S.E.2d 585 (2004) (decided under former O.C.G.A. § 24-3-16).

Trial court did not err in admitting the videotaped statement of the child victim in the defendant's trial for child molestation since the child was 11 years old when the statement was made, the clinical psychologist who conducted the interview assessed and commented on the child's demeanor and emotional state, and testified that the child's language and vocabulary were generally within normal range, that the child gave sensory and contextual details about the incidents, that the child did not appear to have been coached, and that it was unnecessary to ask the child leading questions because the child provided sufficient details on the child's own; moreover, the child's out-of-court statements were detailed and consistent, the defendant had the opportunity to cross-examine the child in the presence of the jury, and had the opportunity to allow the jury to judge the child's demeanor, and the defendant also cross-examined the psychologist extensively regarding the statement. Harris v. State, 279 Ga. App. 241, 630 S.E.2d 853 (2006) (decided under former O.C.G.A. § 24-3-16).

In a child molestation case involving defendant's 13-year-old child, defense counsel was not ineffective for not requesting that the trial court determine the reliability of the victim's videotaped statement under former O.C.G.A. § 24-3-16 or for not objecting to the statement's admission; the victim spontaneously told the victim's foster mother about the incidents when the victim was upset, and the victim repeatedly expressed love for the defendant and a desire not to get the defendant into trouble. Foster v. State, 286 Ga. App. 250, 649 S.E.2d 322 (2007), cert. dismissed, 2007 Ga. LEXIS 875 (Ga. 2007) (decided under former O.C.G.A. § 24-3-16).

In admitting the videotaped interview under former O.C.G.A. § 24-3-16, and allowing the defendant to cross-examine the victim at trial, the trial court determined that there were sufficient indicia of reliability surrounding the victim's out-of-court statements to justify the statement's admission. Phillips v. State, 284 Ga. App. 224, 644 S.E.2d 153 (2007) (decided under former O.C.G.A. § 24-3-16).

In a child molestation prosecution, videotaped interviews by the police with a defendant's victim had sufficient indicia of reliability to be admissible under former O.C.G.A. § 24-3-16 because the victim was interviewed outside the presence of the victim's parent and the victim's recounting of the events remained consistent; an additional safeguard was provided by the fact that the victim testified at the defendant's trial and, thus, was subject to cross-examination. Hughes v. State, 297 Ga. App. 581, 677 S.E.2d 674 (2009) (decided under former O.C.G.A. § 24-3-16).

In a conviction of aggravated child molestation and aggravated sodomy involving a four-year-old child, there was sufficient indicia of reliability to admit a videotape of a forensic interview of the child because the interviewer developed a rapport with the child, and there were no threats or promises for the child's answers. Brown v. State, 300 Ga. App. 359, 685 S.E.2d 377 (2009) (decided under former O.C.G.A. § 24-3-16).

Evidence supported defendant's conviction for molesting defendant's granddaughter. The videotaped police interview of the victim and the testimony of the victim's mother, the child therapist, and the victim's brother concerning what the victim told them, was substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-3-16. Towry v. State, 304 Ga. App. 139, 695 S.E.2d 683 (2010) (decided under former O.C.G.A. § 24-3-16).

Reliability of videotaped statements not established. — Circum-

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stances surrounding the making of videotaped statements of 4 ½ year old alleged child molestation victim failed to establish the inherent reliability of those statements, even though the victim used terminology which would not be expected of a child the child's age and although the child had no apparent motive to fabricate, the child's statements did not meet the test of "spontaneity and consistent repetition," some of the assertions made by the child during the two videotaped interviews were inconsistent with the known facts, and the interviews were conducted by persons acting in a law enforcement capacity, with the clear intention of gathering evidence for use against the defendant. Rolader v. State, 202 Ga. App. 134, 413 S.E.2d 752 (1991), cert. denied, 202 Ga. App. 907, 413 S.E.2d 752 (1992) (decided under former O.C.G.A. § 24-3-16).

Videotape of interview between child victim and investigating officer. — When the circumstances surrounding the videotape of an interview between a child victim and an investigating officer provided sufficient indicia of reliability of the statements therein, any conflicts between the videotaped statement and the testimony of the child at trial would not necessarily render the former inadmissible, but would rather present a question of credibility of the witness to be resolved by the trier of fact. Ware v. State, 191 Ga. App. 896, 383 S.E.2d 368 (1989) (decided under former O.C.G.A. § 24-3-16).

Taped interview with a child was admissible under former O.C.G.A. § 24-3-16 if it described acts of sexual contact or physical abuse, if the child was available to testify in court, and if the circumstances of the statement were shown to have sufficient indicia of reliability. Vick v. State, 194 Ga. App. 616, 391 S.E.2d 455 (1990) (decided under former O.C.G.A. § 24-3-16); Heidler v. State, 273 Ga. 54, 537 S.E.2d 44 (2000), cert denied, 532 U.S. 1029, 121 S. Ct. 1979, 149 L. Ed. 2d 771 (2001) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 did not require a hearing for the determination that reliability of the videotaped interviews of a four-year-old child was indicated by the neutrality of the interviewer and place of interview, and the spontaneity of the interviews conducted shortly after the alleged molestation. King v. State, 194 Ga. App. 662, 391 S.E.2d 660, cert. denied, 194 Ga. App. 912, 391 S.E.2d 660 (1990) (decided under former O.C.G.A. § 24-3-16).

When two videotapes of interviews with a child were showed to a jury, the child was called as the court's witness and testified similarly, and the child was examined by all parties, there was no abuse of the court's discretion in finding the child qualified to testify, nor in admitting the videotapes. Frazier v. State, 195 Ga. App. 109, 393 S.E.2d 262 (1990) (trial held prior to April 19, 1989) (decided under former O.C.G.A. § 24-3-16); Dupree v. State, 206 Ga. App. 4, 424 S.E.2d 316 (1992); Lindo v. State, 218 Ga. App. 756, 463 S.E.2d 148 (1995) (decided under former O.C.G.A. § 24-3-16).

Requirement of a neutral interviewer and place of interview should be recognized as relating to the atmosphere, circumstances, and manner in which the interview was conducted. Interviews by police officers of young victims of sexual abuse are not barred; such cases merely require that the officer conduct the interview in a manner conducive to eliciting the truth. Knight v. State, 210 Ga. App. 228, 435 S.E.2d 682 (1993) (decided under former O.C.G.A. § 24-3-16).

In a case where defendant was tried for first degree cruelty to children for allegedly burning the three-year-old victim's back with a cigarette, the trial court did not abuse the court's discretion in admitting the victim's videotaped interview; although several factors weighed against admitting the videotaped interview, such as the victim's tender age, the length of time between the event and the videotaped interview, and the fact that police officers conducted the interview, these factors did not require that the videotaped interview be excluded as a matter of law, and because the victim testified at trial, defendant had the opportunity to cross-examine the victim regarding the victim's memory of the interview and the circumstances surrounding the interview.

Conley v. State, 257 Ga. App. 563, 571 S.E.2d 554 (2002) (decided under former O.C.G.A. § 24-3-16).

In defendant's conviction for child molestation, trial court properly denied defendant's motion for directed verdict of acquittal as sufficient evidence existed based on testimony of the child victim's parent, who testified as to discovery of defendant on top of the victim; further evidence in support of defendant's conviction included the child's videotaped police interviews describing what happened. Lopez v. State, 291 Ga. App. 210, 661 S.E.2d 618 (2008) (decided under former O.C.G.A. § 24-3-16).

Whether videotape bolstered testimony irrelevant. — After a defendant molested a nine-year-old child, a videotape of the child's interview by a detective was properly admitted under former O.C.G.A. § 24-3-16 as a statement made by a child under the age of 14 years describing an act of sexual contact. Whether the videotape also bolstered the child's trial testimony was immaterial. Whitaker v. State, 293 Ga. App. 427, 667 S.E.2d 202 (2008) (decided under former O.C.G.A. § 24-3-16).

Trial court did not abuse the court's discretion in admitting a videotaped forensic interview of a child molestation victim because the victim testified at trial and was subject to cross-examination about the circumstances surrounding the videotaped interview and statements the victim made during the interview, and it was the jury's responsibility, as the trier of fact, to resolve any inconsistencies in the victim's statements and judge the victim's credibility; there was no evidence to support the defendant's claim that the victim recanted the allegations the victim made or that the victim falsely accused the defendant of molesting the victim's sister, the videotape showed that the victim was sufficiently credible for the interview to be shown to the jury, and the interview in question took place at a neutral location with only the interviewer present. Lynn v. State, 300 Ga. App. 170, 684 S.E.2d 325 (2009) (decided under former O.C.G.A. § 24-3-16).

Victim's testimony not bolstered by videotape. — Playing of the videotape of the interview with the victim before the jury did not constitute an impermissible bolstering of the victim's testimony. Knight v. State, 210 Ga. App. 228, 435 S.E.2d 682 (1993) (decided under former O.C.G.A. § 24-3-16).

Videotape of interview between child victim and psychotherapist. — Admission of a videotaped interview with a child victim of defendant's sexual offenses was proper under the Child Hearsay Statute, former O.C.G.A. § 24-3-16, although defendant was not indicted for offenses requiring proof of sexual contact or physical abuse as the former statute applied to descriptions of physical abuse or sexual contact, which could have been merely verbal. Carolina v. State, 276 Ga. App. 298, 623 S.E.2d 151 (2005) (decided under former O.C.G.A. § 24-3-16).

Audio tape of victim's testimony recorded by social worker was admissible even though the tape was stopped and restarted several times during the interview; the victim was available to testify and testimony of the social worker established sufficient indicia of reliability. Martin v. State, 205 Ga. App. 591, 422 S.E.2d 876, cert. denied, 205 Ga. App. 900, 422 S.E.2d 876 (1992) (decided under former O.C.G.A. § 24-3-16).

In child molestation case, videotape of victim was properly admitted after the trial court conducted a lengthy hearing outside the presence of the jury to determine the tape's reliability. Court considered the atmosphere and circumstances of the interview, the spontaneity of the victim's responses, and the demeanor of the victim during the interview. Penaranda v. State, 203 Ga. App. 740, 417 S.E.2d 683, cert. denied, 203 Ga. App. 907, 417 S.E.2d 683 (1992) (decided under former O.C.G.A. § 24-3-16); Allen v. State, 263 Ga. 60, 428 S.E.2d 73 (1993) (decided under former O.C.G.A. § 24-3-16).

Trial court did not err in admitting a videotaped statement of a defendant's daughter describing incidents of molestation committed by defendant when she was four years old because the daughter was available for cross-examination at trial, although she was not very responsive to the state's questions on direct examination. Conn v. State, 300 Ga. App.

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193, 685 S.E.2d 745 (2009), cert. denied, No. S10C0226, 2010 Ga. LEXIS 131 (Ga. 2010) (decided under former O.C.G.A. § 24-3-16).

Reliability

Dual burden in determining reliability. — Former O.C.G.A. § 24-3-16 imposed a dual burden on the trial court and the proponent of child hearsay testimony. The state had to present evidence proving the child's reliability, and the court had to assess that evidence. But former O.C.G.A. § 24-3-16 did not authorize the state to eviscerate the rule against improper bolstering. Roberson v. State, 241 Ga. App. 226, 526 S.E.2d 428 (1999) (decided under former O.C.G.A. § 24-3-16).

Burden is on the state to show that the state's evidence falls within the hearsay exception created by former O.C.G.A. § 24-3-16 for the admission of out-of-court hearsay statements of a child victim of sexual abuse; former O.C.G.A. § 24-3-16 imposed a dual burden on the trial court and the proponent of child hearsay testimony, as the state had to present evidence proving the child's reliability, and the trial court had to assess that evidence. Ferreri v. State, 267 Ga. App. 811, 600 S.E.2d 793 (2004) (decided under former O.C.G.A. § 24-3-16).

Court could consider factors in determining reliability. — Trial court could consider certain factors when deciding if a child's statement's provided sufficient indicia of reliability pursuant to the former statute; any bolstering could be explored by a defendant in cross examination. Howard v. State, 252 Ga. App. 465, 556 S.E.2d 536 (2001) (decided under former O.C.G.A. § 24-3-16).

Factors considered in determining reliability. — Indicia of reliability must spring from the circumstances of the statement. The factors which the court may consider, when applicable, include but are not limited to the following: (1) the atmosphere and circumstances under which the statement was made (including the time, the place, and the people present); (2) the spontaneity of the child's statement to the people present; (3) the child's age; (4) the child's general demeanor; (5) the child's condition (physical or emotional); (6) the presence or absence of threats or promise of benefits; (7) the presence or absence of drugs or alcohol; (8) the child's general credibility; (9) the presence or absence of any coaching by parents or other third parties before or at the time of the child's statement, and the type of coaching and circumstances surrounding the statement and, the nature of the child's statement and type of language used therein; and (10) the consistency between repeated out-of-court statements by the child. Gregg v. State, 201 Ga. App. 238, 411 S.E.2d 65, cert. denied, 201 Ga. App. 903, 411 S.E.2d 65 (1991) (decided under former O.C.G.A. § 24-3-16); Williams v. State, 204 Ga. App. 878, 420 S.E.2d 781 (1992) (decided under former O.C.G.A. § 24-3-16); Gentry v. State, 213 Ga. App. 24, 443 S.E.2d 667 (1994) (decided under former O.C.G.A. § 24-3-16); Heard v. State, 221 Ga. App. 166, 471 S.E.2d 22 (1996) (decided under former O.C.G.A. § 24-3-16).

Reliability hearing required. — Defendant's child molestation conviction was reversed as given that the child victim was three-years-old, that the victim gave inconsistent statements, that the victim might have been coached by defendant's estranged spouse, that law enforcement was involved in the child's interviews, that 75 out-of-court hearsay statements of the child were introduced by the state, and that the child's hearsay statements formed the bulk of the evidence against defendant, a pretrial Gregg hearing on the reliability of the statements was required under former O.C.G.A. § 24-9-5. Ferreri v. State, 267 Ga. App. 811, 600 S.E.2d 793 (2004) (decided under former O.C.G.A. § 24-3-16).

Reliability of statement established. — Victim's statement to the victim's friend had a sufficient indicia of reliability to render the statement admissible pursuant to former O.C.G.A. § 24-3-16 since both young women were 13 years old, there was no evidence to suggest the victim had a tendency to exaggerate or falsify information, the victim's friend testified that discussing the acts of

molestation obviously upset the victim and the victim began to cry, and all of the victim's out-of-court statements and the victim's in-court testimony were consistent. Peters v. State, 206 Ga. App. 143, 424 S.E.2d 372 (1992) (decided under former O.C.G.A. § 24-3-16).

Victims' statements made to their mother and social caseworker were sufficiently reliable in light of: (1) their repeated consistency over the course of three separate occasions; (2) the children's apparent uncoached and generally relaxed trial demeanor; (3) the lack of any promises or threats made to the children; and (4) their full availability to the defendant's cross-examination at trial. Tucker v. State, 208 Ga. App. 441, 430 S.E.2d 811 (1993) (decided under former O.C.G.A. § 24-3-16).

There was a sufficient showing of reliability when the victim's statements, introduced through hearsay at trial, were made originally by the victim in a spontaneous manner without apparent coaching and, although there was evidence presented that the victim had originally named other possible perpetrators, the victim's later statements consistently named the defendant. White v. State, 211 Ga. App. 694, 440 S.E.2d 68 (1994) (decided under former O.C.G.A. § 24-3-16).

Trial court properly admitted child hearsay testimony after the victim's version of events as recounted to the victim's mother to sheriff's department officials, to Department of Family & Children Services representatives, in the victim's grand jury testimony, and in the victim's trial testimony was not shown by defendant to be inconsistent. Tidwell v. State, 219 Ga. App. 233, 464 S.E.2d 834 (1995) (decided under former O.C.G.A. § 24-3-16).

Testimony of several witnesses regarding what the 11-year-old victim told the witnesses about an incident soon after the incident happened was admissible and the court was not required to make an explicit finding of sufficient indicia of reliability. Wells v. State, 222 Ga. App. 587, 474 S.E.2d 764 (1996) (decided under former O.C.G.A. § 24-3-16).

Considering the child's age; the immediacy and spontaneity of the outcry to the child's mother; the general consistency of the child's statements to numerous adults trained to work with abused children (police, medical personnel, and a DFACS worker); the lack of time between the incident and the outcry, thereby demonstrating the absence of "coaching"; the child's fear of the defendant; and the physical manifestations of possible abuse consistent with the child's statements, the record established a sufficient showing of indicia of reliability within the meaning of former O.C.G.A. § 24-3-16 so as to support the admission of the outcry testimony. Medina v. State, 234 Ga. App. 13, 505 S.E.2d 558 (1998) (decided under former O.C.G.A. § 24-3-16).

Although the child gave differing accounts as to the number of times the defendant had molested the child, under the totality of the circumstances, the child's out-of-court statements bore sufficient indicia of reliability to authorize the statement's admission in evidence. Jenkins v. State, 235 Ga. App. 53, 508 S.E.2d 710 (1998) (decided under former O.C.G.A. § 24-3-16).

Taped statement of the young victim was properly found to be reliable, notwithstanding that the victim was interviewed after the victim's mother was interviewed in the victim's presence, since the interviewing officer testified that the victim was not coached and spoke voluntarily and no evidence was presented showing that the tape was unreliable or inadmissible. Scroggins v. State, 237 Ga. App. 122, 514 S.E.2d 252 (1999) (decided under former O.C.G.A. § 24-3-16).

Considering the immediacy and spontaneity of the child's outcry to the father, the child's age, the limited time between the child's return home and the initial outcry, thus demonstrating the absence of coaching, and the general consistency of the child's statements to several adults, sufficient indicia of reliability was established to support the admission of the challenged statements. Herrington v. State, 241 Ga. App. 326, 527 S.E.2d 33 (1999) (decided under former O.C.G.A. § 24-3-16).

Considering the atmosphere and circumstances under which a child made out-of-court statements, the spontaneity of a number of the statements, the ab-

Reliability (Cont'd)

sence of any threats, promise of benefits, or coaching, the consistency of the statements with one another, and the child's provision of certain details which could have been found corroborative, the trial court was authorized to find that sufficient indicia of reliability warranted admission of the statements in evidence. Croy v. State, 247 Ga. App. 654, 545 S.E.2d 80 (2001) (decided under former O.C.G.A. § 24-3-16).

There was no abuse of discretion in the decision of the court to admit testimony concerning a child's statements about sexual abuse by the child's father where the child's mother's testimony corroborated the statements made by the child to others and the foster mother never suggested to the child that the child's father had abused the child. In re J.W., 249 Ga. App. 849, 549 S.E.2d 802 (2001) (decided under former O.C.G.A. § 24-3-16).

Circumstances surrounding a six-year-old victim's out-of-court statements to the victim's mother and a nurse practitioner regarding being sexually molested contained sufficient indicia of reliability under former O.C.G.A. § 24-3-16 to allow the mother and the nurse practitioner to testify about the statements since: (1) there was no evidence that the victim was forced to make the statements or was coached regarding what to say; (2) there was a lack of contact with anyone concerning the incidents until the victim made the initial out-cry to the victim's mother; (3) the language the victim used was appropriate for a six-year-old; (4) the statement to the victim's mother was consistent with the statement that the victim made to the nurse practitioner; (5) the victim's demeanor during both statements showed that the victim was obviously upset by the acts of molestation; and (6) there was no evidence that the victim had been exposed to any sexually explicit material. In re K.C., 258 Ga. App. 363, 574 S.E.2d 413 (2002) (decided under former O.C.G.A. § 24-3-16).

Sufficient indicia of reliability existed for a trial court to have admitted a child victim's out-of-court statements regarding sexual abuse by the victim's father where, inter alia, the victim's description of the incidents were consistent every time the victim gave a statement to an adult prior to trial and the medical evidence corroborated the victim's testimony. Ivey v. State, 258 Ga. App. 719, 574 S.E.2d 908 (2002) (decided under former O.C.G.A. § 24-3-16).

Trial court permitted the state to introduce the testimony of the victim under the provisions of the child hearsay statute, former O.C.G.A. § 24-3-16, in a trial on a charge of child molesting because the victim was made available for cross-examination, and the trial court took sufficient steps to ensure that the victim's testimony was reliable. Howell v. State, 278 Ga. App. 634, 629 S.E.2d 398 (2006) (decided under former O.C.G.A. § 24-3-16).

Trial court did not abuse the court's discretion in concluding that a child's hearsay statements regarding abuse contained sufficient indicia of reliability to support their admission because the victim was nine years old at the time of the alleged incidents, there was no evidence that the child was forced to make the statements or coached regarding what to say, and the statements were made in a therapeutic setting without provocation or intervention from the state; although some of the statements were inconsistent with statements given to others regarding the defendant's participation in the abuse, the statements were also consistent with statements given to others. Finally, the victim was available in court, but defense counsel elected not to call the victim. Pickle v. State, 280 Ga. App. 821, 635 S.E.2d 197 (2006), cert. denied, No. S06C2150, 2007 Ga. LEXIS 110, 111 (Ga. 2007) (decided under former O.C.G.A. § 24-3-16).

In the sexual abuse case, the trial court did not abuse the court's discretion in finding, without a hearing, the child victim's videotape hearsay to be reliable under former O.C.G.A. § 24-3-16; the victim, age 12 at the time, did not refuse to speak with the interviewing detective, the victim was not coached, led, pressured, threatened, or induced, and the victim testified at trial and was subject to cross-examination. Newton v. State, 281

Ga. App. 549, 636 S.E.2d 728 (2006), overruled on other grounds, McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008) (decided under former O.C.G.A. § 24-3-16).

During a defendant's trial for criminal charges arising out of sexual offenses committed against the defendant's 11-year-old child, the Georgia Child Hearsay Statute, former O.C.G.A. § 24-3-16, permitted the admission of the testimony of a caseworker that a sibling of the child saw the rapist having sex with the child and reported it several times to the defendant and the testimony of a neighbor to whom the victim said that the defendant had not tried to stop the rapist from molesting the victim; no hearing or express judicial findings of reliability were required, the defendant did not object at trial to the admission of the statements, and the defendant failed to explain on appeal how the record lacked evidence of reliability. Johnson v. State, 283 Ga. App. 99, 640 S.E.2d 644 (2006) (decided under former O.C.G.A. § 24-3-16).

In defendant's trial for child molestation, the trial court did not abuse the court's discretion by admitting the victim's statements made to the victim's mother, brother, a child forensic investigator, and the investigating officer as the statements were spontaneous when made and were remarkably consistent and corroborated at trial by the testimony of the victim's siblings, the victim's videotaped interview, and defendant's confession. Simmons v. State, 291 Ga. App. 642, 662 S.E.2d 660 (2008) (decided under former O.C.G.A. § 24-3-16).

With regard to a defendant's convictions for child molestation and related crimes arising from actions the defendant took toward three children and those that the defendant forced the children to engage in amongst each other by gunpoint while the defendant was a babysitter for the children, the trial court did not err by allowing one of the victim's best friend to testify that the victim told the witness that the defendant had a gun and had made the victim do stuff as the testimony was properly admitted under the Child Hearsay Statute, former O.C.G.A. § 24-3-16. The victim's disclosure to the friend occurred in the relaxed setting of a private conversation between two friends, there was no evidence of any threats, promise of benefits, coaching, drugs, or alcohol that would have influenced the victim's disclosure, and there was no evidence that the victim had a tendency to exaggerate or falsify information or otherwise lacked general credibility. Sullivan v. State, 295 Ga. App. 145, 671 S.E.2d 180 (2008), cert. denied, No. S09C0624, 2009 Ga. LEXIS 215 (Ga. 2009) (decided under former O.C.G.A. § 24-3-16).

In a conviction for aggravated child molestation and child molestation for acts committed upon defendant's four-year-old daughter, the victim's statements had sufficient indicia of reliability because the victim made several spontaneous disclosures regarding the acts committed upon the victim by defendant using age-appropriate language, which did not appear to have been the result of adult coaching, and the videotaped statements were consistent with statements made to the victim's mother and therapist, which were made in a neutral location and without any threats or promises. Romani v. State, 303 Ga. App. 829, 695 S.E.2d 303 (2010) (decided under former O.C.G.A. § 24-3-16).

Although the defendant argued that the videotaped statement of the victim, which was admitted pursuant to the child hearsay statute found in former O.C.G.A. § 24-3-16, was not properly admitted because the trial court failed to make the findings of reliability required by that statute, the trial court actually did make a finding that there were sufficient indicia of reliability. Moreover, an express finding in that regard was not necessary as the statutory requirement was met after both parties rested; the record contained evidence which would support such a finding. Adams v. State, 288 Ga. 695, 707 S.E.2d 359 (2011) (decided under former O.C.G.A. § 24-3-16).

Recorded interview of the victim was admissible because the recording showed sufficient indicia of reliability including that, inter alia, the interview occurred outside the presence of the victim's mother, the interview resulted from the victim's spontaneous outcry, the victim

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appeared to understand the questions and the victim's responses seemed unrehearsed and spontaneous, and there was no evidence the victim received either threats or promises. Anderson v. State, 315 Ga. App. 679, 727 S.E.2d 504 (2012) (decided under former O.C.G.A. § 24-3-16).

Defense attorney was not subject to disqualification as a necessary witness to a child's statement. — Molestation defendant's attorney was not subject to disqualification on the basis that the attorney's testimony was necessary for admission of a child's statement in the attorney's presence under former O.C.G.A. § 24-3-16. The testimony was not necessary under Ga. St. Bar R. 4-102(d):3.7(a) because the child's mother was present at the interview and could testify to the circumstances of the statement. Schaff v. State, 304 Ga. App. 638, 697 S.E.2d 305 (2010) (decided under former O.C.G.A. § 24-3-16).

Testimony of officer admitted. — There was sufficient evidence of reliability of a child's statement to a police officer based on the officer's testimony that the child left the child's residence and reported the molestation immediately after the molestation occurred, that the officer spoke with the child the same evening, that the officer saw no evidence that the child was coached, and the officer did not lead the child in making a statement. Crider v. State, 246 Ga. App. 765, 542 S.E.2d 13 (2000) (decided under former O.C.G.A. § 24-3-16).

No error in failing to determine reliability. — Because every event described by the detective and the investigator was confirmed by the victim in much greater detail, there was no error in failing to determine the reliability of the victim's statements. Nelson v. State, 255 Ga. App. 315, 565 S.E.2d 551 (2002) (decided under former O.C.G.A. § 24-3-16).

Application

Statement about contact with other child inadmissible. — Statements made by the victim to a witness about sexual contact between the defendant and another child were not admissible evidence. Riddle v. State, 208 Ga. App. 8, 430 S.E.2d 153 (1993) (decided under former O.C.G.A. § 24-3-16).

Age of child at time witness testifies irrelevant. — It is plain from the face of former O.C.G.A. § 24-3-16 that the age of the child at the time the witness testifies is irrelevant as long as the child's statement about which the witness testifies was made while the child was under 14 years of age. Greer v. State, 201 Ga. App. 775, 412 S.E.2d 843, cert. denied, 201 Ga. App. 903, 412 S.E.2d 843 (1991) (decided under former O.C.G.A. § 24-3-16).

In a child molestation case where similar transaction evidence about alleged sexual abuse of the defendant's child was admitted, testimony of the child's other parent and a videotaped interview with the child were properly admitted under the child hearsay statute because the child was ten when the child made the statements; it was immaterial that the child was 19 at the time of the trial. Slade v. State, 287 Ga. App. 34, 651 S.E.2d 352 (2007), cert. denied, 129 S. Ct. 56, 172 L.Ed.2d 24 (2008) (decided under former O.C.G.A. § 24-3-16).

Age of the child at the time the statements were made is determinative of their admissibility under former O.C.G.A. § 24-9-5. Darden v. State, 206 Ga. App. 400, 425 S.E.2d 409 (1992) (decided under former O.C.G.A. § 24-3-16).

Statements about which the friend testified concerning the molestation of the victim by the victim's stepfather were made when the victim was 13 years old and so were admissible under O.C.G.A. § 24-3-16. Geiger v. State, 258 Ga. App. 57, 573 S.E.2d 85 (2002) (decided under former O.C.G.A. § 24-3-16).

Because the child was not under the age of 14 when the child made the alleged hearsay statement at issue, former O.C.G.A. § 24-9-5, did not apply; moreover, because the contested witness's testimony was substantially the same as to what the child victim testified to, the evidence was cumulative and any error in admission was harmless. Currington v. State, 270 Ga. App. 381, 606 S.E.2d 619 (2004) (decided under former O.C.G.A. § 24-3-16).

As a child was 15 when the child told an officer that the defendant had molested the child, the officer's testimony about the child's accusation was not admissible under former O.C.G.A. § 24-9-5. Cash v. State, 294 Ga. App. 741, 669 S.E.2d 731 (2008) (decided under former O.C.G.A. § 24-3-16).

Trial court did not err in permitting the victim's mother to testify to the victim's prior consistent statements about what happened on the night the defendant had sexual intercourse with the victim over the defendant's bolstering objection because the victim was thirteen years old at the time the victim made the statements, the mother's testimony relating those statements was admissible under former O.C.G.A. § 24-9-5. Davis v. State, 303 Ga. App. 799, 694 S.E.2d 381 (2010) (decided under former O.C.G.A. § 24-3-16).

Mental ability equivalent to child below 14 years. — Although there was evidence that the 15-year-old victim was mildly mentally handicapped with intellectual abilities and social skills equivalent to an average child below 14 years of age, the trial court improperly ruled that former O.C.G.A. § 24-9-5 applied. Foster v. State, 216 Ga. App. 26, 453 S.E.2d 482 (1995) (decided under former O.C.G.A. § 24-3-16).

When the state called the child as a witness and the child was fully cross-examined, there was no error. McLelland v. State, 203 Ga. App. 93, 416 S.E.2d 340, cert. denied, 203 Ga. App. 907, 416 S.E.2d 340 (1992) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-3-16 was inapplicable as the child testified at trial and was fully cross-examined by the defendant. Hayes v. State, 274 Ga. 875, 560 S.E.2d 656 (2002) (decided under former O.C.G.A. § 24-3-16).

Five-year-old child's out-of-court statements to the child's grandmother and aunt regarding a sexual assault were admissible under former O.C.G.A. § 24-9-5 because: (1) the child was upset when making the statement to the aunt; (2) the child was at home when making the statements, and there was no evidence that the child was forced to make the statements or that the child was coached regarding what to say; (3) the child used age-appropriate language; (4) the statements were consistent; and (5) the child testified and defense counsel had the opportunity to cross-examine the child. Ingram v. State, 262 Ga. App. 304, 585 S.E.2d 211 (2003) (decided under former O.C.G.A. § 24-3-16).

Age of witness irrelevant. — Any competent person could present testimony under former O.C.G.A. § 24-9-5; thus, a 13-year-old friend properly testified. Peters v. State, 206 Ga. App. 143, 424 S.E.2d 372 (1992) (decided under former O.C.G.A. § 24-3-16).

Demeanor is one of the factors used to determine the reliability of a child's statement. Keller v. State, 221 Ga. App. 846, 473 S.E.2d 194 (1996) (decided under former O.C.G.A. § 24-3-16).

Finding as to reliability not a condition precedent. — While the court must find that "the circumstances of the statement provide sufficient indicia of reliability," such finding is not a condition precedent to the admissibility of the statement; rather, the requirement of former O.C.G.A. § 24-9-5 was met if after both parties have rested, the record contained evidence which would support such a finding. Gregg v. State, 201 Ga. App. 238, 411 S.E.2d 65, cert. denied, 201 Ga. App. 903, 411 S.E.2d 65 (1991) (decided under former O.C.G.A. § 24-3-16); Tidwell v. State, 219 Ga. App. 233, 464 S.E.2d 834 (1995) (decided under former O.C.G.A. § 24-3-16).

Former O.C.G.A. § 24-9-5 did not require a hearing to determine "indicia of reliability" be held prior to receiving the testimony. Holden v. State, 202 Ga. App. 558, 414 S.E.2d 910 (1992) (decided under former O.C.G.A. § 24-3-16).

With regard to a defendant's convictions on several counts of child molestation, the trial court properly admitting the tape recorded statement of the child victim under former O.C.G.A. § 24-9-5 as by stating that the court found no reason to question the reliability of the child's statement, the trial court, in effect, made the required finding that the tape was reliable. There was no requirement that the trial court make a specific finding of sufficient indicia of reliability for the

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out-of-court statement of the child victim to be admissible. Taylor v. State, 292 Ga. App. 846, 666 S.E.2d 85 (2008), overruled on other grounds, Adams v. State, 299 Ga. App. 39, 681 S.E.2d 725 (2009) (decided under former O.C.G.A. § 24-3-16).

Questions regarding victim's credibility not allowed. — Trial court erred in asking the witness, in the presence of the jury, whether the victim had exhibited "a general attitude of credibility" during the interview process. Buice v. State, 239 Ga. App. 52, 520 S.E.2d 258 (1999), aff'd, 528 S.E.2d 788 (2000) (decided under former O.C.G.A. § 24-3-16).

Corroboration of testimony not required. — Former O.C.G.A. § 24-9-5 required only that the child be available to testify; it did not require the child to corroborate the hearsay testimony. Jones v. State, 200 Ga. App. 103, 407 S.E.2d 85 (1991) (decided under former O.C.G.A. § 24-3-16); Braddy v. State, 205 Ga. App. 424, 422 S.E.2d 260 (1992) (decided under former O.C.G.A. § 24-3-16); Bookout v. State, 205 Ga. App. 530, 423 S.E.2d 7, cert. denied, 205 Ga. App. 899, 423 S.E.2d 7 (1992) (decided under former O.C.G.A. § 24-3-16); Kapua v. State, 228 Ga. App. 193, 491 S.E.2d 387 (1997) (decided under former O.C.G.A. § 24-3-16).

Child molestation and aggravated child molestation convictions were upheld on appeal as a videotaped statement from the victim of those crimes accusing the defendant of requiring the victim to place the defendant's penis in the victim's mouth was corroborated by another witness; hence, the defendant was not denied due process and former O.C.G.A. § 24-9-5, did not require corroboration of child hearsay. Simpson v. State, 282 Ga. App. 456, 638 S.E.2d 900 (2006) (decided under former O.C.G.A. § 24-3-16).

Spontaneous statement admissible. — Phrase "available to testify" means "competent to testify under [former] O.C.G.A. § 24-9-5" (see now O.C.G.A. §§ 24-6-601 and 24-6-603). In re K.T.B., 192 Ga. App. 132, 384 S.E.2d 231 (1989) (decided under former O.C.G.A. § 24-3-16); In re K.G.L., 198 Ga. App. 891, 403 S.E.2d 464 (1991) (decided under former O.C.G.A. § 24-3-16).

Hearsay testimony of a social worker was properly admitted under former O.C.G.A. § 24-9-5 as a child was with a parent in a comfortable non-threatening environment when the child said, "(The defendant) hurt me. I don't like (the defendant. The defendant's) mean"; the statement was not made in response to any inquiry, but was a spontaneous reaction to something said by the parent. Revells v. State, 283 Ga. App. 59, 640 S.E.2d 587 (2006) (decided under former O.C.G.A. § 24-3-16).

Child "available to testify" in former O.C.G.A. § 24-3-16 meant one competent to testify under former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). For offenses occurring before April 19, 1989, including child molestation, a child incompetent as a witness is not available to testify and any out-of-court statements are not rendered admissible by former O.C.G.A. § 24-3-16. Hunnicutt v. State, 194 Ga. App. 714, 391 S.E.2d 790 (1990), later appeal, 198 Ga. App. 572, 402 S.E.2d 534 (1991) (decided under former O.C.G.A. § 24-3-16).

Child was considered "available to testify" under former O.C.G.A. § 24-3-16 only if the child was "competent" to testify within the meaning of former O.C.G.A. § 24-9-5 (see now O.C.G.A. §§ 24-6-601 and 24-6-603). Shaver v. State, 199 Ga. App. 428, 405 S.E.2d 281, cert. denied, 199 Ga. App. 907, 405 S.E.2d 281 (1991) (decided under former O.C.G.A. § 24-3-16).

Availability of child for pretrial interview. — When the witness is a child, it is permissible for the legal custodian to decide whether the child will be made available to defense counsel for a pretrial interview. Kelly v. State, 197 Ga. App. 811, 399 S.E.2d 568 (1990) (decided under former O.C.G.A. § 24-3-16).

Defendant's right to notice of statements before trial. — There was no requirement in former O.C.G.A. § 24-3-16 that the state provide the defense with pretrial notice of the state's intention to introduce child hearsay statements in evidence. Schwindler v. State, 254 Ga. App. 579, 563 S.E.2d 154 (2002), cert. denied, 538 U.S. 1016, 123 S. Ct. 1935, 155 L. Ed.

2d 854 (2003) (decided under former O.C.G.A. § 24-3-16).

Evidence admissible although child available to testify. — In a prosecution for child molestation, hearsay evidence was admissible under former O.C.G.A. § 24-3-16 because the child was clearly available to testify, and the defendant did not challenge the existence of indicia of reliability. Trew v. State, 244 Ga. App. 76, 534 S.E.2d 804 (2000) (decided under former O.C.G.A. § 24-3-16).

Child's own statements about molestation were admissible under the child hearsay statute. Phillips v. State, 251 Ga. App. 179, 553 S.E.2d 847 (2001) (decided under former O.C.G.A. § 24-3-16).

Tape recorded police interview with an eight year old female victim was properly admissible under former O.C.G.A. § 24-3-16 at defendant's trial for child molestation. The child testified at trial and the defendant had the opportunity to cross examine the child regarding the child's memory and the circumstances surrounding the child's out-of-court statements, and the judge and jury had an opportunity to evaluate the child's veracity. The police officer testified about the manner in which the child's mother came to the officer and about the officer's involvement in recording the interview. There was no evidence that the child was forced to make the child's statements or that the child was coached regarding what to say. Hayes v. State, 252 Ga. App. 897, 557 S.E.2d 468 (2001) (decided under former O.C.G.A. § 24-3-16).

Although a trial court stated that a child witness would not testify at trial because the child kept crying, because the child was present and available to testify at trial, inadmissibility of the child's hearsay statements was not present under former O.C.G.A. § 24-3-16; the judge's comment that the witness would not testify was not an improper comment on the evidence under O.C.G.A. § 17-8-57. Brock v. State, 270 Ga. App. 250, 605 S.E.2d 907 (2004) (decided under former O.C.G.A. § 24-3-16).

Trial court did not abuse the court's discretion in denying defendant's motion in limine to exclude statements that the 13-year-old male child molestation victim made to the parents as such statements were admissible under former O.C.G.A. § 24-3-16 because sufficient indicia of reliability were established; the victim was present at trial and testified on direct examination as to why the victim initially denied the molestation when the victim was first confronted by the parents, and then why the victim finally admitted the molestation. Steverson v. State, 276 Ga. App. 876, 625 S.E.2d 476 (2005) (decided under former O.C.G.A. § 24-3-16).

Evidence presented at trial was sufficient to establish the reliability of the statement that the child victim made to an aunt, and the trial court did not err in finding that the statement had the requisite degree of trustworthiness to be admitted at trial; moreover, admission of the statement was harmless because all the child victims testified about the incident at trial and the defendant was acquitted of an aggravated child molestation charge. Nelson v. State, 279 Ga. App. 859, 632 S.E.2d 749 (2006) (decided under former O.C.G.A. § 24-3-16).

In the sexual molestation case, the trial court did not err in allowing into evidence the out-of-court statements of the six-year-old victim via the parent's hearsay testimony; the statements were admissible under former O.C.G.A. § 24-9-5 as the victim's out-of-court statements were made under circumstances that provided sufficient indicia of reliability in that the statements were made immediately after the incident and remained consistent, and the victim testified at trial and was cross-examined. Mikell v. State, 281 Ga. App. 739, 637 S.E.2d 142 (2006) (decided under former O.C.G.A. § 24-3-16).

No abuse of discretion resulted from the admission of testimony from the investigating officer, the child victim's mother, and the child victim's sister, about the alleged child molestation committed by the juvenile as: (1) the child was available to testify; (2) cross-examination of the child victim in the judge's chambers was attempted, but proved unsuccessful; and (3) the judge ruled that no further purpose would be served by having the child examined in the open courtroom. In the Interest of S.S., 281 Ga. App. 781, 637 S.E.2d

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151 (2006) (decided under former O.C.G.A. § 24-3-16).

Juvenile court did not err in allowing the foster mother to give hearsay testimony about statements the children made under former O.C.G.A. § 24-3-16 because the statements described acts of sexual contact performed with another person in the children's presence and the children were physically in the courthouse and available to testify. In the Interest of A. S., 318 Ga. App. 457, 734 S.E.2d 225 (2012) (decided under former O.C.G.A. § 24-3-16).

Recanting of child victim's testimony. — Former O.C.G.A. § 24-3-16 did not require the child to corroborate the hearsay testimony, and conflicts between the videotaped statement and the testimony of the child at trial do not necessarily render the former inadmissible, but rather present a question of credibility of the witness to be resolved by the trier of fact; despite a child victim's apparent recantation of the victim's accusations of molestation at trial, sufficient evidence supported convictions of child molestation and aggravated child molestation after the victim described the molestation in a pre-trial videotaped interview, when an expert witness testified that children may recant testimony with regard to sexual abuse for reasons unrelated to falsity, including embarrassment and fear, and a doctor also testified that the doctor's examination of the victim revealed "unusual" findings that would have caused the doctor to inquire regarding sexual abuse if the findings had appeared on a routine exam. Amerson v. State, 268 Ga. App. 855, 602 S.E.2d 857 (2004) (decided under former O.C.G.A. § 24-3-16).

Witnesses testified pursuant to former O.C.G.A. § 24-3-16 that the defendant's stepchild, then 12, told the witnesses about being repeatedly raped and molested by the defendant. That the stepchild recanted these statements at trial did not render the hearsay inadmissible under former O.C.G.A. § 24-3-16, and as the stepchild's credibility was for the jury to decide, the evidence was sufficient to support the defendant's convictions for rape, incest, and child molestation. Harvey v. State, 295 Ga. App. 458, 671 S.E.2d 924 (2009) (decided under former O.C.G.A. § 24-3-16).

Evidence admissible because victim took stand. — Direct testimony of the victim and out-of-court statements the victim made to others were admissible since the victim took the stand and was examined and cross-examined by both parties. Fields v. State, 194 Ga. App. 149, 390 S.E.2d 71 (1990) (decided under former O.C.G.A. § 24-3-16).

Because a child victim testified of defendant's sexual abuse and that defendant showed the victim "pictures or movies where people didn't have any clothes on," the trial court properly admitted the videotapes and determined that a psychotherapist's testimony was admissible under former O.C.G.A. § 24-3-16; consequently, defendant failed to show that trial counsel was ineffective. Johnson v. State, 274 Ga. App. 69, 616 S.E.2d 848 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006); overruled on other grounds, Miller v. State, 285 Ga. 285, 676 S.E.2d 173 (2009) (decided under former O.C.G.A. § 24-3-16).

In a case where a defendant was convicted of cruelty to children in violation of O.C.G.A. § 16-5-70, the trial court did not err in denying the defendant's motion for a mistrial or in refusing to strike certain testimony because hearsay statements by the defendant's daughter were admissible pursuant to former O.C.G.A. § 24-3-16 since the daughter was available to appear at trial and, in fact, took the witness stand. Stegall v. State, 297 Ga. App. 425, 677 S.E.2d 441 (2009) (decided under former O.C.G.A. § 24-3-16).

Defendant denied right of confrontation. — Trial court erroneously and over objection allowed the state to ask defendant's daughter, in a prosecution for child molestation and incest, whether she had heard her brothers tell her mother what defendant had done to them, as this evidence was hearsay and double hearsay not falling the exception of former O.C.G.A. § 24-3-16 because the brothers were not available to testify. Cobb v. State, 209 Ga. App. 708, 434 S.E.2d 513 (1993) (decided under former O.C.G.A. § 24-3-16).

Defendant was not denied the right of confrontation, even though the defendant was unable to confront the victim when the victim's statements were originally made since the victim actually testified at trial and was subject to a thorough cross-examination. Reynolds v. State, 257 Ga. 725, 363 S.E.2d 249 (1988) (decided under former O.C.G.A. § 24-3-16); Sticher v. State, 209 Ga. App. 423, 433 S.E.2d 660 (1993) (decided under former O.C.G.A. § 24-3-16); White v. State, 213 Ga. App. 429, 445 S.E.2d 309 (1994) (decided under former O.C.G.A. § 24-3-16).

When the victim had been called by the state and the defendant had an opportunity to cross-examine without having to call the victim to the stand, the application of former O.C.G.A. § 24-3-16 did not violate the defendant's right to due process to confront the witness. Lawhorn v. State, 257 Ga. 780, 364 S.E.2d 559 (1988) (decided under former O.C.G.A. § 24-3-16).

Child witness's unresponsiveness to a number of questions as put by defendant did not constitute a deprivation of defendant's constitutional confrontation right so as to require that the witness's out-of-court statements be stricken since defendant was not denied the right to a thorough and sifting cross-examination of a witness who appeared to answer as well as the witness was capable of answering. Bright v. State, 197 Ga. App. 784, 400 S.E.2d 18 (1990) (decided under former O.C.G.A. § 24-3-16).

Defendant's right to confront and cross-examine a child witness was protected in spite of the child's unresponsiveness on cross-examination as to the merits of the case brought against the defendant; the child's unresponsiveness did not preclude the defendant from thoroughly cross-examining the child as to the veracity of hearsay statements made against the defendant's interests by the child's parents and the caseworker. Byrd v. State, 204 Ga. App. 252, 419 S.E.2d 111 (1992) (decided under former O.C.G.A. § 24-3-16).

Hearsay testimony of an investigator was properly admitted under former O.C.G.A. § 24-3-16 as the trial court listened to the audiotape of an interview with a child and concluded there had been no excessive coaching or planting of information and that there was sufficient indicia of reliability; moreover, the child was available for cross-examination by defense counsel concerning the child's claimed memory lapses and confusion, but counsel chose not to cross-examine the child. Revells v. State, 283 Ga. App. 59, 640 S.E.2d 587 (2006) (decided under former O.C.G.A. § 24-3-16).

Procedure employed by court satisfactory. — When the trial court ultimately found a child victim's statements reliable and admitted the statements, and obviously would have done the same following a separate hearing, any conceivable error arising from the procedure employed by the trial court would have been of the defendants' own making since the defendant's persuaded the trial court to review the child's video-recorded statements and assured the court at the time that the procedure was satisfactory. Newman v. State, 286 Ga. App. 353, 649 S.E.2d 349 (2007) (decided under former O.C.G.A. § 24-3-16).

Statements of four-year-old properly admitted. — Trial court did not err in exercising the trial court's broad discretion to admit a four-year-old child's out-of-court statements under the child hearsay statute, former O.C.G.A. § 24-3-16, with regard to defendant's convictions for aggravated child molestation and two counts of child molestation. Given the totality of the circumstances, the trial court was authorized to find sufficient indicia of reliability to admit the child's hearsay statements based on: (1) the child's tender years; (2) a therapist testifying that there was no indication that the child had been coached; and (3) an interview report that purportedly raised questions about coaching and the reliability of the statements was never introduced into evidence at trial. Brumbelow v. State, 289 Ga. App. 520, 657 S.E.2d 603 (2008) (decided under former O.C.G.A. § 24-3-16).

Interval of time between offenses and interview. — Passage of an interval of time between the commission of the offenses and the making of the videotape does not preclude any possibility of spon-

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taneity; the relevance of such chronological intervals must be considered along with other factors, but there is no authority for a bright line rule precluding admission of an interview. Knight v. State, 210 Ga. App. 228, 435 S.E.2d 682 (1993) (decided under former O.C.G.A. § 24-3-16).

Statement made days, weeks, or months after incident. — Fact that the statement is made days, weeks, or even several months after the alleged incident, in and of itself, does not make the statement unreliable. Gregg v. State, 201 Ga. App. 238, 411 S.E.2d 65, cert. denied, 201 Ga. App. 903, 411 S.E.2d 65 (1991) (decided under former O.C.G.A. § 24-3-16).

Admission of similar transactions. — Nothing in former O.C.G.A. § 24-3-16 restricted the statement to use solely in connection with the prior incident, and in child molestation cases, the appellate court had consistently upheld the admission of similar transactions involving incidents for which the defendant was not on trial. Guest v. State, 216 Ga. App. 457, 454 S.E.2d 622 (1995) (decided under former O.C.G.A. § 24-3-16).

Fathers of the two similar transaction victims were allowed to give hearsay testimony about the victims' statements that defendant had molested the victims, because this sort of hearsay testimony, describing a child's statement about sexual abuse, is admissible similar transaction evidence under former O.C.G.A. § 24-3-16. Deal v. State, 241 Ga. App. 879, 528 S.E.2d 289 (2000) (decided under former O.C.G.A. § 24-3-16).

Statements admissible as substantive evidence. — In a criminal prosecution for sexual and non-sexual acts committed against a child, the jury was allowed to consider the child's out-of-court statements as substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-3-16, and conflicts between the child's testimony at trial and out-of-court statements were for the jury to resolve. Manders v. State, 281 Ga. App. 786, 637 S.E.2d 460 (2006) (decided under former O.C.G.A. § 24-3-16).

Subsequent report of molestation by another not admissible. — Subsequent report by the victim of molestation by another was neither prior to nor necessarily inconsistent with the victim's earlier report that the defendant was the victim's only molester, and was not admissible as impeaching evidence. Thompson v. State, 187 Ga. App. 152, 369 S.E.2d 523 (1988) (decided under former O.C.G.A. § 24-3-16).

Testimony of child sodomy victim's accusation allowed. — Trial court did not err in allowing testimony of the child's accusation that defendant committed the acts which constitute the crime of aggravated child molestation since the victim told the victim's grandmother that defendant orally sodomized the victim and that defendant forced the victim to perform acts of oral sodomy and the victim's mother's testimony that she had never discussed oral sodomy with the three-year-old victim and that she had never known the child to make up stories. Williams v. State, 204 Ga. App. 878, 420 S.E.2d 781 (1992) (decided under former O.C.G.A. § 24-3-16).

Child sodomy victim's statements qualified as "outcry" arguably so near to the event and so free of afterthought and forethought, connivance, or "reflective thought," as to be part of the res gestae, and so as to be evidence of the crime itself, and not merely a later statement by the child about the crime, as it might have been under former O.C.G.A. § 24-3-16, where these outcries occurred while the child was asleep the night the child returned home after the child's mother picked the child up at the child's grandfather's house where the crime allegedly occurred. Godfrey v. State, 187 Ga. App. 319, 370 S.E.2d 183 (1988) (decided under former O.C.G.A. § 24-3-16).

Statement as part of res gestae of child molestation charge. — Child's statement to an investigative agent regarding a "game" in which the defendant, the child victim, and others removed articles of their clothing were admissible as describing part of the res gestae of the crime of child molestation. Berry v. State, 235 Ga. App. 35, 508 S.E.2d 435 (1998) (decided under former O.C.G.A. § 24-3-16).

Testimony by the mother of a child-molestation victim concerning al-

legations made by her child to her against defendant was properly admitted since the court considered atmosphere, circumstances, spontaneity, and demeanor in judging the reliability of the statement. Ortiz v. State, 188 Ga. App. 532, 374 S.E.2d 92, cert. denied, 188 Ga. App. 912, 374 S.E.2d 92 (1988) (decided under former O.C.G.A. § 24-3-16).

Testimony of victim's mother concerning statements made to her by victim was admissible. Dupree v. State, 206 Ga. App. 4, 424 S.E.2d 316 (1992) (decided under former O.C.G.A. § 24-3-16).

Mother's testimony following victim's recanting of original statement. — Although the victim was not under the age of 14 at the time the statements were made, this did not affect the admissibility of the testimony of the victim's mother and a detective because the victim's veracity was placed in issue after the victim signed an affidavit recanting the victim's original statement, and the victim was present at trial and was thoroughly cross-examined about the truthfulness of the victim's original statement. Frady v. State, 245 Ga. App. 832, 538 S.E.2d 893 (2000) (decided under former O.C.G.A. § 24-3-16).

Statement made through interpreter admissible. — Statements made through an interpreter by an 11-year-old victim of child molestation to witnesses who asked the victim questions were admissible through testimony of the witnesses even though the interpreter did not testify at the trial. Davis v. State, 214 Ga. App. 360, 448 S.E.2d 26 (1994) (decided under former O.C.G.A. § 24-3-16).

Witness statements admissible despite child's unresponsiveness. — Trial court did not err in refusing to strike the testimony of adult witnesses who related a child molestation victim's statements to the witnesses in spite of the victim's unresponsiveness as a witness when called by the court. Smith v. State, 228 Ga. App. 144, 491 S.E.2d 194 (1997) (decided under former O.C.G.A. § 24-3-16).

Child who told adults that defendant placed the defendant's finger inside her vagina was not unavailable within the meaning of former O.C.G.A. § 24-3-16 because she was unresponsive when she was asked questions in court, and the trial court's decision allowing adults to testify about out-of-court statements the child made to the adults was correct. Bell v. State, 263 Ga. App. 894, 589 S.E.2d 653 (2003) (decided under former O.C.G.A. § 24-3-16).

Physical appearance of victim at trial all that is required. — Availability requirement under former O.C.G.A. § 24-3-16 was met even if the victim took the stand and was incapable of reiterating the accusations against the defendant or was uncommunicative or unresponsive; the child needed only physically appear at trial. Jenkins v. State, 235 Ga. App. 53, 508 S.E.2d 710 (1998) (decided under former O.C.G.A. § 24-3-16).

Victim/witness director allowed to testify regarding conversation with victim. — In an incest and child molestation trial, there was no error in the trial court's decision allowing the victim/witness director to testify regarding the contents of a conversation the director had with the victim. Chambers v. State, 205 Ga. App. 78, 421 S.E.2d 326 (1992) (decided under former O.C.G.A. § 24-3-16).

Witnesses' testimony regarding statements of victim's mother admissible. — Witnesses' testimony that older victim said when she told her mother what defendant was doing, the mother said to pray and not tell anyone, was not beyond permissible hearsay under former O.C.G.A. § 24-3-16 because it was not offered to show the truth of matters asserted therein. Mother's response to her daughter was not an assertion but a request, and the testimony concerning her response was presented not to prove prayer and silence on the subject of defendant's conduct were desirable, but simply to show the mother's request for prayer and silence was made. Gibby v. State, 213 Ga. App. 20, 443 S.E.2d 852 (1994) (decided under former O.C.G.A. § 24-3-16).

Mother's and other professional witnesses' statements admissible. — Trial court properly allowed hearsay testimony about statements made by the victim to the victim's mother, the school counselor, and the nurse practitioner who examined the victim pursuant to former

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O.C.G.A. § 24-3-16 in defendant's child molestation trial; defendant's arguments that there was no evidence that the statements were spontaneous and that there were two inconsistencies in the victim's statements, giving differing answers when asked how many times defendant had molested the victim and describing the incidents in a different order in two different statements, were not sufficient to show that the trial court abused the court's discretion in admitting the statements. Flowers v. State, 255 Ga. App. 660, 566 S.E.2d 339 (2002) (decided under former O.C.G.A. § 24-3-16).

Statements of victim's mother held inadmissible. — In a child custody proceeding, former O.C.G.A. § 24-3-16 did not apply to allow mother to present hearsay testimony regarding harassment of her children by their stepbrother. Martin v. True, 232 Ga. App. 435, 502 S.E.2d 285 (1998) (decided under former O.C.G.A. § 24-3-16).

Evidence inadmissible when child unavailable to testify. — Child was not available within the meaning of former O.C.G.A. § 24-3-16; therefore, the child's mother's testimony regarding the child's out-of-court statements was inadmissible since the trial court excused the child without the child ever being sworn and examined as a witness because the child was distraught. Hines v. State, 248 Ga. App. 752, 548 S.E.2d 642 (2001) (decided under former O.C.G.A. § 24-3-16).

State failed to meet the state's burden of showing that an allegedly abused child was "available to physically appear" at the deprivation hearing as required for hearsay testimony to be admissible under former O.C.G.A. § 24-3-16. The juvenile court erred in relying on the hearsay testimony of a social worker and a DFCS case manager regarding what the child said. In the Interest A.T., 309 Ga. App. 822, 711 S.E.2d 382 (2011) (decided under former O.C.G.A. § 24-3-16).

Statements as to the circumstances in which appellant chased appellant's son down the hall while carrying a maul constitutes statements regarding any act of physical abuse within the meaning of former O.C.G.A. § 24-3-16. Brewton v. State, 216 Ga. App. 346, 454 S.E.2d 558 (1995), rev'd on other grounds, 266 Ga. 160, 465 S.E.2d 668 (1996) (decided under former O.C.G.A. § 24-3-16).

Child molestation victim's statements included in expert witness testimony are admissible. — Trial court did not err in allowing into evidence the testimony of the prosecution's expert witness as to statements made to the witness by the child molestation victim, which statements were incriminating of defendant, since the record shows that the victim was not only available to testify in the proceedings, but was called as the prosecution's first witness and that, prior to the admission of the expert witness's testimony, the trial court determined that the circumstances surrounding the victim's statements provided sufficient indicia of reliability. Knopp v. State, 190 Ga. App. 266, 378 S.E.2d 703 (1989) (decided under former O.C.G.A. § 24-3-16).

Statements admissible when victim available. — In a prosecution for child molestation, testimony by two witnesses regarding statements made by one of the victims about seeing the defendants engaged in sex was admissible since the victim, although not called by the state, was available to be called as a witness. Grimsley v. State, 233 Ga. App. 781, 505 S.E.2d 522 (1998) (decided under former O.C.G.A. § 24-3-16).

Statements made to government agency investigator admissible. — Trial court did not err in admitting out-of-court statements made by a five-year-old victim to her aunt and a Department of Family Services investigator. McCormick v. State, 228 Ga. App. 467, 491 S.E.2d 903 (1997) (decided under former O.C.G.A. § 24-3-16).

In a proceeding to terminate the parental rights of a father who had been convicted of molesting his children, the trial court did not err in allowing a child protective services investigator, women's shelter manager, and a therapist to testify as to statements made by the children. In re S.M.L., 228 Ga. App. 81, 491 S.E.2d 186 (1997) (decided under former O.C.G.A. § 24-3-16).

Defendant's claim of error in the admis-

sion of an investigator's testimony regarding a child victim's statements to a forensic interviewer was rejected as the investigator was behind a two-way mirror when the victim made the statements and the victim knew that the investigator was listening. Brown v. State, 280 Ga. App. 884, 635 S.E.2d 240 (2006) (decided under former O.C.G.A. § 24-3-16).

In an action wherein two parents were found to have deprived an adopted child due to one parent's sexual abuse of the child and the other parent's failure to protect the child from such abuse, the juvenile court did not abuse the court's discretion by allowing the testimony of a forensic interviewer regarding statements made by the child as the Child Hearsay Statute, former O.C.G.A. § 24-3-16, permitted such testimony, despite the parents' challenges to the competency of the child. In the Interest of B.H., 295 Ga. App. 297, 671 S.E.2d 303 (2008) (decided under former O.C.G.A. § 24-3-16).

Question regarding victim's credibility properly admitted. — Trial court properly admitted testimony from a psychologist who stated that the psychologist treated an 11-year-old girl after the girl told several people that her stepfather molested her and believed that the girl had not made up her story because the testimony was offered to rehabilitate the girl's credibility after the stepfather attacked the girl's credibility. Horne v. State, 262 Ga. App. 604, 586 S.E.2d 13 (2003) (decided under former O.C.G.A. § 24-3-16).

With regard to a defendant's convictions on four counts of aggravated child molestation and three counts of child molestation, the trial court did not err by failing to hold a hearing outside of the jury's presence with regard to the testimony of a social worker who made an audiotape of the victim's statement, and by allowing the social worker to testify as to the general credibility assessment of the victim because the defendant failed to object at trial to the social worker's testimony. By waiting to raise the issue on appeal, the defendant waited too late and such failure amounted to a waiver of any objection that might have been raised. Hargrove v. State, 289 Ga. App. 363, 657 S.E.2d 282 (2008), cert. denied, No. S08C0970, 2008 Ga. LEXIS 500 (Ga. 2008) (decided under former O.C.G.A. § 24-3-16).

Spontaneous statement admissible. — When the victim, a 14-year-old, in a spontaneous, unprompted, crying event told the residential manager of the mobile home park in which the victim lived that the victim's father was abusing the victim and later that same day the victim made substantially the same statements to a government social worker, the statements bore sufficient indicia of reliability. Smith v. State, 207 Ga. App. 55, 427 S.E.2d 48 (1993) (decided under former O.C.G.A. § 24-3-16).

Showing of necessity to support the admission of a videotape of a police interview of the victim under former O.C.G.A. § 24-3-16 was satisfied by the fact that the victim was a witness at the trial whom the defendant was permitted to cross-examine. Knight v. State, 210 Ga. App. 228, 435 S.E.2d 682 (1993) (decided under former O.C.G.A. § 24-3-16).

When one of two victims was ruled incompetent to testify, but a pediatrician's testimony established that both girls had been sexually molested, and the other child testified that the defendant molested her and that she saw him molest her sister, the defendant's conviction was not based on inadmissible hearsay. Mantooth v. State, 197 Ga. App. 797, 399 S.E.2d 505 (1990), overruled on other grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003) (decided under former O.C.G.A. § 24-3-16).

Cumulative testimony concerning victim's statements held harmless error. — After a witness was allowed to testify as to statements which were not made directly to the witness but which the witness observed and heard by watching a monitor during the taping, the testimony was not admissible. However, the testimony was merely cumulative of other testimony presented at trial, and the error consequently presented no ground for reversal. Kelly v. State, 197 Ga. App. 811, 399 S.E.2d 568 (1990) (decided under former O.C.G.A. § 24-3-16).

Trial court erroneously admitted under the Child Hearsay Statute, former O.C.G.A. § 24-3-16, the foster mother's

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statement that the foster mother overheard the children making remarks to one another that allegedly implicated the defendant in sexually abusing the children as the foster mother could not testify under former O.C.G.A. § 24-3-16 since the statement was not made to the foster mother; the evidence was cumulative of other evidence of abuse, however, so the error was harmless. Clemmons v. State, 282 Ga. App. 261, 638 S.E.2d 409 (2006) (decided under former O.C.G.A. § 24-3-16).

More than one statement admissible. — Trial court did not err in allowing the introduction of the victim's prior consistent statements before the victim testified. Wooten v. State, 244 Ga. App. 101, 533 S.E.2d 441 (2000) (decided under former O.C.G.A. § 24-3-16).

Erroneous admission of the child's statements is only reversible if it appears likely that the hearsay contributed to the guilty verdict. Estep v. State, 238 Ga. App. 170, 518 S.E.2d 176 (1999) (decided under former O.C.G.A. § 24-3-16).

Judge was not required to conduct a hearing to determine whether there existed any indicia of reliability surrounding statements made by a child to a psychologist in a parental rights termination proceeding. In re D.R.C., 198 Ga. App. 348, 401 S.E.2d 754 (1991) (decided under former O.C.G.A. § 24-3-16).

Trial court did not need to make an express finding that the circumstances of the statement provided sufficient indicia of reliability before admitting the statement as this statutory requirement was met if, after both parties rested, the record contained evidence which would have supported such a finding; the admission of a child victim's out-of-court statements regarding alleged sexual molestation was proper since the statements were initially spontaneous and remained consistent, and since the victim was cross-examined by defense counsel at trial. Frazier v. State, 278 Ga. App. 685, 629 S.E.2d 568 (2006), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007) (decided under former O.C.G.A. § 24-3-16).

Necessary finding of admissibility implicit in judge's ruling. — Mother's testimony as to what the victim told her was properly admitted in evidence, even though the judge did not make a specific finding of "sufficient indicia of reliability." Implicit in any ruling by a judge is that the judge has made the necessary finding of admissibility before admitting such evidence. Windom v. State, 187 Ga. App. 18, 369 S.E.2d 311 (1988) (decided under former O.C.G.A. § 24-3-16).

It is implicit in the admission of statements pursuant to former O.C.G.A. § 24-3-16 that the trial court made the necessary finding. Calloway v. State, 202 Ga. App. 816, 415 S.E.2d 533 (1992) (decided under former O.C.G.A. § 24-3-16); Green v. State, 212 Ga. App. 250, 441 S.E.2d 689 (1994) (decided under former O.C.G.A. § 24-3-16); Roberson v. State, 214 Ga. App. 288, 447 S.E.2d 640 (1994) (decided under former O.C.G.A. § 24-3-16).

Proffer required to appeal exclusion of testimony. — Defendant's failure to make a proffer at trial showing that testimony should have been admitted under former O.C.G.A. § 24-9-5 precluded consideration on appeal of the issue of the exclusion of such testimony. Jones v. State, 232 Ga. App. 505, 502 S.E.2d 345 (1998) (decided under former O.C.G.A. § 24-3-16).

Effective assistance of counsel. — Alleged failure of counsel to demand a reliability ruling for those witnesses who were called to testify about hearsay statements made by the victim did not constitute ineffective assistance since counsel did demand a reliability ruling regarding the pediatrician's repetition of the victim's statement, counsel filed a motion to invoke the procedures of Sosebee v. State, 257 Ga. 298, 357 S.E.2d 562 (1987), and when the motion was heard the state indicated that the victim would testify. Also, there was a sufficient showing of indicia of reliability, within the meaning of former O.C.G.A. § 24-9-5, as to all out-of-court statements made by the victim, which were testified to by witnesses in the presence of the jury. Williamson v. State, 207 Ga. App. 565, 428 S.E.2d 628 (1993) (decided under former O.C.G.A. § 24-3-16).

Defendant was not denied effective assistance of counsel at a trial for aggravated child molestation because it would have been futile to object to the 10-year old victim's videotaped statement, which was admissible under the former statute's exception for a child's statement of sexual abuse, since there were sufficient indicia of reliability and the child was available to testify at trial. Campos v. State, 263 Ga. App. 119, 587 S.E.2d 264 (2003) (decided under former O.C.G.A. § 24-3-16).

Defendant did not receive ineffective assistance of counsel for counsel's failure to object to a psychologist's testimony that it was uncommon for a child to be able to specify incident dates if there was a recurrence of events over a prolonged period; the psychologist did not improperly bolster the victim's testimony and the psychologist's testimony was not a comment on an ultimate issue of fact; the trial court was authorized to find that the conclusion drawn by the expert was beyond the ken of the jurors. Maddox v. State, 275 Ga. App. 869, 622 S.E.2d 80 (2005) (decided under former O.C.G.A. § 24-3-16).

Decision as to whether to call an expert witness concerning interviewing techniques of children in a child molestation case is one of trial strategy and in a case where trial counsel testified at the second hearing on the motion for new trial that trial counsel did not consult an expert on interviewing techniques because after reviewing the videotape, trial counsel determined that the factors outlined in case law had been met, trial counsel had filed three pretrial motions seeking to exclude or restrict child hearsay statements, and required the state to lay a proper foundation for the use of child hearsay, trial counsel's performance was not deficient in that regard. Nichols v. State, 288 Ga. App. 118, 653 S.E.2d 300 (2007) (decided under former O.C.G.A. § 24-3-16).

Defendant failed to establish ineffective assistance of counsel with regard to defendant's trial and conviction for child molestation based on trial counsel's failure to object and conceding to the issue of reliability for the admission of the child victim's hearsay testimony as: (1) defendant failed to point to any evidence indicating that the victim's statements were unreliable since the statements were videotaped at a neutral location in a room alone with a professional forensic interviewer; (2) the forensic interviewer testified that the victim was very bright and articulate and did not appear to be coached; (3) the victim's videotaped statements were spontaneous, voluntary, and not coerced; (4) the victim's videotaped statements were consistent with other out-of-court statements; and (5) significantly, the victim's statements were consistent with defendant's statements to police. Williams v. State, 290 Ga. App. 841, 660 S.E.2d 740 (2008) (decided under former O.C.G.A. § 24-3-16).

Although defendant's trial counsel's performance fell below the objective standard of reasonableness under the first prong of the Strickland ineffective assistance of counsel test, the error however was harmless because although defendant's trial counsel performed deficiently in failing to raise a hearsay objection to admission of the victim's statements contained in the videotaped interview, defendant did not show that trial counsel's error prejudiced the defense since statements made by the victim during the videotaped interview were merely cumulative of testimony the victim offered at trial and for which the victim was cross-examined by trial counsel. Forde v. State, 289 Ga. App. 805, 658 S.E.2d 410 (2008) (decided under former O.C.G.A. § 24-3-16).

Trial counsel was not ineffective in failing to ask for a hearing on the admissibility of the child molestation victim's videotaped statement because counsel testified that counsel chose not to request a hearing under former O.C.G.A. § 24-9-5 since counsel had never seen a victim's statement declared inadmissible, and counsel did not want the delay resulting from such a request to give the state additional time to prepare the state's case; trial counsel is under no obligation to invoke his or her client's legal right to a hearing designed to protect that client's interests if the invocation of that abstract right would, in his or her professional judgment of the circumstances presented by a specific case, do actual harm to those interests. Robinson v. State, 308 Ga. App. 45, 706 S.E.2d 577 (2011) (decided under former O.C.G.A. § 24-3-16).

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Trial counsel was not ineffective for failing to object to the trial court's determination that the victim was present and available to testify without further inquiring into the reliability of the victim's out-of-court statements under former O.C.G.A. § 24-3-16 because counsel did not want the statements to be excluded in light of counsel's trial strategy to show that the victim had been coached. Henry v. State, 316 Ga. App. 132, 729 S.E.2d 429 (2012) (decided under former O.C.G.A. § 24-3-16).

Speculation does not support ineffective assistance of counsel claim. — Defendant's ineffective assistance of counsel claim was rejected as the defendant's claim that trial counsel was not knowledgeable about the Child Hearsay Statute, former O.C.G.A. § 24-9-5, and failed to highlight the unreliability of the child victim's statement to a nurse was based on mere speculation that a more thorough cross-examination would have altered the outcome at trial. Brown v. State, 280 Ga. App. 884, 635 S.E.2d 240 (2006) (decided under former O.C.G.A. § 24-3-16).

Defendant's right to notice of statements before trial. — There was no requirement that the state provide defendant with pretrial notice of the state's intention to introduce child hearsay statements and, when defendant was notified in advance that there was nothing exculpatory in videotaped interviews with children and defendant was allowed to view tapes during the trial, defendant's due process rights were not violated by not being permitted to view the tapes prior to trial. Thornton v. State, 264 Ga. 563, 449 S.E.2d 98 (1994) (decided under former O.C.G.A. § 24-3-16).

Evidence sufficed for aggravated child molestation conviction. — Evidence and testimony from several adults that the victim reported defendant's sexual assault in the manner charged in the indictment was sufficient to convict for aggravated child molestation, although the victim testified that the criminal act occurred while the victim was wearing jeans. McGuire v. State, 209 Ga. App. 813, 434 S.E.2d 802 (1993) (decided under former O.C.G.A. § 24-3-16).

Evidence was sufficient to convict defendant of child molestation, even if much of the evidence was hearsay repetition of the child's out-of-court statements, as defendant failed to argue that the evidence did not satisfy the reliability criteria set forth in former O.C.G.A. § 24-9-5. Brown v. State, 267 Ga. App. 826, 600 S.E.2d 774 (2004) (decided under former O.C.G.A. § 24-3-16).

There was sufficient evidence to support a defendant's convictions for aggravated child molestation, child molestation, and false imprisonment with regard to allegations that the defendant forced a romantic friend's minor child to perform oral sex on the defendant several times over a three year period, based on the testimony of the victim (which alone was sufficient), the videotaped forensic interview of the victim, the testimony of the police investigator and the victim's mother concerning what the victim told them, as well as the testimony of the victim's siblings, who were eyewitnesses to one incident. Further, the testimony of the victim that the defendant locked the victim in the house and would not let the victim leave supported the conviction on the false imprisonment charge, and the videotaped forensic interview and the testimony of the police investigator and the victim's mother concerning what the victim told them were admissible as substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-9-5. Metts v. State, 297 Ga. App. 330, 677 S.E.2d 377 (2009) (decided under former O.C.G.A. § 24-3-16).

Failing to object to the testimony of the state's witnesses regarding what the victim told the witnesses was not a deficiency by counsel because these statements would have been admissible under the Child Hearsay Statute, former O.C.G.A. § 24-9-5, since the victim, age ten, was a witness at trial whom the defendant cross-examined. Silcox v. State, 241 Ga. App. 845, 528 S.E.2d 271 (2000) (decided under former O.C.G.A. § 24-3-16).

Parents' testimony admissible. — When the record shows the victims testified at trial and were subject to examination and cross-examination, the trial court

did not abuse the court's discretion under the Child Hearsay Statute, former O.C.G.A. § 24-9-5, by admitting the parents' testimony about things the victims said to the parent's about defendant. Kight v. State, 242 Ga. App. 13, 528 S.E.2d 542 (2000) (decided under former O.C.G.A. § 24-3-16).

Statement made to therapist admissible. — Court properly admitted hearsay testimony by a child's therapist that the defendant "put his thing" in the child's mouth where the statement was made in a child-friendly, one-on-one therapy session, not an investigative interview, and the statement was made in response to a non-leading question. Guzman v. State, 273 Ga. App. 819, 616 S.E.2d 142 (2005) (decided under former O.C.G.A. § 24-3-16).

Statement during medical examination admissible. — Nurse's testimony as to a 13-year-old victim's statements that defendant forced intercourse upon the victim made during the medical examination was properly admissible under former O.C.G.A. § 24-9-5. Bell v. State, 294 Ga. App. 779, 670 S.E.2d 476 (2008) (decided under former O.C.G.A. § 24-3-16).

Statements admissible. — In a child molestation case, the trial court properly allowed a deputy to read the statements of three of the teenagers involved into evidence; while all of the teenagers and their parents were present when the teenagers wrote out their statements for the deputy, the record reflected no evidence of undue pressure or influence, and the deputy was not directly involved in later videotaped interviews. Krirat v. State, 286 Ga. App. 650, 649 S.E.2d 786 (2007), cert. denied, No. S07C1788, 2007 Ga. LEXIS 745 (Ga. 2007) (decided under former O.C.G.A. § 24-3-16).

After a trial court properly admitted sufficiently reliable videotaped statements made by three siblings who were the victims of a defendant's cruelty, there was no error in also admitting testimony from nurses from the hospital where the children were taken regarding statements the children made to the nurses as the matters testified to by the nurses were the same matters detailed in the videotaped statements. Williams v. State, 293 Ga. App. 617, 668 S.E.2d 21 (2008) (decided under former O.C.G.A. § 24-3-16).

Under O.C.G.A. § former O.C.G.A. § 24-9-5, the trial court properly allowed a school counselor to testify about the victim's out-of-court statements to the counselor. The victim was available to testify and did in fact testify and was thoroughly cross-examined as was the counselor; furthermore, because the statements were admissible, counsel was not ineffective for failing to object to the statements. Hilliard v. State, 298 Ga. App. 473, 680 S.E.2d 541 (2009) (decided under former O.C.G.A. § 24-3-16).

Victim's testimony alone was sufficient to prove defendant guilty of child molestation (O.C.G.A. § 16-6-4(a)) and aggravated child molestation (O.C.G.A. § 16-6-22.2(b)), pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8). The testimony of the victim's cousin, two school friends, and the interviewing detective, was admissible as substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-9-5. Vaughn v. State, 301 Ga. App. 391, 687 S.E.2d 651 (2009) (decided under former O.C.G.A. § 24-3-16).

There was competent evidence to support the defendant's convictions for aggravated child molestation, O.C.G.A. § 16-6-4(c), and child molestation, O.C.G.A. § 16-6-4(a)(1), because the victim's step-uncle and one of the forensic interviewers proffered evidence that the defendant sexually molested the victim pursuant to the Child Hearsay Act, former O.C.G.A. § 24-9-5; although the victim testified that the defendant touched the victim in a way that the victim did not like, the victim did not provide any details about those incidents, but both the step-uncle and the forensic interviewer testified that the victim disclosed that the defendant touched the victim's privates with the defendant's hand and the defendant's own privates and forced the victim to place the victim's mouth on the defendant's privates, and the jury resolved any credibility or inconsistency issues against the defendant. Westbrooks v. State, 309 Ga. App. 398, 710 S.E.2d 594 (2011) (decided under former O.C.G.A. § 24-3-16).

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Trial court did not abuse the court's discretion in allowing the testimony of an investigator, a pediatrician, and a forensic interviewer regarding statements the victims made to them under former O.C.G.A. § 24-9-5, because the witnesses did not opine as to whether the victims were telling the truth but rather testified regarding the victims' statements to them. Ledford v. State, 313 Ga. App. 389, 721 S.E.2d 585 (2011) (decided under former O.C.G.A. § 24-3-16).

Plain error doctrine inapplicable. — Plain error doctrine had been limited to capital cases and to criminal cases in which the trial judge allegedly intimated an opinion of the defendant's guilt in violation of O.C.G.A. § 17-8-57 and had no application to a defendant's claims that a child molestation victim's hearsay statements served to bolster the victim's credibility and lacked sufficient indicia of reliability. Brown v. State, 280 Ga. App. 884, 635 S.E.2d 240 (2006) (decided under former O.C.G.A. § 24-3-16).

Harmless error. — If the trial court erroneously allowed under former O.C.G.A. § 24-9-5 the testimony of the psychologist in the child molestation case, any error was harmless; although the defendant argued that the testimony was the only evidence of the defendant's mental state, there was ample evidence that the defendant had the propensity to molest children, including the victim's detailed statements, the corroborating medical examination, and the testimony of the children's parent that the defendant had molested the children's parent when the children's parent was very young. Clemmons v. State, 282 Ga. App. 261, 638 S.E.2d 409 (2006) (decided under former O.C.G.A. § 24-3-16).

With regard to a defendant's convictions for child molestation and related crimes arising from actions the defendant took toward three children and those that the defendant forced the children to engage in by gunpoint while the defendant was a babysitter for the children, although the testimony of the mother of one of the victims that the victim was forced to have sex with the defendant was double hearsay and inadmissible, the error was not reversible since other legally admissible evidence of the same fact was introduced, therefore, the error was harmless. Sullivan v. State, 295 Ga. App. 145, 671 S.E.2d 180 (2008), cert. denied, No. S09C0624, 2009 Ga. LEXIS 215 (Ga. 2009) (decided under former O.C.G.A. § 24-3-16).

Jury Issues and Instructions

Evidence was sufficient for the jury to find a defendant guilty of child molestation beyond a reasonable doubt as it was within the jury's province to reject the defendant's defense denying the crime with regard to the victim as well as with regard to the witnesses who testified as to similar transactions with the defendant. The testimony of the victim was corroborated by an investigator and a forensic interviewer, who testified as to what the victim had told had occurred; the victim's statements were corroborated by the sheriff's investigator; and the jury was entitled to consider the victim's out-of-court statements as substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-3-16. Lamb v. State, 293 Ga. App. 65, 666 S.E.2d 462 (2008) (decided under former O.C.G.A. § 24-3-16).

Trial court did not err in denying the defendant's motion for new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 because the jury was authorized to conclude that the defendant was guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1); under the Child Hearsay Statute, former O.C.G.A. § 24-3-16, the jury was entitled to consider the victim's out-of-court statements as substantive evidence, and the victim was made available at trial for confrontation and cross-examination, at which time the jury was allowed to judge the credibility of the victim's accusations. Hargrave v. State, 311 Ga. App. 852, 717 S.E.2d 485 (2011) (decided under former O.C.G.A. § 24-3-16).

Evidence that a defendant became highly intoxicated while having visitation with his seven-year-old daughter, that he licked her vagina, kissed her with his tongue in her mouth, and made her rub her hand on his penis was sufficient to

support convictions for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). A jury could infer from the evidence that the defendant's intent was to arouse and satisfy his sexual desires pursuant to O.C.G.A. § 16-2-6. Obeginski v. State, 313 Ga. App. 567, 722 S.E.2d 162 (2012), cert. denied, No. S12C0908, 2012 Ga. LEXIS 1013 (Ga. 2012) (decided under former O.C.G.A. § 24-3-16).

Credibility of witness within jury's purview. — Despite defendant's argument that expert testimony showed it as likely that statements of defendant's grandson to the lead detective regarding defendant's sexual molestation of the grandson were coached, those were deemed admissible pursuant to the Child Hearsay Statute, former O.C.G.A. § 24-3-16, in that they were statements by a child available to testify in the proceedings that described abuse of a child under 14 which provided sufficient indicia of reliability; determinations as to the credibility of a witness were a matter solely within the jury's purview and would not be disturbed on appeal. Wright v. State, 259 Ga. App. 74, 576 S.E.2d 64 (2003) (decided under former O.C.G.A. § 24-3-16).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Corroboration of a Child's Sexual Abuse Allegation with Behavioral Evidence, 25 POF3d 189.

ALR. — Witnesses: child competency statutes, 60 ALR4th 369.

Validity, construction, and application of child hearsay statutes, 71 ALR5th 637.

24-8-821. Admissions in pleadings.

Without offering the same in evidence, either party may avail himself or herself of allegations or admissions made in the pleadings of the other. (Code 1981, § 24-8-821, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-3-30, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Wood v. Isom, 68 Ga. 417 (1882) and East Tenn., V. & Ga. Ry. v. Kane, 92 Ga. 187, 18 S.E. 18 (1893).

Cross references. — Request for admission of opposing party, § 9-11-36.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5188, former Civil Code 1910, § 5775, former Code 1933, § 38-402, and former O.C.G.A. § 24-3-30\ are included in the annotations for this Code section.

History of statute. — Former statute was a codification of the principle announced in East Tenn., V. & Ga. Ry. v. Kane, 92 Ga. 187, 18 S.E.2d 18, 22 L.R.A. 315 (1893), and a number of prior cases, in which it was asserted that "certainly a party should be relieved from proving that which his adversary distinctly alleges," and this a party may do "without formally tendering the pleading in evidence." Greene v. Gulf Oil Corp., 119 Ga. App. 87, 166 S.E.2d 626 (1969) (decided under former Code 1933, § 38-402); Carver v. Saye, 198 Ga. App. 146, 400 S.E.2d 683 (1990), cert. denied, 198 Ga. App. 897, 400 S.E.2d 683 (1991) (decided under former O.C.G.A. § 24-3-30).

An admission in the pleadings is to be taken as true, and the record should not be burdened by proof of the fact admitted. Greene v. Gulf Oil Corp., 119 Ga.

App. 87, 166 S.E.2d 626 (1969) (decided under former Code 1933, § 38-402).

Pleader is bound by the allegations of the pleader's own pleadings, and what the pleader alleges in the pleader's pleadings to be true is evidence that the pleader is not even permitted to deny. State Hwy Dep't v. Lumpkin, 222 Ga. 727, 152 S.E.2d 557 (1966) (decided under former Code 1933, § 38-402).

When the plaintiff never sought to amend or withdraw averments of fact made in plaintiff's declaratory judgment petition, plaintiff was bound by those admissions and could not put up evidence over objection to contradict them. Keeley v. Cardiovascular Surgical Assocs., 236 Ga. App. 26, 510 S.E.2d 880 (1999) (decided under former O.C.G.A. § 24-3-30).

When the trial court accepted into evidence tenants' affidavits which directly contradicted earlier admissions made by the tenants in their pleadings, those earlier admissions were considered withdrawn. Therefore, the trial court erred in granting summary judgment to the landlord as a matter of law under the termination clause of the lease based on the tenants' earlier admissions that the tenants were the ones who had terminated the lease. Michel v. Abrahams, 254 Ga. App. 293, 562 S.E.2d 194 (2002) (decided under former O.C.G.A. § 24-3-30).

When the pleading is inconsistent, the admission, not the denial, prevails. Taylor v. Crawford, 119 Ga. App. 262, 167 S.E.2d 404 (1969) (decided under former Code 1933, § 38-402); Johnson v. Daniel, 135 Ga. App. 926, 219 S.E.2d 579 (1975) (decided under former Code 1933, § 38-402).

Effect of conflicting evidence on pleadings. — Party is not prevented, per se, from making an admission in judicio in the party's pleadings as to a fact merely because conflicting evidence may exist as to that issue of fact. If the trial court admits that conflicting evidence and either the court (e.g., when ruling on a motion for summary judgment) or the jury (when reaching a verdict) considers the conflicting evidence on the merits, the pleadings at that point become amended to conform to such evidence. Walker v. Jack Eckerd Corp., 209 Ga. App. 517, 434 S.E.2d 63 (1993) (decided under former O.C.G.A. § 24-3-30).

When the trial court does not allow conflicting evidence to be admitted or, when applicable, elects not to consider the issue on the merits, the admission of fact made in the pleadings remains in full force and effect as an admission in judicio and is conclusive of the fact admitted. Walker v. Jack Eckerd Corp., 209 Ga. App. 517, 434 S.E.2d 63 (1993) (decided under former O.C.G.A. § 24-3-30).

Admissions of fact in the pleadings can always be taken advantage of by the opposite party, and can be used as evidence, even though the pleadings should be stricken or withdrawn. Improved Fertilizer Co. v. Swift & Co., 15 Ga. App. 601, 84 S.E. 132 (1914) (decided under former Civil Code 1910, § 5775); Clift & Goodrich, Inc. v. Mincey Mfg. Co., 41 Ga. App. 38, 152 S.E. 136 (1930); Carver v. Carver, 199 Ga. 352, 34 S.E.2d 509 (1945) (decided under former Code 1933, § 38-402); Stallings v. Britt, 204 Ga. 250, 49 S.E.2d 517 (1948) (decided under former Code 1933, § 38-402); Cummings v. State, 84 Ga. App. 698, 67 S.E.2d 156 (1951) (decided under former Code 1933, § 38-402); Spurlock v. Commercial Banking Co., 151 Ga. App. 649, 260 S.E.2d 912 (1979) (decided under former Code 1933, § 38-402); Lawson v. Duke Oil Co., 155 Ga. App. 363, 270 S.E.2d 898 (1980) (decided under former Code 1933, § 38-402).

When the pleading has been stricken, the admission contained in the pleading remains to be utilized as evidence of fact which the admitting party can explain but may be unable to conclusively refute. Strozier v. Simmons U.S.A. Corp., 192 Ga. App. 601, 385 S.E.2d 677, cert. denied, 192 Ga. App. 903, 385 S.E.2d 677 (1989) (decided under former O.C.G.A. § 24-3-30).

In an action seeking damages from an insurance company based on a claim that the company acted in bad faith when the company failed to settle an injured party's claim against an insured, the insurance company admission, in the company's answer to the complaint, that the injured party offered to settle the case for the policy limits of the insured's policy was properly offered to the jury as an admis-

sion that there was a policy of insurance. VFH Captive Ins. Co. v. Cielinski, 260 Ga. App. 807, 581 S.E.2d 335 (2003) (decided under former O.C.G.A. § 24-3-30).

Defendants were bound by admissions which were never expressly withdrawn. — Defendants, who never expressly withdrew the admissions contained in the pleadings, were bound by the admissions, and even if the amendment to their answer impliedly withdrew the admissions, the defendants would still be faced with the admissions as evidence. Strozier v. Simmons U.S.A. Corp., 192 Ga. App. 601, 385 S.E.2d 677, cert. denied, 192 Ga. App. 903, 385 S.E.2d 677 (1989) (decided under former O.C.G.A. § 24-3-30).

Alternative pleadings. — Civil Practice Act, O.C.G.A. Ch. 11, T. 9, which permits alternative pleadings does not change the rule of evidence that a party is bound by the party's judicial admissions. Ditch v. Royal Indem. Co., 205 Ga. App. 478, 422 S.E.2d 868, cert. denied, 205 Ga. App. 899, 422 S.E.2d 868 (1992) (decided under former O.C.G.A. § 24-3-30).

Considered as evidence in record. — When matter is contained in a pleading, from which inferences may be drawn beneficial to the opposite party, it may be considered as evidence in the record in the party's favor. Johnson v. Daniel, 135 Ga. App. 926, 219 S.E.2d 579 (1975) (decided under former Code 1933, § 38-402); Lawson v. Duke Oil Co., 155 Ga. App. 363, 270 S.E.2d 898 (1980) (decided under former Code 1933, § 38-402); Metro Leasing, Inc. v. Health Educ. & Research Servs., Inc., 193 Ga. App. 157, 387 S.E.2d 399 (1989) (decided under former O.C.G.A. § 24-3-30).

Can be explained or disproved. — When the answer admitted an allegation of the petition but was later amended by striking the admission, the admission, though introduced as evidence for the plaintiff, was not conclusive, and could be explained or disproved by the defendant. Watkins v. Price Mercantile Co., 45 Ga. App. 272, 164 S.E. 231 (1932) (decided under former Civil Code 1910, § 5775).

Admission must be withdrawn from record. — Party to a suit will not even be allowed to disprove an admission made in the party's pleadings without first withdrawing the admission from the record. Clift & Goodrich, Inc. v. Mincey Mfg. Co., 41 Ga. App. 38, 152 S.E. 136 (1930) (decided under former Civil Code 1910, § 5775); Maryland Cas. Co. v. Sammons, 67 Ga. App. 83, 19 S.E.2d 314 (1942); Head v. Lee, 203 Ga. 191, 45 S.E.2d 666 (1947) (decided under former Code 1933, § 38-402); Dye v. Hirsch, 92 Ga. App. 803, 90 S.E.2d 332 (1955) (decided under former Code 1933, § 38-402); Plymouth Record Corp. v. Books, Inc., 92 Ga. App. 753, 90 S.E.2d 336 (1955) (decided under former Code 1933, § 38-402); Grigsby v. Fleming, 96 Ga. App. 664, 101 S.E.2d 217 (1957) (decided under former Code 1933, § 38-402); Greene v. Gulf Oil Corp., 119 Ga. App. 87, 166 S.E.2d 626 (1969) (decided under former Code 1933, § 38-402); Sambo's of Ga., Inc. v. First Am. Nat'l Bank, 152 Ga. App. 899, 264 S.E.2d 330 (1980) (decided under former Code 1933, § 38-402); Strozier v. Simmons U.S.A. Corp., 192 Ga. App. 601, 385 S.E.2d 677, cert. denied, 192 Ga. App. 903, 385 S.E.2d 677 (1989) (decided under former O.C.G.A. § 24-3-30).

Rule only applies to factual admissions. — Rule that a party cannot disprove an admission in pleadings without first withdrawing the admission from the record applies to admissions of fact, and is not applicable when the admission is merely the opinion on the part of the party making the admission as to the legal effect of the instrument sued on. Clift & Goodrich, Inc. v. Mincey Mfg. Co., 41 Ga. App. 38, 152 S.E. 136 (1930) (decided under former Civil Code 1910, § 5775); Scott v. Jefferson, 174 Ga. App. 651, 331 S.E.2d 1 (1985) (decided under former O.C.G.A. § 24-3-30); Perry & Co. v. New S. Ins. Brokers of Ga., Inc., 182 Ga. App. 84, 354 S.E.2d 852 (1987) (decided under former O.C.G.A. § 24-3-30); Ellerbee v. Interstate Contract Carrier Corp., 183 Ga. App. 828, 360 S.E.2d 280 (1987) (decided under former O.C.G.A. § 24-3-30).

Pleading "admission" that a particular person was an heir at law of the deceased was not conclusive against the pleader. Scott v. Jefferson, 174 Ga. App. 651, 331 S.E.2d 1 (1985) (decided under former O.C.G.A. § 24-3-30).

Pleading that was replete with a party's opinions and legal conclusions could not be considered an admission in judicio that would be effectively binding upon other parties. Mountain Bound, Inc. v. Alliant Foodservice, Inc., 242 Ga. App. 557, 530 S.E.2d 272 (2000) (decided under former O.C.G.A. § 24-3-30).

Appellants made admission in judicio, in their motion for new trial or in the alternative motion to amend judgment, of the fact that the probate court "entered a judgment styled 'Final Order'"; this admission in judicio expressed the fact that the order was entered on the date specified. Jabaley v. Jabaley, 208 Ga. App. 179, 430 S.E.2d 119 (1993) (decided under former O.C.G.A. § 24-3-30).

Use of withdrawn pleadings. — When a part of a petition or of a plea is stricken by amendment, the stricken part may, if pertinent to any issue remaining in the case, be offered in evidence; but, unless so offered and admitted in evidence, it is not evidence for the consideration of the jury or proper matter for argument of counsel, save only when the amendment is made after the evidence is closed. Lydia Pinkham Medicine Co. v. Gibbs, 108 Ga. 138, 33 S.E. 945 (1899) (decided under former Civil Code 1895, § 5188); Alabama Midland Ry. v. Guilford, 114 Ga. 627, 40 S.E. 794 (1902) (decided under former Civil Code 1895, § 5188); Continental Trust Co. v. Bank of Harrison, 36 Ga. App. 149, 136 S.E. 319 (1926) (decided under former Civil Code 1910, § 5775).

Withdrawal of admission by amendment of pleadings. — In an action against a negligent driver's father, the father's initial admission that the vehicle was a family purpose vehicle was made regarding a legal opinion, i.e., agency under the family purpose doctrine, and, therefore, it could not be an admission in judicio or an admission against interest, because the admission was a legal opinion or conclusion that had been withdrawn by amendment from the pleadings. Wahnschaff v. Erdman, 232 Ga. 77, 502 S.E.2d 246 (1998) (decided under former O.C.G.A. § 24-3-30).

Defendant could not cross-examine plaintiff on allegations in plaintiff's complaint since the complaint was amended and the contentions therein were no longer solemn admissions in judicio. Crosby v. Cooper Tire & Rubber Co., 240 Ga. App. 857, 524 S.E.2d 313 (1999) (decided under former O.C.G.A. § 24-3-30).

If the party amended the party's pleadings to withdraw the party's judicial admissions, the party could introduce evidence contravening the admissions, and if such contradictory evidence was admitted, even over the objection of the other party, then under O.C.G.A. § 9-11-15(b), such evidence could be deemed to amend the pleadings to withdraw the admissions. SAKS Assocs., LLC v. Southeast Culvert, Inc., 282 Ga. App. 359, 638 S.E.2d 799 (2006) (decided under former O.C.G.A. § 24-3-30).

In passengers' negligence suit against a taxicab company, to the extent the company's initial answer contained an admission under former O.C.G.A. § 24-3-30 that the driver was the company's employee, such admission was withdrawn by timely amendment, allowing positive evidence of the contrary to overcome it as an admission. Lopez v. El Palmar Taxi, Inc., 297 Ga. App. 121, 676 S.E.2d 460 (2009) (decided under former O.C.G.A. § 24-3-30).

Averments negativing existence of right claimed. — If the averments of a complaint expressly negative the existence of a right claimed therein, or show the impossibility of its existence, they are to be regarded as evidence deposited in the record in favor of the opposite party, and demand the finding thereon in the party's favor. New Zealand Fire Ins. Co. v. Brewer, 29 Ga. App. 773, 116 S.E. 922 (1923) (decided under former Civil Code 1910, § 5775).

Admissions not binding on codefendant when interests adverse. — Any admissions in judicio as to amounts owed to lenders by a corporation made by the first borrower were not binding on the corporation under former O.C.G.A. § 24-3-30 as the borrowers' interests were not joint but adverse as the first borrower was not a shareholder, officer, or director of the corporation. Walker v. Ace Auto Sales & Leasing, Inc., 294 Ga. App. 267, 668 S.E.2d 877 (2008) (decided under former O.C.G.A. § 24-3-30).

Effect of pretrial order. — In a personal injury suit, a company explicitly

preserved the company's argument that the company was not a proper party in the consolidated pretrial order which the trial court signed. Under Ga. Unif. Super. Ct. R. 7.2, this order expressly superseded the pleadings and established the issues in litigation; thus, the company was not estopped under former O.C.G.A. § 24-3-30 from asserting at trial that the company was not the proper party to be sued. First Support Servs. v. Trevino, 288 Ga. App. 850, 655 S.E.2d 627 (2007), cert. denied, No. S08C0717, 2008 Ga. LEXIS 388 (Ga. 2008) (decided under former O.C.G.A. § 24-3-30).

Judicial admission. — Trial court did not err in granting summary judgment to the materialman on the materialman's action to recover under a lien discharge bond, as the surety admitted in surety's response to the materialman's amended complaint that the materialman had performed all conditions precedent to bring the materialman's action; the surety's admission was a judicial admission that bound the surety and contradicted its defense that the materialman had not fulfilled a lien statute notice requirement. Washington Intl Ins. Co. v. Hughes Supply, Inc., 271 Ga. App. 50, 609 S.E.2d 99 (2004) (decided under former O.C.G.A. § 24-3-30).

Inconsistent defenses. — Defendant may, of course, file inconsistent defenses; but the plaintiff may take advantage of the contradictory nature of the defenses, and may use, as an admission against the defendant, a statement made is one of the pleas, although in another of the pleas there is set up a contradictory state of facts. The jury is not bound to accept the testimony of a witness which is contradictory to a plea one has filed. Wheeler v. Salinger, 33 Ga. App. 300, 125 S.E. 888 (1924) (decided under former Civil Code 1910, § 5775); Myers v. Woodson, 33 Ga. App. 748, 127 S.E. 888 (1925) (decided under former Civil Code 1910, § 5775).

Estoppel. — When upon a suit on a contract, the plaintiff obtains a judgment or relief amounting to an adjudication in the plaintiff's favor, and is afterwards sued for a subsequent breach of plaintiff's own part of the contract, the plaintiff is estopped to deny the essential terms of the contract as pleaded in the former petition under which the plaintiff recovered. Florence, Phillips & Co. v. Newsome, 26 Ga. App. 501, 106 S.E. 619 (1921) (decided under former Civil Code 1910, § 5775).

Reviewing court on appeal will not consider the question of whether a plaintiff's alleged bill of sale was sufficient to constitute a valid lien or claim of title to the proceeds of the sale since the defendant had conceded in the court below, by a solemn admission in judicio, that the bill of sale of the plaintiff constituted a prior claim on the proceeds of the sale, and the defendant defended upon the sole ground of estoppel. C.I. & M. Dingfelder v. Georgia Peach Growers Exch., 182 Ga. 521, 186 S.E. 425 (1936) (decided under former Code 1933, § 38-402).

Estoppel not applicable in later and different action. — Statements in pleadings are considered as judicial and not as evidentiary admissions, and for these purposes, until withdrawn or amended, are conclusive; but estoppels by admissions made in pleading apply only between parties and privies to the suit or litigation in which the admissions relied on as an estoppel were made; when such admissions in pleadings are introduced as evidence in a later and different action, they no longer operate as admissions in judicio but, rather, as evidentiary admissions and, as evidence, such admissions may be explained or contradicted. Foster v. State, 157 Ga. App. 554, 278 S.E.2d 136 (1981) (decided under former Code 1933, § 38-402).

Objection invalid. — When the defendant admitted in the defendant's plea the execution by the defendant of an instrument which formed a part of the plaintiff's abstract of title, in view of the former statute it was not a good objection to the admission of the instrument in evidence that the instrument's execution had not been proved. Vizard v. Moody, 119 Ga. 918, 47 S.E. 348 (1904) (decided under former Civil Code 1895, § 5188).

Incorporating admission in brief of evidence. — Admissions in pleading were properly incorporated in the brief of evidence, though stricken by amendment after evidence closed. Lydia Pinkham

Medicine Co. v. Gibbs, 108 Ga. 138, 33 S.E. 945 (1899) (decided under former Civil Code 1895, § 5188).

Instructions. — If a party desires instructions to the jury touching admissions made in the other party's pleadings, the party should present a proper request therefor. Georgia Power Co. v. Rabun, 111 Ga. App. 63, 140 S.E.2d 568 (1965) (decided under former Code 1933, § 38-402).

In the absence of a proper request, a trial court does not err in failing to instruct the jury specifically that various portions of the opposite party's pleadings should be considered by the jury as admissions against that party. Crane v. Doolittle, 116 Ga. App. 572, 158 S.E.2d 426 (1967) (decided under former Code 1933, § 38-402).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d Evidence, § 787.

C.J.S. — 31A C.J.S., Evidence, § 418 et seq.

ALR. — Admissibility as evidence of pleadings as containing admissions against interest, 14 ALR 22; 90 ALR 1393; 52 ALR2d 516.

Necessity in action on judgment of sister state confessed under warrant of attorney, of alleging and proving the law of the latter state permitting such judgment, 155 ALR 921.

Admissibility in evidence of withdrawn, superseded, amended, or abandoned pleading as containing admissions against interest, 52 ALR2d 516.

Admissibility of pleading as evidence against pleader, on behalf of stranger to proceedings in which pleading was filed, 63 ALR2d 412.

Counsel's right, in summation in civil case, to point out inconsistencies between opponent's pleading and testimony, 72 ALR2d 1304.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 ALR2d 1224.

24-8-822. Right to have whole conversation heard.

When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence. (Code 1981, § 24-8-822, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3738, former Code 1873, § 3791, former Code 1882, § 3791, former Penal Code 1895, § 1004, former Civil Code 1910, § 5783, former Code 1933, § 38-410, and former O.C.G.A. § 24-3-38 are included in the annotations for this Code section.

It is the universal rule, in both civil and criminal cases, that if part of a conversation is introduced, all that is said in the same conversation which is relevant to the issue should be admitted. West v. State, 200 Ga. 566, 37 S.E.2d 799, later appeal, 74 Ga. App. 423, 40 S.E.2d 98 (1946) (decided under former Code 1933, § 38-410).

Admission defined. — An admission is positive or substantive proof of the facts asserted. Seaboard Coast Line R.R. v. Duncan, 123 Ga. App. 479, 181 S.E.2d 535 (1971) (decided under former Code 1933, § 38-410).

An admission is an out-of-court statement which is inconsistent with the contention of the party. Seaboard Coast Line R.R. v. Duncan, 123 Ga. App. 479, 181

S.E.2d 535 (1971) (decided under former Code 1933, § 38-410).

All of confession must be admitted. — On the trial of a person charged with an offense, it is error to admit part of the person's confession and exclude the other part. Long v. State, 22 Ga. 40 (1857) (decided under former law); Peterson v. State, 47 Ga. 524, later appeal, 50 Ga. 142 (1873) (decided under former Code 1868, § 3788).

Remainder of conversation shown by cross-examination. — Generally, when part of a conversation has been introduced in evidence, the rest of the conversation may be brought out by the opposite party on cross-examination of the witness. Cox v. State, 64 Ga. 374, 37 Am. R. 76 (1879) (decided under former Code 1873, § 3791). See Betts v. State, 66 Ga. 508 (1881).

No cross-examination when no direct examination. — Trial court did not err in preventing the defendant from cross-examining the investigating officer about an incriminating statement made by the defendant after the state introduced evidence concerning the statement. Former O.C.G.A. §§ 24-3-38 and 24-9-64 (see now O.C.G.A. §§ 24-8-822 and 24-6-611) ("The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him") were inapplicable because there had been no direct examination relating to any part of the statement by the state. Davis v. State, 261 Ga. 382, 405 S.E.2d 648 (1991) (decided under former O.C.G.A. § 24-3-38).

Refusal to state remainder of conversation. — If in the examination in chief the witness should testify to anything occurring in such communications material to the witness's side of the case, the other party would have the right to inquire concerning the entire conversation. If there should be anything tending to incriminate the witness and the witness should refuse to answer as to it, the whole conversation should be excluded. Young v. State, 65 Ga. 525 (1880) (decided under former Code 1873, § 3791).

Use to avoid impeachment. — When witness was asked about a conversation, with a view to laying a foundation to impeach the witness, the witness had the right to give the whole conversation so far as it is pertinent. Archer v. Gwinnett County, 110 Ga. App. 442, 138 S.E.2d 895 (1964) (decided under former Code 1933, § 38-410).

Irrelevant matters not admissible. — Matters in conversation or documents otherwise irrelevant, and wholly disconnected with the part first offered, were not thereby made admissible by the former statute. Brown v. State, 119 Ga. 572, 46 S.E. 833 (1904) (decided under former Penal Code 1895, § 1004).

Since past sexual experiences of a victim of child molestation were not shown to be relevant, the trial court did not err by redacting such material from a taped interview of the victim. Roberts v. State, 232 Ga. App. 745, 503 S.E.2d 614 (1998) (decided under former O.C.G.A. § 24-3-38).

In a prosecution for rape, the omission, premised on the former rape-shield statute, of defendant's reference to the victim as a "well known whore" in a statement to police was not error. Johnson v. State, 238 Ga. App. 677, 520 S.E.2d 221 (1999) (decided under former O.C.G.A. § 24-3-38).

Admissibility into evidence of a complete one page letter to a detective that contained defendant's signature at the bottom was not affected by the fact that other pages enclosed with the letter, relating to the alleged criminal activity of other people, had been forwarded by the detective to the Georgia Bureau of Investigation. Boatman v. State, 272 Ga. 139, 527 S.E.2d 560 (2000) (decided under former O.C.G.A. § 24-3-38).

Matters irrelevant and wholly disconnected with the conversation first offered are not rendered admissible by admission of some of the conversation. Brown v. State, 119 Ga. 572, 46 S.E. 833 (1904) (decided under former Penal Code 1895, § 1004).

Self-serving declarations. — In a suit by an executrix to recover certain personal property from another, there was no error in excluding a self-serving declaration made by the surviving party to a contract under which the possession of the property in dispute was held by the surviving party, which attempted to set up an additional claim or demand against the

deceased party to the contract, as a basis for the surviving party's adverse possession. May v. Subers, 19 Ga. App. 306, 91 S.E. 435 (1917) (decided under former Civil Code 1910, § 5783).

Subsequent conversations. — In a subsequent conversation with the same person and upon the same subject, what was said in the first admission, in the absence of something to the contrary, is necessarily understood, and must be taken and considered as a component part of the subsequent conversation. West v. State, 200 Ga. 566, 37 S.E.2d 799, later appeal, 74 Ga. App. 423, 40 S.E.2d 98 (1946) (decided under former Code 1933, § 38-410).

Indicative of other crimes not objection. — Testimony which constitutes an admission by the defendant regarding the offense for which the defendant is on trial is not subject to objection for the reason that the testimony likewise indicates the defendant was guilty of another offense since the language is such that it is impossible to convey the defendant's meaning without repeating the complete statement. Crider v. State, 98 Ga. App. 164, 105 S.E.2d 506 (1958) (decided under former Code 1933, § 38-410).

Failure to hear whole conversation. — That a witness did not hear all of the conversation about which the witness is asked to testify is no ground of objection to the witness stating as much of the conversation as the witness did hear. Westmoreland v. State, 45 Ga. 225 (1872) (decided under former Code 1868, § 3738); Woolfork v. State, 85 Ga. 69, 11 S.E. 814 (1890) (decided under former Code 1882, § 3791); Lynn v. State, 140 Ga. 387, 79 S.E. 29 (1913) (decided under former Penal Code 1910, § 1030).

Extracts from prior statements. — An extract, shown to be substantially correct, from a prisoner's statement made on a former trial was admissible without offering the entire statement, though it was shown that the statement made at the former trial as taken down by the official reporter had been lost. Medlin v. State, 149 Ga. 23, 98 S.E. 551 (1919) (decided under former Penal Code 1910, § 1030).

Part of trial report used. — State may read in evidence a part of a stenographic report of a former trial without putting in the whole, the other party being at liberty to introduce the balance, or so much thereof as is pertinent. Burnett v. State, 87 Ga. 622, 13 S.E. 552 (1891) (decided under former Code 1882, § 3791).

Recorded telephone conversations with an informant. — There was circumstantial evidence that a defendant was the participant in recorded phone conversations with an informant; therefore the conversations were admissible as admissions of a party opponent under former O.C.G.A. § 24-3-31 (see now O.C.G.A. § 24-8-801), and the entirety of the calls were admissible under former O.C.G.A. § 24-3-38. Kimble v. State, 301 Ga. App. 237, 687 S.E.2d 242 (2009) (decided under former O.C.G.A. § 24-3-38).

When a part of a conversation, which amounts to an incriminatory admission, is admitted in evidence, it is the right of the accused to bring out other portions of the same conversation, even though it is self-serving in its nature, or exculpatory, in that it justifies, excuses, or mitigates the act. West v. State, 200 Ga. 566, 37 S.E.2d 799, later appeal, 74 Ga. App. 423, 40 S.E.2d 98 (1946) (decided under former Code 1933, § 38-410).

It was error to deny the accused the right, under cross-examination, to have a witness further testify what the accused told the witness in the first conversation which may tend to exculpate the accused after a witness had testified as to a second conversation containing an admission by the accused. West v. State, 200 Ga. 566, 37 S.E.2d 799, later appeal, 74 Ga. App. 423, 40 S.E.2d 98 (1946) (decided under former Code 1933, § 38-410).

Incomplete return. — When a plaintiff offered in evidence an incomplete return of an administrator as an admission, and it had folded in it various receipts, accounts, etc., referred to as vouchers, plaintiff was not compelled to put the vouchers in evidence along with the returns. That was the right of the defendants, if the defendants could show that the enclosed were either a part of the admission or connected therewith. Dowling v. Feeley, 72 Ga. 557 (1884) (decided under former Code 1882, § 3791).

Admission of partial statement upheld. — In a prosecution for rape, despite former O.C.G.A. § 24-3-38, the rape shield statute prohibited the admission of a portion of defendant's statement in which the defendant said that the victim had sexual intercourse with the victim's cousin. Snow v. State, 228 Ga. App. 649, 492 S.E.2d 564 (1997) (decided under former O.C.G.A. § 24-3-38).

Trial court did not err by refusing the defendant's request to admit only the portions of letters written by the codefendant that cast the codefendant in a bad light relative to the crimes and excluding other portions that described the defendant's role in the crimes as being more significant than the defendant had described in a custodial interview because the defendant was not permitted to admit portions of the letters for the purportedly-limited purpose of showing the codefendant's state of mind without waiving the defendant's objections to the state's introduction of the remainder of the letters. Stinski v. State, 286 Ga. 839, 691 S.E.2d 854, cert. denied, U.S. , 131 S. Ct. 522, 178 L. Ed. 2d 385 (2010) (decided under former O.C.G.A. § 24-3-38).

Death of party making statements. — Whole conversation should go in under the former statute, though involving statements made by one since dead. Powell v. Watts, 72 Ga. 770 (1884) (decided under former Code 1882, § 3791).

Non-testifying witness's hearsay statement. — Pretermitting whether a complained-of hearsay statement was admissible under the rule of completeness, admission of the statement was harmless beyond a reasonable doubt given that the admission was cumulative of other positive witness identifications, defendant's own confession, and the videotaped evidence depicting defendant robbing the store, all of which overwhelmingly established defendant's guilt. Jackson v. State, 262 Ga. App. 451, 585 S.E.2d 745 (2003) (decided under former O.C.G.A. § 24-3-38).

Law student's testimony on pretrial interview admissible. — Trial court did not improperly admit a law student's testimony about a pretrial interview of a witness because the testimony was not improper bolstering but admissible pursuant to the rule of completeness and former O.C.G.A. § 24-3-38 (see now O.C.G.A. § 24-8-822). Westbrook v. State, 291 Ga. 60, 727 S.E.2d 473 (2012) (decided under former O.C.G.A. § 24-3-38).

Refusal to utilize remainder of statements. — Trial court erred in denying a codefendant's motion to sever the trial from the defendant's trial because the codefendant was not allowed to introduce the exculpatory portions of the statements that explained the excerpted admissions introduced by the state, which supported the codefendant's antagonistic defense that the codefendant was present at the robberies due to coercion by the defendant. To avoid potential Bruton issues, the state introduced only those portions of the codefendant's 9-1-1 calls or custodial statements made establishing that the codefendant was at the scene of two robberies, that the codefendant's vehicles were used, and that the codefendant sent police to a motel room to investigate the robberies, but refused the additional portions of the statements that tended to support the codefendant's defense that the codefendant was coerced into participating in the crimes. Bowe v. State, 288 Ga. App. 376, 654 S.E.2d 196 (2007), cert. dismissed, sub. nom., State v. Baker, No. S08C0548, 2008 Ga. LEXIS 318 (Ga. 2008) (decided under former O.C.G.A. § 24-3-38).

Failure to listen to all of audiotape was harmless error. — In a recorded conversation, the defendant denied committing a murder. Assuming that under former O.C.G.A. § 24-3-38, the defendant should have been allowed to play the audiotape in its entirety because an accomplice had testified to a portion of the conversation, any error was harmless as the defendant's recorded denial of involvement would have been cumulative of other evidence. Patterson v. State, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010) (decided under former O.C.G.A. § 24-3-38).

Ineffective assistance of counsel not established. — Defendant failed to show that trial counsel was ineffective by not arguing the rule of completeness, for-

mer O.C.G.A. § 24-3-38, as a means to get the defendant's entire post-stabbing statement into evidence because there were discrepancies between the defendant's trial testimony and the account of a witness regarding a statement the defendant allegedly made on the night of the stabbing; therefore, an acquittal would not likely have resulted had the jury heard the witness' testimony in its entirety. Carruth v. State, 290 Ga. 342, 721 S.E.2d 80 (2012) (decided under former O.C.G.A. § 24-3-38).

Issue not preserved for review. — "Rule of completeness" as a ground for admissibility was not preserved for review because defense counsel did not raise the "rule of completeness" as a ground for allowing a witness to testify to the defendant's entire statement. Carruth v. State, 290 Ga. 342, 721 S.E.2d 80 (2012) (decided under former O.C.G.A. § 24-3-38).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 759.

C.J.S. — 31A C.J.S., Evidence, § 518.

ALR. — Proof of entire conversation containing alleged confession, 2 ALR 1017; 26 ALR 541.

Duty of court to instruct regarding exculpatory or mitigating statements in confession or admission introduced by prosecution, 116 ALR 1459.

Party's waiver of privilege as to communications with counsel by taking stand and testifying, 51 ALR2d 521.

Testifying in civil proceeding as waiver of privilege against self-incrimination, 72 ALR2d 830.

24-8-823. Admissions and confessions received with care; no conviction on uncorroborated confession.

All admissions shall be scanned with care, and confessions of guilt shall be received with great caution. A confession alone, uncorroborated by any other evidence, shall not justify a conviction. (Code 1981, § 24-8-823, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3739, former Code 1873, § 3792, Code 1882, § 3792, former Civil Code 1895, § 5197, former Penal Code 1895, §§ 1005, 1006, former Penal Code 1910, § 1031, former Code 1933, § 38-420, and former O.C.G.A. § 24-3-53 are included in the annotations for this Code section.

History generally. — The opinion of Judge Lumpkin in Miller v. Cotten, 5 Ga. 341 (1848), had been since followed, and from it and its successors on the same line the provisions of the former statute were drawn; in fact the former version of this section embodied principles, long previously established by the common-law courts, and were merely declaratory of these principles. Beall v. Clark, 71 Ga. 818 (1883) (decided under former Code 1882, § 3792).

Reason for the rule. — All confessions should be received with care and caution, not on account of the character of the testimony, but on account of the fact of their transmission through one or two different channels with consequent liability of mistake as to what was said, and

liability of mistake in repeating. Calvin v. State, 118 Ga. 73, 44 S.E. 848 (1903) (decided under former Penal Code 1895, § 1005).

That a witness is liable to misunderstand the language of the one making the confession is another reason for the rule. Minton v. State, 99 Ga. 254, 25 S.E. 626 (1896) (decided under former Penal Code 1895, §§ 1005, 1006).

Discretion of court. — While admissions should be scanned with care, admissions are evidence; and when a jury bases a verdict thereon, and the trial judge approves the finding, the reviewing court will not interfere with the judge's discretion in refusing a new trial. Burk v. Hill, 119 Ga. 38, 45 S.E. 732 (1903) (decided under former Civil Code 1895, § 5197).

When trial judge resolves issues in favor of admissibility, such factual and credibility determinations must be accepted by appellate courts unless such determinations are clearly erroneous. Cunningham v. State, 248 Ga. 835, 286 S.E.2d 427 (1982) (decided under former Code 1933, § 38-420).

It is not required that admissions be corroborated by other evidence in the case, as are confessions of the crime. Sheffield v. State, 188 Ga. 1, 2 S.E.2d 657 (1939) (decided under former Code 1933, § 38-420); Lowe v. State, 267 Ga. 180, 476 S.E.2d 583 (1996) (decided under former O.C.G.A. § 24-3-53).

While admissions are to be scanned with care and considered, along with other evidence, for what the admissions are worth, it is not required that the admissions be corroborated by other evidence as are confessions to a crime. Brown v. State, 167 Ga. App. 851, 307 S.E.2d 737 (1983) (decided under former O.C.G.A. § 24-3-38); Williams v. State, 246 Ga. App. 347, 540 S.E.2d 305 (2000) (decided under former O.C.G.A. § 24-3-38).

Defendant's statement in which the defendant did not admit every essential element of the charged offense constituted an admission rather than a confession for which no corroboration was required. Stowers v. State, 205 Ga. App. 518, 422 S.E.2d 870 (1992), cert. denied, 205 Ga. App. 901, 422 S.E.2d 870 (1992) (decided under former O.C.G.A. § 24-3-53); Herrington v. State, 243 Ga. App. 265, 533 S.E.2d 133 (2000), appeal dismissed, 265 Ga. App. 454, 594 S.E.2d 682 (2004) (decided under former O.C.G.A. § 24-3-53).

Standard for determining admissibility of confessions is preponderance of the evidence. Bassett v. State, 159 Ga. App. 829, 285 S.E.2d 260 (1981) (decided under former Code 1933, § 38-420).

Applicable rules when state relies on defendant's statements to show intent. — When the state solely relies upon the extrajudicial statements of the accused alone to show intent to commit the crime charged and no other evidence is introduced to show such intent there are two rules which apply: one rule holds that the defendant's explanation of the crime charged must be accepted since the defendant's statement is consistent with the physical facts shown, and the other rule holds that the defendant's explanation may be rejected by the trial court when the defendant's statement is not consistent with and does not explain the other direct and circumstantial evidence. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982) (decided under former Code 1933, § 38-420).

Fact that language of confession indicates commission of other offense. — It is no valid ground of objection to the admission in evidence of an incriminatory statement or confession made by the accused in a criminal case that the language indicated that the accused had committed also another and separate offense. Laney v. State, 159 Ga. App. 609, 284 S.E.2d 114 (1981) (decided under former Code 1933, § 38-420).

Admission is not inadmissible on grounds that it was written by someone else from defendant's dictation, even if defendant had not signed the statement as defendant's own because the officer who interviewed defendant would be permitted to testify to the content of the verbal statement voluntarily given the officer by defendant. Graves v. State, 180 Ga. App. 446, 349 S.E.2d 519 (1986) (decided under former O.C.G.A. § 24-3-53).

Admission defined. — Admissions relate to any fact material to the issue, and

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are to be scanned with care and considered, with any other evidence, for what the admissions are worth. Sheffield v. State, 188 Ga. 1, 2 S.E.2d 657 (1939) (decided under former Code 1933, § 38-420).

An admission as applied to criminal cases, is the avowal of a fact or of circumstances from which guilt may be inferred, but only tending to prove the offense charged, and not amounting to a confession of guilt. Oliphant v. State, 52 Ga. App. 105, 182 S.E. 523 (1935) (decided under former Code 1933, § 38-420).

Unless the statement of the defendant is broad enough to comprehend every essential element necessary to make out the case against the defendant, it cannot be said to be an admission of guilt. Johnson v. State, 204 Ga. 528, 50 S.E.2d 334 (1948) (decided under former Code 1933, § 38-420).

An admission as applied to a criminal case is the statement made by the defendant of a fact or facts pertinent to the issue, and tending, in connection with other facts and circumstances, to prove the guilt of the accused, but which does not contain all the essential elements of the crime. Johns v. State, 79 Ga. App. 429, 54 S.E.2d 142 (1949) (decided under former Code 1933, § 38-420).

An admission of the main fact from which the essential elements of the criminal act may be inferred amounts to an admission of the crime itself. Jones v. State, 223 Ga. 157, 154 S.E.2d 228, rev'd on other grounds, 389 U.S. 24, 88 S. Ct. 4, 19 L. Ed. 2d 25 (1967) (decided under former Code 1933, § 38-420).

Confession defined. — Confession is a voluntary admission of guilt. Oliphant v. State, 52 Ga. App. 105, 182 S.E. 523 (1935) (decided under former Code 1933, § 38-420).

The requirements to constitute a confession are that the facts admitted must comprise all the essential elements necessary to make out the case against the defendant, yet a confession is sufficiently plenary in substance, and responsive to the requirement that it contain all the essential elements necessary to make out the case, when the confession, though lacking in a recital of the many details constituting the crime, does disclose certain facts from which the main fact of guilt is revealed. Meriwether v. State, 63 Ga. App. 667, 11 S.E.2d 816 (1940) (decided under former Code 1933, § 38-420).

Confession is a person's admission of declaration of the person's agency or participation in a crime, and is restricted to admissions of guilt. Johnson v. State, 204 Ga. 528, 50 S.E.2d 334 (1948) (decided under former Code 1933, § 38-420).

Confession is an admission of the main fact in a charge of crime, without any exculpatory explanation. Johns v. State, 79 Ga. App. 429, 54 S.E.2d 142 (1949) (decided under former Code 1933, § 38-420).

Incriminating statements and confessions distinguished. — There is a difference between an incriminating statement and a confession of guilt. In the former only one or more facts entering into the criminal act is admitted, while in the latter the entire criminal act is confessed. Cumberlander v. State, 53 Ga. App. 276, 185 S.E. 379 (1936) (decided under former Code 1933, § 38-420); Johnson v. State, 204 Ga. 528, 50 S.E.2d 334 (1948) (decided under former Code 1933, § 38-420).

A confession is a voluntary statement acknowledging guilt of a criminal offense, and the term admission ordinarily signifies the avowal or acknowledgment of a fact or of circumstances from which guilt may be inferred and only tending to prove the offense charged, but not amounting to a confession of guilt. Norrell v. State, 116 Ga. App. 479, 157 S.E.2d 784 (1967) (decided under former Code 1933, § 38-420).

An incriminating statement, to be the equivalent of a confession of guilt, must be so comprehensive as to include every essential element of the offense. Johnson v. State, 204 Ga. 528, 50 S.E.2d 334 (1948) (decided under former Code 1933, § 38-420). Norrell v. State, 116 Ga. App. 479, 157 S.E.2d 784 (1967).

Admission as constituting high degree of evidence. — There was nothing in the provisions of the former statute, nor in any other statute of the state, which declared that when an admission was es-

tablished to the satisfaction of the jury the admission constituted a high degree of evidence and the jury should give it great weight. Raleigh & G.R.R. v. Allen, 106 Ga. 572, 32 S.E. 622 (1899) (decided under former Civil Code 1895, § 5197).

Confession alone may be evidence. — Since it is unnecessary that a confession be corroborated by independent proof in all its details and particulars, and since a confession is direct evidence and not circumstantial evidence, a confession is sufficient to prove the manner and means of death as charged in an indictment, without independent corroborating evidence, just as it is the rule that once the requirements of the corpus delicti are met, the confession of the accused is available to identify the person confessing as the criminal agent. McVeigh v. State, 205 Ga. 326, 53 S.E.2d 462 (1949) (decided under former Code 1933, § 38-420).

Ambiguous admissions. — Admissions contained in a letter are to be scanned with care if the admissions are susceptible of more than one construction, and if, in order to discover their true meaning, attention should be directed to the precise terms employed by the writer. Richmond & D.R.R. v. Kerler, 88 Ga. 39, 13 S.E. 833 (1891) (decided under former Code 1882, § 3792).

Admissions in pleas. — Fact that an admission made; by the defendant in a plea which had been stricken by amendment and was put in evidence by the introduction of the plea containing the admission had, before the plea was amended, possessed the character of an admission in judicio, does not relieve the admission from the application of the rule of law (generally applicable to all admissions) that admissions should be scanned with care and it was not error for the court so to charge. Griffin v. Browning, 51 Ga. App. 743, 181 S.E. 801 (1935) (decided under former Code 1933, § 38-420).

Admissions by infants. — In general, infants are not bound by their admissions. Howard v. Hall, 112 Ga. App. 247, 145 S.E.2d 70 (1965) (decided under former Code 1933, § 38-420).

While the decision of whether a child, or "infant," is competent to testify is one made in the sound discretion of the judge, based upon the capacity of the child to know the nature of the oath rather than upon the child's years, the admission in evidence of an infant's admission against interest must be very carefully scanned because of the child's immaturity and the deleterious effect such admissions would have. Howard v. Hall, 112 Ga. App. 247, 145 S.E.2d 70 (1965) (decided under former Code 1933, § 38-420).

Confessions of juveniles are scanned with more care and received with greater caution. Crawford v. State, 240 Ga. 321, 240 S.E.2d 824 (1977) (decided under former Code 1933, § 38-420); Howe v. State, 250 Ga. 811, 301 S.E.2d 280 (1983) (decided under former Code 1933, § 38-420).

Conviction not required to admit similar transaction evidence. — While former O.C.G.A. § 24-3-53 did not allow a conviction based solely on an uncorroborated confession, such a limitation did not apply to the admission of prior similar transaction evidence regarding a defendant's involvement in a similar uncharged robbery as the defendant did not have to be convicted for such evidence to be admissible. Dean v. State, 292 Ga. App. 695, 665 S.E.2d 406 (2008) (decided under former O.C.G.A. § 24-3-53).

Accomplices. — Confession made by the accused and supported by evidence of the corpus delicti will serve as sufficient corroboration of the evidence of an accomplice. Westbrook v. State, 91 Ga. 11, 16 S.E. 100 (1892) (decided under former Code 1882, § 3792). Allen v. State, 91 Ga. 189, 16 S.E. 980 (1893) (decided under former Code 1882, § 3792); Schaefer v. State, 93 Ga. 177, 18 S.E. 552 (1893) (decided under former Code 1882, § 3792).

Proof of the corpus delicti, even though independent of the confession or evidence of an accomplice, does not at all corroborate the testimony of the confessing accomplice so as to authorize a conviction of another accomplice who has not confessed. Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248 (1940) (decided under former Code 1933, § 38-420).

Mere fact that the defendant had accomplices in the commission of a crime does not change the rule that proof of the corpus delicti may be sufficient corrobora-

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tion of a confession of guilt to sustain a verdict of guilty, as it relates to the amount of evidence, other than the testimony of an accomplice, necessary to corroborate the confession in order to support a verdict of guilty. Moreover, evidence of the confessions is sufficient to corroborate the testimony of an accomplice so as to support a verdict of guilty against the confessor. Motes v. State, 66 Ga. App. 543, 18 S.E.2d 497 (1942) (decided under former Code 1933, § 38-420).

While it is the rule that the testimony of an accomplice must be corroborated by circumstances definitely connecting the accused with the perpetration of the crime, this is not the rule in reference to the corroboration of a confession. Lastinger v. State, 84 Ga. App. 760, 67 S.E.2d 411 (1951) (decided under former Code 1933, § 38-420).

Trial court's findings upheld on appeal. — Unless clearly erroneous, a trial court's findings as to factual determinations and credibility relating to the admissibility of a confession will be upheld on appeal. Bassett v. State, 159 Ga. App. 829, 285 S.E.2d 260 (1981) (decided under former Code 1933, § 38-410).

Corroboration

Corroboration of admission not required. — Defendant's statement to an officer that the defendant's license was suspended was an admission and not a confession requiring corroboration under former O.C.G.A. § 24-3-53, because the defendant's statement did not include an admission to driving on a highway of the state, which was an essential element of the offense of driving with a suspended license under O.C.G.A. § 40-5-121(a). Griffin v. State, 302 Ga. App. 807, 692 S.E.2d 7 (2010) (decided under former O.C.G.A. § 24-3-53).

Sufficiency of corroboration. — Corroborating testimony need not show the fact beyond a reasonable doubt, but is adequate if the testimony tends materially to corroborate the confession and to connect the defendant with the crime. Douglas v. State, 6 Ga. App. 157, 64 S.E. 490 (1909); Navarra v. State, 51 Ga. App. 321, 180 S.E. 375 (1935) (decided under former Code 1933, § 38-420); Logue v. State, 198 Ga. 672, 32 S.E.2d 397 (1944) (decided under former Code 1933, § 38-420).

Sufficient corroboration of defendant's confession existed in the form of additional evidence regarding the manner in which the victim was killed and the victim's body disposed. Walsh v. State, 269 Ga. 427, 499 S.E.2d 332 (1998) (decided under former O.C.G.A. § 24-3-53).

Store owner's testimony and the videotape concerning the commission of the burglary corroborated defendant's confession to entering the store with a shirt over defendant's head, stealing beer and cigarettes, and then selling them. Ward v. State, 242 Ga. App. 246, 529 S.E.2d 378 (2000), appeal dismissed, 299 Ga. App. 63, 682 S.E.2d 128 (2009) (decided under former O.C.G.A. § 24-3-53).

Defendant's cocaine possession conviction was affirmed as the defendant's statement that the defendant and two other men went to the victim's house to buy cocaine, that the victim came out of the victim's house with the cocaine and gave it to the defendant, and that the defendant split the cocaine with the defendant's accomplices was corroborated by proof that cash was found on the victim's bed next to several bags of a substance that later tested positive for crack cocaine. Williams v. State, 270 Ga. App. 424, 606 S.E.2d 871 (2004) (decided under former O.C.G.A. § 24-3-53).

Defendant's statement to the police was in the nature of an admission and defendant's conviction for malice and felony murder was corroborated by showing that the gun that defendant carried to the scene was the same gun that fired the fatal shot, that the defendant had access to the weapon, and that the defendant arranged the meeting with the victim. Flanders v. State, 279 Ga. 35, 609 S.E.2d 346 (2005) (decided under former O.C.G.A. § 24-3-53).

Because defendant's confession was videotaped and defendant admitted to attacking the victim because defendant wanted money to buy drugs, the admission of defendant's confession via videotape was held to have been sufficiently

corroborated because the two interviewing police officers both testified at the trial and established the corpus delicti of each crime, thereby providing the requisite corroboration to sustain the convictions for aggravated assault, armed robbery, kidnapping, and hijacking a motor vehicle. Cummings v. State, 272 Ga. App. 886, 614 S.E.2d 121 (2005) (decided under former O.C.G.A. § 24-3-53).

Defendant's confessions were sufficiently corroborated by the victim and the officer's testimony, and a confession to eight armed robberies was corroborated by testimony confirming when the crimes occurred, defendant's conduct during the crimes, and the use of a stolen car to flee. Robinson v. State, 276 Ga. App. 502, 623 S.E.2d 711 (2005) (decided under former O.C.G.A. § 24-3-53).

Trial court properly denied a defendant's motion for a directed verdict regarding at least five counts of the indictment charging four counts of aggravated child molestation and three counts of child molestation because the verdicts were not based solely on the defendant's uncorroborated confession. The evidence corresponded to the defendant's confession and was sufficient to establish the corpus delicti, namely that the crimes actually occurred, because it showed more than two improper sexual acts by the defendant against the defendant's child: the (1) testimony of a social worker; (2) the victim's audiotaped statement, in which the victim described how the defendant abused the victim; (3) the victim's trial testimony that the victim told the social worker the truth; and (4) evidence that the victim's behavior was typical of an abused child, were sufficient for the jury to find that the victim had been abused on numerous occasions. Hargrove v. State, 289 Ga. App. 363, 657 S.E.2d 282 (2008), cert. denied, No. S08C0970, 2008 Ga. LEXIS 500 (Ga. 2008) (decided under former O.C.G.A. § 24-3-53).

Evidence that the defendant possessed the murder weapon was sufficient under former O.C.G.A. § 24-3-53 to corroborate the defendant's confession that the defendant pointed a gun at a clerk in a convenience store and ultimately murdered the clerk. Moore v. State, 285 Ga. 157, 674 S.E.2d 315 (2009) (decided under former O.C.G.A. § 24-3-53).

Defendant's convictions for armed robbery and robbery by intimidation in violation of O.C.G.A. §§ 16-8-40(a)(2) and 16-8-41(a) were appropriate because the defendant's own confessions to participating in the crimes were corroborated by the testimony of the victims, among other evidence. Likewise, the defendant's codefendants' statements and testimony implicating the defendant in the crimes were corroborated by the defendant's confessions and the victims' testimony. Cantrell v. State, 299 Ga. App. 746, 683 S.E.2d 676 (2009) (decided under former O.C.G.A. § 24-3-53).

Defendant's confession was corroborated by independent evidence that the victim was found dead on the floor, that the victim died from manual strangulation, that the defendant was present at the time of the victim's death, and that the defendant previously had threatened to kill the victim in the victim's sleep. Merritt v. State, 292 Ga. 327, 737 S.E.2d 673 (2013) (decided under former O.C.G.A. § 24-3-53).

Sufficient corroboration of confession of murder when no body was found. — Pursuant to former O.C.G.A. § 24-3-53, a defendant's confession was sufficiently corroborated by evidence that the victim disappeared near the time of the Super Bowl, that the victim left with the defendant to go to the Super Bowl, that the defendant always carried a .380 handgun, and that the defendant had shot the other victim. Rogers v. State, 290 Ga. 401, 721 S.E.2d 864 (2012) (decided under former O.C.G.A. § 24-3-53).

All essential facts must be proved. — Amount of corroboration necessary to support the conviction is in every case a question of fact for the jury. But even if incriminatory admissions, supplemented by other circumstances, be equivalent to a confession, evidence that the accused confessed the commission of an offense would not be sufficient to authorize a conviction, unless all of the facts essential to establish that the alleged offense was in fact committed are satisfactorily proved. Boyd v. State, 4 Ga. App. 58, 60 S.E. 801 (1908) (decided under former Penal Code 1895,

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§ 1005); West v. State, 6 Ga. App. 105, 64 S.E. 130 (1909) (decided under former Penal Code 1895, § 1005); Harvey v. State, 8 Ga. App. 660, 70 S.E. 141 (1911) (decided under former Penal Code 1910, § 1031); Davenport v. State, 12 Ga. App. 102, 76 S.E. 756 (1912) (decided under former Penal Code 1910, § 1031).

When juvenile defendants confessed to entering a vacant home and causing damage therein, and a police officer testified to the condition of the home and the damage the officer found upon investigation, together with witness statements from people who were with defendants prior to and after the acts, wherein the witnesses' testified that defendants indicated the defendants' intent to damage the house, there was sufficient evidence to support an adjudication of delinquency pursuant to O.C.G.A. § 15-11-2; there was sufficient corroborative evidence under former O.C.G.A. § 24-3-53 to support the conviction as well. In the Interest of Q.D., 263 Ga. App. 293, 587 S.E.2d 336 (2003) (decided under former O.C.G.A. § 24-3-53).

Corroboration of confession in any particular. — Although an uncorroborated confession cannot support a conviction under former O.C.G.A. § 24-3-53, corroboration of a confession in any particular satisfied the requirements of the former statute. Sands v. State, 262 Ga. 367, 418 S.E.2d 55 (1992) (decided under former O.C.G.A. § 24-3-53); Miller v. State, 268 Ga. 1, 485 S.E.2d 752 (1997) (decided under former O.C.G.A. § 24-3-53).

Although an uncorroborated confession cannot support a conviction under former O.C.G.A. § 24-3-53, corroboration of a confession in any particular satisfied the requirements of the former statute; thus, when defendant's detailed confessions to two counts of armed robbery, two counts of theft by taking, three counts of aggravated assault, three counts of simple battery, three counts of kidnapping, and two counts of possessing a firearm during the commission of a crime were corroborated by the testimony of one of the victims who ultimately identified defendant as the person who placed a knife to the victim's neck during the robbery of the victim's spouse's store and forced the victim to the back of the store and secured the victim with duct tape, such evidence more than amply authorized the convictions. Phanamixay v. State, 260 Ga. App. 177, 581 S.E.2d 286 (2003) (decided under former O.C.G.A. § 24-3-53).

Failure to corroborate. — When the evidence pertaining to one count of the indictment was supported only by a confession, which was not corroborated by any evidence, the court committed reversible error in denying the motion for a new trial as to that count. Chapman v. State, 90 Ga. App. 845, 84 S.E.2d 485 (1954) (decided under former Code 1933, § 38-420).

Even though the defendant confessed to the crime of possession of cocaine, since the state did not offer the alleged cocaine in evidence or offer any other evidence that the substance found was cocaine, the trial court erred in denying defendant's motion for a directed verdict of acquittal. Johnson v. State, 205 Ga. App. 760, 423 S.E.2d 702 (1992) (decided under former O.C.G.A. § 24-3-53).

Question for jury. — Former statute did not fix the amount of evidence necessary to corroborate a confession but left the question of its corroborative sufficiency entirely with the jury, who may consider the confession along with other facts and circumstances independent of and separate from the confession in determining whether or not the corpus delicti had been established to the jury's satisfaction. Murray v. State, 43 Ga. 256 (1871) (decided under former Code 1868, § 3739); Holsenbake v. State, 45 Ga. 43 (1872) (decided under former Code 1868, § 3739); Smith v. State, 64 Ga. 605 (1880) (decided under former Code 1873, § 3792); Cook v. State, 9 Ga. App. 208, 70 S.E. 1019 (1911) (decided under former Penal Code 1895, § 1005); Perdue v. State, 24 Ga. App. 50, 99 S.E. 797 (1919) (decided under former Penal Code 1910, § 1031); Hinson v. State, 152 Ga. 243, 109 S.E. 661 (1921) (decided under former Penal Code 1910, § 1031); Gilder v. State, 219 Ga. 495, 133 S.E.2d 861 (1933) (decided under former Penal Code 1910, § 1031); Navarra v. State, 51 Ga. App.

321, 180 S.E. 375 (1935) (decided under former Code 1933, § 38-420); Logue v. State, 198 Ga. 672, 32 S.E.2d 397 (1944) (decided under former Code 1933, § 38-420); Kicklighter v. State, 76 Ga. App. 246, 45 S.E.2d 719 (1947) (decided under former Code 1933, § 38-420); Figures v. State, 80 Ga. App. 832, 57 S.E.2d 629 (1950) (decided under former Code 1933, § 38-420); Gilder v. State, 219 Ga. 495, 133 S.E.2d 861 (1963) (decided under former Code 1933, § 38-420); Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870 (1972) (decided under former Code 1933, § 38-420); Hilliard v. State, 128 Ga. App. 157, 195 S.E.2d 772 (1973) (decided under former Code 1933, § 38-420); Griswold v. State, 159 Ga. App. 22, 282 S.E.2d 679 (1981) (decided under former Code 1933, § 38-420); Sheppard v. State, 165 Ga. App. 393, 301 S.E.2d 306 (1983) (decided under former O.C.G.A. § 24-3-53); Singleton v. State, 195 Ga. App. 119, 393 S.E.2d 6 (1990) (decided under former O.C.G.A. § 24-3-38).

Amount of evidence necessary to corroborate a confession is left entirely within the province of the jury and corroboration in any material particular satisfies the requirements of the law. Reynolds v. State, 168 Ga. App. 555, 309 S.E.2d 867 (1983) (decided under former O.C.G.A. § 24-3-38).

Defendant's confession was significantly corroborated by the victim's testimony that the defendant was the person who robbed the victim. Although the defendant challenged the accuracy of the identification, this was a credibility issue for the jury to resolve. Burns v. State, 288 Ga. App. 507, 654 S.E.2d 405 (2007) (decided under former O.C.G.A. § 24-3-38).

Proof of corpus delicti sufficient corroboration. — Conviction may be lawfully had upon a free and voluntary confession though the confession be not otherwise corroborated than by proof of the corpus delicti. Johnson v. State, 86 Ga. 90, 13 S.E. 282 (1890) (decided under former Code 1882, § 3792); Westbrook v. State, 91 Ga. 11, 16 S.E. 100 (1892) (decided under former Code 1882, § 3792); Allen v. State, 91 Ga. 189, 16 S.E. 980 (1893) (decided under former Code 1882, § 3792); Schaefer v. State, 93 Ga. 177, 18 S.E. 552 (1893) (decided under former Code 1882, § 3792); Simmons v. State, 18 Ga. App. 104, 88 S.E. 904 (1916) (decided under former Penal Code 1910, § 1005); Millen v. State, 175 Ga. 283, 165 S.E. 226 (1932) (decided under former Penal Code 1910, § 1005); Mathis v. State, 55 Ga. App. 727, 191 S.E. 272 (1937) (decided under former Code 1933, § 38-420); Wilson v. State, 57 Ga. App. 839, 197 S.E. 48 (1938) (decided under former Code 1933, § 38-420); Burns v. State, 188 Ga. 22, 2 S.E.2d 627 (1939) (decided under former Code 1933, § 38-420); Miller v. State, 60 Ga. App. 682, 4 S.E.2d 729 (1939) (decided under former Code 1933, § 38-420); Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248 (1940) (decided under former Code 1933, § 38-420); Moore v. State, 193 Ga. 877, 20 S.E.2d 403 (1942) (decided under former Code 1933, § 38-420); Byars v. State, 73 Ga. App. 727, 38 S.E.2d 53 (1946) (decided under former Code 1933, § 38-420); Webb v. State, 73 Ga. App. 748, 38 S.E.2d 54 (1946) (decided under former Code 1933, § 38-420); Reddick v. State, 202 Ga. 209, 42 S.E.2d 742 (1947) (decided under former Code 1933, § 38-420); Jackson v. State, 77 Ga. App. 635, 49 S.E.2d 198 (1948), cert. denied, 335 U.S. 905, 69 S. Ct. 403, 93 L. Ed. 439 (1949) (decided under former Code 1933, § 38-420); Grimes v. State, 204 Ga. 854, 51 S.E.2d 797 (1949) (decided under former Code 1933, § 38-420); McVeigh v. State, 205 Ga. 326, 53 S.E.2d 462 (1949) (decided under former Code 1933, § 38-420); Davenport v. State, 81 Ga. App. 787, 60 S.E.2d 190 (1950) (decided under former Code 1933, § 38-420); Lastinger v. State, 84 Ga. App. 760, 67 S.E.2d 411 (1951) (decided under former Code 1933, § 38-420); Moon v. State, 85 Ga. App. 212, 68 S.E.2d 617 (1952) (decided under former Code 1933, § 38-420); Barksdale v. State, 88 Ga. App. 861, 78 S.E.2d 82 (1953) (decided under former Code 1933, § 38-420); Davis v. State, 211 Ga. 76, 84 S.E.2d 46 (1954) (decided under former Code 1933, § 38-420); Poythress v. State, 95 Ga. App. 124, 97 S.E.2d 165 (1957) (decided under former Code 1933, § 38-420); Gray v. State, 135 Ga. App. 253, 217 S.E.2d 482 (1975) (decided under former Code 1933, § 38-420); Soggins v. State, 156 Ga. App.

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652, 275 S.E.2d 676 (1980) (decided under former Code 1933, § 38-420); Rosser v. State, 157 Ga. App. 161, 276 S.E.2d 672 (1981) (decided under former Code 1933, § 38-420); Christian v. State, 190 Ga. App. 667, 379 S.E.2d 807 (1989) (decided under former O.C.G.A. § 24-3-53); Montijo v. State, 238 Ga. App. 696, 520 S.E.2d 24 (1999) (decided under former O.C.G.A. § 24-3-53).

Conviction may be lawfully had upon a free and voluntary confession although corroborated only by proof of the corpus delicti. Brown v. State, 167 Ga. App. 851, 307 S.E.2d 737 (1983) (decided under former O.C.G.A. § 24-3-53); Kirksey v. State, 177 Ga. App. 428, 339 S.E.2d 401 (1986) (decided under former O.C.G.A. § 24-3-53); Ryan v. State, 179 Ga. App. 210, 346 S.E.2d 3 (1986) (decided under former O.C.G.A. § 24-3-53); Nation v. State, 180 Ga. App. 460, 349 S.E.2d 479 (1986) (decided under former O.C.G.A. § 24-3-53).

When the testimony of the victims established the corpus delicti of each crime a defendant was charged with, the testimony provided the requisite corroboration of the defendant's confession to charges of rape, sodomy, assault, and burglary. Smith v. State, 195 Ga. App. 486, 393 S.E.2d 743 (1990) (decided under former O.C.G.A. § 24-3-53).

Testimony by a victim who survived a robbery in which the victim's companion was killed was sufficient to corroborate defendant's confession that defendant was one of four men who committed the robbery and that defendant shot the victim who died when the victim grabbed the barrel of a gun the defendant was holding, and the state supreme court affirmed defendant's convictions for felony murder and armed robbery. Chapman v. State, 275 Ga. 314, 565 S.E.2d 442 (2002) (decided under former O.C.G.A. § 24-3-53).

Confession is corroborated by the testimony of the victim who establishes the corpus delicti. Patrick v. State, 169 Ga. App. 302, 312 S.E.2d 385 (1983), aff'd, 252 Ga. 509, 314 S.E.2d 909 (1984) (decided under former O.C.G.A. § 24-3-53); McCloud v. State, 210 Ga. App. 69, 435 S.E.2d 281 (1993) (decided under former O.C.G.A. § 24-3-53).

Corroborated by defendant's confession, the victim's testimony that defendant had sexual intercourse with the victim when the victim was 14 sufficed to sustain the conviction. Bankston v. State, 249 Ga. App. 118, 548 S.E.2d 25 (2001) (decided under former O.C.G.A. § 24-3-53).

Corpus delicti may be proved either by direct or circumstantial evidence. Davis v. State, 105 Ga. 808, 32 S.E. 158 (1898) (decided under former Penal Code 1895, § 1005); Harvey v. State, 8 Ga. App. 660, 70 S.E. 141 (1911) (decided under former Penal Code 1895, § 1005); Tolver v. State, 10 Ga. App. 33, 72 S.E. 516 (1911) (decided under former Penal Code 1895, § 1005); Sutton v. State, 17 Ga. App. 713, 88 S.E. 122 (1916) (decided under former Penal Code 1895, § 1005); Thomas v. State, 18 Ga. App. 101, 88 S.E. 917 (1916) (decided under former Penal Code 1895, § 1005); Underwood v. State, 51 Ga. App. 735, 181 S.E. 500 (1935) (decided under former Code 1933, § 38-420); Brown v. State, 98 Ga. App. 350, 105 S.E.2d 785 (1958) (decided under former Code 1933, § 38-420).

Corpus delicti must be proved independently of confession. — Corpus delicti cannot be proved by the extrajudicial confession of the accused, but must be shown by evidence aliunde the confession or incriminatory admissions. West v. State, 6 Ga. App. 105, 64 S.E. 130 (1909) (decided under former Penal Code 1895, § 1005); Moon v. State, 12 Ga. App. 614, 77 S.E. 1088 (1913) (decided under former Penal Code 1910, § 1005); Sims v. State, 12 Ga. App. 551, 77 S.E. 891, later appeal, 14 Ga. App. 28, 79 S.E. 1133 (1913) (decided under former Penal Code 1910, § 1005); Wilburn v. State, 141 Ga. 510, 81 S.E. 444 (1914) (decided under former Penal Code 1910, § 1005); Pyant v. State, 46 Ga. App. 490, 167 S.E. 922 (1933) (decided under former Penal Code 1910, § 1005); Navarra v. State, 51 Ga. App. 321, 180 S.E. 375 (1935) (decided under former Code 1933, § 38-420); Underwood v. State, 51 Ga. App. 735, 181 S.E. 500 (1935) (decided under former Code 1933, § 38-420); Grimes v. State, 204 Ga. 854, 51 S.E.2d

797 (1949) (decided under former Code 1933, § 38-420); Williams v. State, 96 Ga. App. 833, 101 S.E.2d 747 (1958) (decided under former Code 1933, § 38-420).

Jury may consider the confession along with other facts and circumstances independent of and separate from the confession it in determining whether or not the corpus delicti has been established to the jury's satisfaction. Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870 (1972).

Jury may believe only portions of confessions. — Every confession necessarily contains incriminatory admissions, and though a statement as a whole may amount to a confession, still it is within the province of the jury to disbelieve that part which would constitute it a confession, and believe only the portion thereof which amounted to incriminatory admissions. Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945), overruled on other grounds, Milton v. State, 245 Ga. 18, 262 S.E.2d 789 (1980) (decided under former Code 1933, § 38-420).

Two confessions. — Even two positive confessions of guilt, without independent proof of the corpus delicti, are not sufficient to authorize a conviction. Bines v. State, 118 Ga. 320, 45 S.E. 376 (1903) (decided under former Penal Code 1895, § 1005).

To prove the corpus delicti in a charge of murder, in order to corroborate a confession, it is essential to establish that the person alleged to have been killed is actually dead, and that death was caused or accomplished by violence or other direct criminal agency of another human being; that is, it was not accidental, nor due to natural causes, nor to the act of the deceased, and that the accused caused the death in the manner charged. Grimes v. State, 204 Ga. 854, 51 S.E.2d 797 (1949) (decided under former Code 1933, § 38-420).

Evidence sufficient to corroborate confession to burglary. — When defendant admitted both defendant's presence at the scene of the crime and that the defendant had cut defendant's hand on a broken windowpane there, and there was also testimony that broken bloodstained glass was found within the burglarized home, such evidence was sufficient to corroborate the defendant's confession. Carter v. State, 160 Ga. App. 299, 287 S.E.2d 313 (1981) (decided under former Code 1933, § 38-420).

Evidence supported defendant's conviction for burglary and entering an automobile with the intent to commit a theft because there was evidence corroborating defendant's confession regarding how defendant gained entry into both a warehouse and a car. Morris v. State, 274 Ga. App. 41, 616 S.E.2d 829 (2005) (decided under former O.C.G.A. § 24-3-53).

Because the defendant's statement was sufficiently corroborated by evidence that a bullet from the 9 mm handgun in the defendant's possession killed the victim, and by the defendant's admission to both being involved in the commission and planning of the robbery of the victim, sufficient evidence existed to find the defendant guilty as a party to the crime of burglary beyond a reasonable doubt. Valentine v. State, 289 Ga. App. 60, 656 S.E.2d 208 (2007) (decided under former O.C.G.A. § 24-3-53).

Testimony of an accomplice was not required to be corroborated since the store clerk (victim) was able to testify positively that the defendant was one of the two men who entered the store and performed the robbery. Welch v. State, 179 Ga. App. 221, 346 S.E.2d 4 (1986) (decided under former O.C.G.A. § 24-3-53).

Hearsay cannot corroborate confession. — Since hearsay lacks any probative value, hearsay cannot provide the material evidence necessary to corroborate a defendant's confession, which, without such corroboration, is insufficient to support a conviction. The argument that hearsay is rendered trustworthy and admissible because corroborated by the defendant's confession, while the confession is simultaneously corroborated by the hearsay, is unpersuasive. This would sanction admission of otherwise unreliable evidence by mutual bootstrapping. Shaver v. State, 199 Ga. App. 428, 405 S.E.2d 281, cert. denied, 199 Ga. App. 907, 405 S.E.2d 281 (1991) (decided under former O.C.G.A. § 24-3-53).

Confession found to be sufficiently corroborated. Steele v. State, 166 Ga.

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App. 24, 303 S.E.2d 462 (1983) (decided under former O.C.G.A. § 24-3-53); Hunt v. State, 166 Ga. App. 524, 304 S.E.2d 576 (1983) (decided under former O.C.G.A. § 24-3-53); Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82 (1983) (decided under former O.C.G.A. § 24-3-53); Barnes v. State, 260 Ga. 398, 396 S.E.2d 207 (1990) (decided under former O.C.G.A. § 24-3-53); White v. State, 266 Ga. 134, 465 S.E.2d 277 (1996) (decided under former O.C.G.A. § 24-3-53); McCant v. State, 234 Ga. App. 433, 506 S.E.2d 917 (1998) (decided under former O.C.G.A. § 24-3-53); Kirkland v. State, 271 Ga. 217, 518 S.E.2d 687 (1999) (decided under former O.C.G.A. § 24-3-53).

When on a trial for leaving the scene of an accident, in addition to the defendant's "confession," evidence was adduced at trial showing the corpus delicti, one witness placed defendant near the scene of the accident in question on the night the accident occurred, and evidence was also produced showing that defendant's automobile was damaged at approximately the same time the accident took place, the trial court was authorized to find that the confession was corroborated as required by former O.C.G.A. § 24-3-53. Sheppard v. State, 165 Ga. App. 393, 301 S.E.2d 306 (1983) (decided under former O.C.G.A. § 24-3-53).

Following evidence of corroboration of the defendant's confession to murder satisfied the requirement of former O.C.G.A. § 24-3-53: (1) a bloody claw hammer matching the description of the hammer the defendant confessed defendant used to kill the victim was found near the victim's body; and (2) the paint samples taken from the defendant's truck were similar to those taken from the crime scene. Brown v. State, 253 Ga. 363, 320 S.E.2d 539 (1984) (decided under former O.C.G.A. § 24-3-53).

Defendant's conviction of financial transaction card fraud was affirmed since evidence that a VISA card was used without the owner's authorization to obtain goods and money established the corpus delicti, and the owner's testimony that defendant had access to the owner's mail and that the signatures on the charge slips closely paralleled defendant's handwriting provided sufficient corroboration of defendant's confession. Goswick v. State, 201 Ga. App. 799, 412 S.E.2d 293 (1991) (decided under former O.C.G.A. § 24-3-53).

State presented sufficient independent evidence to corroborate the defendant's confessions after it was shown that the victim died from gunshot wounds inflicted by another human being using a .38 caliber weapon or a .357 Magnum shortly after the defendant was seen in the victim's company. Blackwell v. State, 270 Ga. 509, 512 S.E.2d 233 (1999) (decided under former O.C.G.A. § 24-3-53).

Evidence that defendant gave several false statements about the victim's whereabouts, contributing to the victim's body not being discovered, sufficiently corroborated defendant's confession to concealing a death in violation of O.C.G.A. § 16-10-31. Howard v. State, 262 Ga. App. 214, 585 S.E.2d 115 (2003) (decided under former O.C.G.A. § 24-3-53).

Despite the fact that the defendant did not admit to every element of the charged offenses, the state presented sufficient evidence to corroborate the admissions made; specifically, that the victim died from manual strangulation inflicted by another human being shortly after the defendant was in the victim's company, and presented ample evidence of the defendant's intent to take the victim's life. Sheffield v. State, 281 Ga. 33, 635 S.E.2d 776 (2006) (decided under former O.C.G.A. § 24-3-53).

Because the defendant's statement to a police investigator was corroborated by both the victim and an eyewitness as well as evidence of the defendant's fingerprint on the victim's stolen car, the defendant's claim that the evidence was not corroborated as required by former O.C.G.A. § 24-3-53 was rejected. Sheely v. State, 287 Ga. App. 92, 650 S.E.2d 762 (2007) (decided under former O.C.G.A. § 24-3-53).

Evidence that a vehicle was, in fact, stolen from a location reported by a juvenile involved in a high-speed chase with a state trooper, and abandoned after crashing into a pole in an apartment complex

was sufficient to corroborate the juvenile's confession under former O.C.G.A. § 24-3-53. In the Interest of L.A., 292 Ga. App. 101, 663 S.E.2d 420 (2008) (decided under former O.C.G.A. § 24-3-53).

With regard to a defendant's malice murder conviction arising from the suffocation death of the defendant's newborn daughter, the defendant's confession was legally sufficient to support the convictions since the state produced independent evidence to corroborate the confession, namely, the recovered physical evidence and the witness testimony regarding the defendant's comments, appearance, and behavior before and after the victim's birth. Wright v. State, 285 Ga. 428, 677 S.E.2d 82 (2009), cert. denied, 558 U.S. 1123, 130 S. Ct. 1076, 175 L. Ed. 2d 903 (2010) (decided under former O.C.G.A. § 24-3-53).

Instructions

Charge on the law of confessions, when unauthorized by the evidence, constitutes reversible error. Denson v. State, 150 Ga. 618, 104 S.E. 780 (1920) (decided under former Penal Code 1910, § 1005); Oliphant v. State, 52 Ga. App. 105, 182 S.E. 523 (1935) (decided under former Code 1933, § 38-420); Meriwether v. State, 63 Ga. App. 667, 11 S.E.2d 816 (1940) (decided under former Code 1933, § 38-420); Johnson v. State, 204 Ga. 528, 50 S.E.2d 334 (1948) (decided under former Code 1933, § 38-420); Norrell v. State, 116 Ga. App. 479, 157 S.E.2d 784 (1967) (decided under former Code 1933, § 38-420).

Evidence was sufficient to warrant an instruction based on O.C.G.A. § 24-3-53. — See Wallace v. Mize, 153 Ga. 374, 112 S.E. 724 (1922) (decided under former Penal Code 1910, § 1005); Southern Ry. v. Bullock, 42 Ga. App. 495, 156 S.E. 456 (1931) (decided under former Penal Code 1910, § 1005); Timbs v. State, 71 Ga. App. 141, 30 S.E.2d 290 (1944) (decided under former Code 1933, § 38-420); McDowell v. State, 78 Ga. App. 116, 50 S.E.2d 633 (1948) (decided under former Code 1933, § 38-420).

Charge did not shift burden of proof. — Trial court did not err in charging the jury to consider with great care and caution the evidence of any statement the defendant made, and the jury charge did not improperly shift the burden away from the state, as the charge clearly referred to the jury's consideration of the defendant's custodial statement and not the defendant's testimony, and was given immediately after an explanation of how to determine the voluntariness of the defendant's custodial statement; moreover, the charge impressed upon the jury its duty to determine the credibility of the statement, instructing that a statement unsupported by any other evidence was not sufficient to justify a conviction. Ford v. State, 281 Ga. App. 114, 635 S.E.2d 391 (2006) (decided under former O.C.G.A. § 24-3-53).

With regard to a defendant's conviction for robbery, the trial court did not err by instructing the jury that the jury should consider with great care and caution the evidence of any statement made by the defendant as former O.C.G.A. § 24-3-53 provided the authority for such an instruction. However, the appellate court suggested that to avoid any possibility of confusion, the suggested pattern instruction authorized by former § 24-3-53 should be modified to refer to incriminatory statements only, for example, admissions and confessions. McKenzie v. State, 293 Ga. App. 350, 667 S.E.2d 142 (2008) (decided under former O.C.G.A. § 24-3-53).

Failure to give instruction. — In the absence of any timely written request, the failure to charge the jury on the law of the former statute was not reversible error, since there was evidence, independent of such confessions or admissions, to sustain the conviction. Walker v. State, 118 Ga. 34, 44 S.E. 850 (1903) (decided under former Penal Code 1895, § 1005); Cooner v. State, 16 Ga. App. 539, 85 S.E. 688 (1915) (decided under former Penal Code 1910, § 1031); Denson v. State, 150 Ga. 618, 104 S.E. 780 (1920), appeal dismissed, 258 U.S. 608, 42 S. Ct. 316, 66 L. Ed. 788 (1922) (decided under former Penal Code 1910, § 1031); Wallace v. Mize, 153 Ga. 374, 112 S.E. 724 (1922) (decided under former Penal Code 1910, § 1031); Williamson v. State, 29 Ga. App. 283, 114 S.E. 919 (1922) (decided under former

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Penal Code 1910, § 1031); Gore v. State, 162 Ga. 267, 134 S.E. 36 (1926) (decided under former Penal Code 1910, § 1031); Whitfield v. State, 51 Ga. App. 439, 180 S.E. 630 (1935) (decided under former Code 1933, § 38-420); Mims v. State, 188 Ga. 702, 4 S.E.2d 831 (1939) (decided under former Code 1933, § 38-420); Anderson v. State, 190 Ga. 455, 9 S.E.2d 642 (1940) (decided under former Code 1933, § 38-420); Davis v. State, 66 Ga. App. 877, 19 S.E.2d 543 (1942) (decided under former Code 1933, § 38-420); Mika v. State, 196 Ga. 473, 26 S.E.2d 616 (1943) (decided under former Code 1933, § 38-420); Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945) (decided under former Code 1933, § 38-420); Brandt v. Eckman, 79 Ga. App. 47, 52 S.E.2d 665 (1949) (decided under former Code 1933, § 38-420); Elvine v. State, 205 Ga. 528, 54 S.E.2d 626 (1949) (decided under former Code 1933, § 38-420); Staggers v. State, 101 Ga. App. 463, 114 S.E.2d 142 (1960) (decided under former Code 1933, § 38-420); Pryor v. State, 113 Ga. App. 660, 149 S.E.2d 401 (1966) (decided under former Code 1933, § 38-420); Welch v. State, 235 Ga. 243, 219 S.E.2d 151 (1975) (decided under former Code 1933, § 38-420); Simonton v. State, 151 Ga. App. 431, 260 S.E.2d 487 (1979) (decided under former Code 1933, § 38-420); Jackson v. State, 596 Ga. App. 596, 260 S.E.2d 565 (1979) (decided under former Code 1933, § 38-420).

Absent a timely request, the trial court did not err in failing to charge on the evidentiary weight to be given admissions and confessions or in failing to charge that an uncorroborated confession is insufficient to support a conviction. Hunt v. State, 166 Ga. App. 524, 304 S.E.2d 576 (1983) (decided under former O.C.G.A. § 24-3-53).

Trial court did not err by failing to charge the jury on the state's burden of proving the corpus delicti since defendant filed no written request to charge, and the subject of defendant's oral request regarding the state's burden of proving the corpus delicti was fully satisfied by the trial court's charge regarding the presumption of defendant's innocence and the state's burden of proving all elements of the crime. Barnes v. State, 260 Ga. 398, 396 S.E.2d 207 (1990) (decided under former O.C.G.A. § 24-3-53).

Trial court's decision not to give defendant's requested instruction on the jury considering defendant's admissions with caution, pursuant to former O.C.G.A. § 24-3-53, was not reversible; defendant acquiesced in the counsel's request that a standard charge on credibility be given instead, and defendant was not entitled to acquiesce in that decision and later complain about the decision on appeal. Lummus v. State, 274 Ga. App. 636, 618 S.E.2d 692 (2005), overruled on other grounds, McCart v. State, 289 Ga. App. 830, 658 S.E.2d 465 (2008) (decided under former O.C.G.A. § 24-3-53).

Court not required to give instruction absent specific request. — Because the defendant failed to request a charge on voluntariness of confessions and consideration of statements, admissions, and confessions, the defendant was precluded from asserting error on that basis; the trial court did not need to give an instruction on voluntariness of confessions absent a specific request therefor. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913 (2009) (decided under former O.C.G.A. § 24-3-53).

Failure to charge the language of former O.C.G.A. § 24-3-53 when there had been an admission, but not a "confession," was not error. Richardson v. State, 256 Ga. 746, 353 S.E.2d 342 (1987) (decided under former O.C.G.A. § 24-3-53); Gay v. State, 199 Ga. App. 80, 403 S.E.2d 895 (1991) (decided under former O.C.G.A. § 24-3-53).

Trial court did not err in failing to charge the language of former O.C.G.A. § 24-3-53 since the defendant's statement, while an admission, was not a confession to the crime of murder, inasmuch as the defendant contended that the killing was justified and the court's charge informed the jury that the statement should be examined closely for voluntariness. Houston v. State, 253 Ga. 696, 324 S.E.2d 183 (1985) (decided under former O.C.G.A. § 24-3-53).

Omission in instructions. — Fact that charge omits an instruction as to the

weight to be given to confessions is not cause for new trial, in the absence of a request therefor. Williams v. State, 196 Ga. 503, 26 S.E.2d 926 (1943) (decided under former Code 1933, § 38-420).

Request to charge on principle of corroboration properly denied. — Trial court did not err in refusing to give a requested charge on the principle of corroboration since the charge was not adjusted to the evidence. Flanders v. State, 279 Ga. 35, 609 S.E.2d 346 (2005) (decided under former O.C.G.A. § 24-3-53).

Language used in charging former O.C.G.A. § 24-3-53 was discussed in the following cases. — See Ford v. Kennedy, 64 Ga. 537 (1880); Ocean S.S. Co. v. McAlphin, 69 Ga. 437 (1882); Raleigh & G.R.R. v. Allen, 106 Ga. 572, 32 S.E. 622 (1899); Louisville & N.R.R. v. Bradford, 135 Ga. 522, 69 S.E. 870 (1910); Smithwick v. State, 199 Ga. 292, 34 S.E.2d 28 (1945) (decided under former Code 1933, § 38-420); Williams v. State, 199 Ga. 504, 34 S.E.2d 854 (1945) (decided under former Code 1933, § 38-420); Elvine v. State, 205 Ga. 528, 54 S.E.2d 626 (1949) (decided under former Code 1933, § 38-420); Figures v. State, 80 Ga. App. 832, 57 S.E.2d 629 (1950) (decided under former Code 1933, § 38-420); Reece v. State, 212 Ga. 609, 94 S.E.2d 723 (1956) (decided under former Code 1933, § 38-420); Beard v. State, 151 Ga. App. 724, 261 S.E.2d 404 (1979) (decided under former Code 1933, § 38-420); Hill v. State, 246 Ga. 402, 271 S.E.2d 802 (1980), cert. denied, 451 U.S. 923, 101 S. Ct. 2001, 68 L. Ed. 2d 313 (1981) (decided under former Code 1933, § 38-420).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 765, 766, 1394.

C.J.S. — 31A C.J.S., Evidence, §§ 523, 524.

ALR. — Proof of entire conversation containing alleged confession, 2 ALR 1017; 26 ALR 541.

Confession by one who has been subjected to or threatened with physical suffering, 24 ALR 703.

Confession as circumstantial evidence, 40 ALR 571.

Duty of court to institute preliminary investigation as to voluntary or involuntary character of confession, 102 ALR 605.

Presumption and burden of proof as to voluntariness of nonjudicial confession, 102 ALR 641.

Right of witness to state his conclusion or opinion that confession was voluntary or involuntary, 114 ALR 974.

Detective or other person participating in crime to obtain evidence as accomplice within rule requiring corroboration of, or cautionary instruction as to, testimony of accomplice, 119 ALR 689.

Propriety of instruction, or requested instruction, in civil case, as to caution in considering testimony of oral admissions, or as to weight of such admissions as evidence, 126 ALR 66.

Corroboration of confession, 127 ALR 1130; 45 ALR2d 1316.

Admissibility and weight of party's admissions as to tort occurring during his absence, 54 ALR2d 1069.

Admissibility of inculpatory statements made in presence of accused to which he refuses to reply on advice of counsel, 77 ALR2d 463.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in a tort action for personal injury, wrongful death, or property damage, 80 ALR2d 1224.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud, 99 ALR2d 772.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question, 9 ALR3d 990.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 ALR4th 419.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 ALR4th 495.

Sufficiency of corroboration of confession for purpose of establishing corpus delicti as question of law or fact, 33 ALR5th 571.

24-8-824. Only voluntary confessions admissible.

To make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. (Code 1981, § 24-8-824, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI.

Law reviews. — For comment, "School Bullies — They Aren't Just Students: Examining School Interrogations and the Miranda Warning," see 59 Mercer L. Rev. 731 (2008).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3740, former Code 1873, § 3793, former Penal Code 1895, § 1006, former Penal Code 1910, § 1032, former Code 1933, § 38-411, and former O.C.G.A. § 24-3-50 are included in the annotations for this Code section.

In general. — Any statement or conduct of a person, indicating a consciousness of guilt, when such person is, at the time or thereafter, charged with or suspected of a crime, is admissible against the person upon trial for committing the crime. Bridges v. State, 246 Ga. 323, 271 S.E.2d 471 (1980) (decided under former Code 1933, § 38-411).

Fact that a confession was not reduced to writing does not render confession inadmissible. Hayes v. State, 152 Ga. App. 858, 264 S.E.2d 307 (1980) (decided under former Code 1933, § 38-411).

Confession not inadmissible despite indicating other offenses. — Criminal confession is not rendered inadmissible because the language used therein indicates that the accused had committed another and separate offense. Dampier v. State, 245 Ga. 427, 265 S.E.2d 565, supplemented, 245 Ga. 882, 268 S.E.2d 349 (1980) (decided under former Code 1933, § 38-411).

Harmless error. — Any possible error in admitting a confession of a codefendant after the codefendant refused to testify is rendered harmless when the confession parallels the statements of the codefendants. Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637 (1980) (decided under former Code 1933, § 38-411).

Reversible error. — When inadmissible evidence as to a confession is offered and admitted, its admission constitutes reversible error unless the jury is expressly instructed that the evidence is admitted for the purpose of impeachment only, whether or not a request to so charge be made, and whether or not any exceptions are made to the charge as given. Askea v. State, 153 Ga. App. 849, 267 S.E.2d 279 (1980) (decided under former Code 1933, § 38-411).

Confession defined. — A confession is an admission freely and voluntarily made by the accused whereby the accused acknowledges personally to be guilty of the

offense charged, and discloses the circumstances of the act, and the share and participation the accused had in the act. Allen v. State, 187 Ga. 178, 200 S.E. 109 (1938) (decided under former Code 1933, § 38-411); Pressley v. State, 201 Ga. 267, 39 S.E.2d 478 (1946) (decided under former Code 1933, § 38-411); Johnson v. State, 204 Ga. 528, 50 S.E.2d 334 (1948) (decided under former Code 1933, § 38-411); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868 (1954) (decided under former Code 1933, § 38-411).

Incriminating statements distinguished. — There is a difference between an incriminating statement and a confession of guilt. In the former only one or more facts entering into the criminal act is admitted, while in the latter the entire criminal act is confessed. Johnson v. State, 204 Ga. 528, 50 S.E.2d 334 (1948) (decided under former Code 1933, § 38-411); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868 (1954) (decided under former Code 1933, § 38-411).

True determinant of whether a defendant has made a confession or merely given a statement is whether the statement is offered by the accused as exculpatory or inculpatory. Sanford v. State, 153 Ga. App. 541, 265 S.E.2d 868 (1980) (decided under former Code 1933, § 38-411).

An admission of the main fact, from which the essential elements of the criminal act charged may be inferred, amounts to a confession of the crime itself. Sanford v. State, 153 Ga. App. 541, 265 S.E.2d 868 (1980) (decided under former Code 1933, § 38-411).

An admission of a fact not in itself involving criminal intent is not a confession. Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868 (1954) (decided under former Code 1933, § 38-411).

Unless the statement of the defendant is broad enough to comprehend every essential element necessary to make out the case against the defendant, it cannot be said to be an admission of guilt. Allen v. State, 187 Ga. 178, 200 S.E. 109 (1938) (decided under former Code 1933, § 38-411); Johnson v. State, 204 Ga. 528, 50 S.E.2d 334 (1948) (decided under former Code 1933, § 38-411); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868 (1954) (decided under former Code 1933, § 38-411).

Prima-facie showing of the admissibility of a confession is made by evidence of compliance with former O.C.G.A. § 24-3-50 in addition to evidence showing that defendant confessed after having been given defendant's Miranda rights. Pruitt v. State, 176 Ga. App. 317, 335 S.E.2d 724 (1985) (decided under former O.C.G.A. § 24-3-50); Adams v. State, 186 Ga. App. 599, 367 S.E.2d 871, cert. denied, 186 Ga. App. 917, 367 S.E.2d 871 (1988) (decided under former O.C.G.A. § 24-3-50).

"Hope of benefit" to which former O.C.G.A. § 24-3-50 referred was usually a hope of lighter punishment. Tyler v. State, 247 Ga. 119, 274 S.E.2d 549, cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981) (decided under former Code 1933, § 38-411); Caffo v. State, 247 Ga. 751, 279 S.E.2d 678 (1981) (decided under former Code 1933, § 38-411).

Within the context of former O.C.G.A. § 24-3-50, the slightest hope of benefit referred to a lighter sentence. Burton v. State, 212 Ga. App. 100, 441 S.E.2d 470 (1994) (decided under former O.C.G.A. § 24-3-50).

Record did not show that the officer made any assurances to defendant that the defendant's sentence would be lighter if the defendant gave an incriminating statement and the officer's statement to the accused that substance abuse counseling was available was an offer of a collateral benefit which did not invalidate the statement. Burton v. State, 212 Ga. App. 100, 441 S.E.2d 470 (1994) (decided under former O.C.G.A. § 24-3-50).

Promise by an officer to assist defendant in getting help through counseling did not constitute an impermissible hope of benefit under former O.C.G.A. § 24-3-50. Peinado v. State, 223 Ga. App. 271, 477 S.E.2d 408 (1996) (decided under former O.C.G.A. § 24-3-50).

An offer by officers to "help" defendant if defendant told the truth and the officer's statement that defendant would face a jury trial if defendant lied were not promises of an improper benefit that would render defendant's confession inadmissi-

General Consideration (Cont'd)

ble under the "slightest hope of benefit" to which O.C.G.A. § 24-3-40 refers. Porter v. State, 264 Ga. App. 526, 591 S.E.2d 436 (2003) (decided under former O.C.G.A. § 24-3-50).

Hope to be released did not implicate former statute. — "Hope of benefit" to which former O.C.G.A. § 24-3-50 referred was usually a hope of lighter punishment. Consequently, being released was not a hope of benefit that would implicate that Code section. Further, even if the court were to find that the GBI agent said that the defendant would be released if the defendant gave the agent information, this would be an offer of a collateral benefit which did not invalidate the statement and thus the statement was admissible. Overton v. State, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009) (decided under former O.C.G.A. § 24-3-50).

Clear intention of the former statute wais that a confession induced by the slightest hope of benefit or remotest fear of injury could not be used against a defendant. Williams v. State, 239 Ga. 327, 236 S.E.2d 672 (1977) (decided under former Code 1933, § 38-411).

Construction with former O.C.G.A. § 24-3-53 (see now O.C.G.A. § 24-8-823). — Both former Code 1933, §§ 38-411 and 38-420 (see now O.C.G.A. §§ 24-8-824 and 24-8-823) refer to evidence in criminal trials. The former statute recognized the distinction between admissions and confessions. In former Code 1933, § 38-420 only one or more facts entering into a criminal act were admitted, while in former Code 1933, § 38-411 the entire criminal act was confessed. Burns v. State, 188 Ga. 22, 2 S.E.2d 627 (1939) (decided under former Code 1933, § 38-411).

Issue regarding voluntariness of confession pursuant to former O.C.G.A. § 24-3-50 must be raised in the trial court. Turner v. State, 246 Ga. App. 49, 539 S.E.2d 553 (2000) (decided under former O.C.G.A. § 24-3-50).

Oral admissions properly admitted after voluntariness determined. — Trial court does not err in admitting defendant's oral admissions contained in the testimony of the investigating officer after the trial court as the trier of fact outside the presence of the jury determined the voluntariness of the defendant's admissions. Kelley v. State, 160 Ga. App. 343, 287 S.E.2d 68 (1981) (decided under former Code 1933, § 38-411).

Request not to be prosecuted was not confession. — Defendant's request not to be prosecuted was not a confession and therefore was not erroneously admitted under former O.C.G.A. § 24-3-50; the request not to be prosecuted was not a confession because the request did not admit every element of the crime and did not acknowledge guilt. McMahon v. State, 308 Ga. App. 292, 707 S.E.2d 528 (2011) (decided under former O.C.G.A. § 24-3-50).

Court's decision to allow confession into evidence not error. Johnson v. State, 261 Ga. 419, 405 S.E.2d 686 (1991) (decided under former O.C.G.A. § 24-3-50); Davis v. State, 271 Ga. 527, 520 S.E.2d 218 (1999) (decided under former O.C.G.A. § 24-3-50).

Constitutional Considerations

In general. — Admission in evidence of a confession voluntarily made, without being induced by another by the slightest hope of benefit or the remotest fear of injury, does not contravene the provisions of the state constitution that no person shall be compelled to give testimony tending in any manner to incriminate oneself, nor is it inimical to anything contained in the Fourteenth Amendment to the Constitution of the United States. Wilburn v. State, 141 Ga. 510, 81 S.E. 444 (1914) (decided under former Penal Code 1910, § 1032).

Use of threats or promises to coerce a criminal defendant to make a statement is contrary to Georgia law and to federal constitutional law. Young v. State, 243 Ga. 546, 255 S.E.2d 20 (1979) (decided under former Code 1933, § 38-411).

Self-incrimination. — Confessions, if made voluntarily without hope of benefit or fear of injury, are admissible and are not rendered inadmissible as violating the constitutional inhibition against

self-incrimination by the fact that the confession is in affidavit form. Elliott v. State, 87 Ga. App. 456, 74 S.E.2d 366 (1953) (decided under former Code 1933, § 38-411).

It must be shown that no constitutional rights of the defendant were violated in obtaining statement when an in-custody written statement of a defendant is offered in evidence. Walker v. State, 226 Ga. 292, 174 S.E.2d 440 (1970), vacated on other grounds, 408 U.S. 936, 92 S. Ct. 2845, 33 L. Ed. 2d 754 (1972) (decided under former Code 1933, § 38-411).

Interrogation by private citizen afforded no constitutional protection. — Confessions which result from coercive interrogations conducted by private citizens are not subject to a constitutional due process analysis in determining whether or not to exclude the confession at trial. Griffin v. State, 230 Ga. App. 318, 496 S.E.2d 480 (1998) (decided under former O.C.G.A. § 24-3-50).

Defendant's constitutional rights could not have been violated when the defendant was not under arrest or in custody at the time of the confession and no police or other law enforcement personnel were present. Gaston v. State, 153 Ga. App. 538, 265 S.E.2d 866 (1980) (decided under former Code 1933, § 38-411).

Fifth and Sixth Amendments not violated. — When the evidence heard was sufficient to authorize the trial court to determine that the defendant was advised of the defendant's rights, that the defendant was not placed under any duress, that the defendant seemed to understand the defendant's rights, that the defendant was not under influence of drugs or alcohol and that the defendant seemed completely aware of what was going on around the defendant, the defendant's confession was voluntarily elicited and not in violation of the Fifth and Sixth Amendments. Simonton v. State, 151 Ga. App. 431, 260 S.E.2d 487 (1979) (decided under former Code 1933, § 38-411).

Question was not a request for counsel. — Question by a defendant as to whether the defendant would have been arrested if the defendant asked for an attorney was not a clear request for counsel that required cessation of police questioning or clarification before continuing the interrogation and there was no evidence that the statement was given in fear of injury or for a hope of benefit; additionally, while the investigator lied to the defendant throughout the interview about the existence and amount of inculpatory evidence, nothing suggested that the investigator sought to procure a false statement. Wright v. State, 279 Ga. App. 155, 630 S.E.2d 656 (2006) (decided under former O.C.G.A. § 24-3-50).

Waiver of Miranda rights. — When a defendant objects to the admission into evidence of defendant's confession, the state must prove by a preponderance of the evidence that the confession was voluntary, and, if the confession is the product of a custodial interrogation by officers of the government, that the confession was preceded by the appellant's knowing and voluntary waiver of the appellant's Miranda rights. Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979), sentence vacated, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980) (remanded for further consideration in light of Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980)) (decided under former Code 1933, § 38-411).

Whether, after the Miranda warnings are given, the waiver of those rights was free and voluntary depends upon the totality of the circumstances. Miller v. State, 155 Ga. App. 587, 271 S.E.2d 719 (1980) (decided under former Code 1933, § 38-411).

Trial court did not err by refusing to exclude the defendant's post-arrest statement, which admitted that the defendant was the shooter because the defendant did not explain how the Miranda warnings were inadequate; the defendant was advised of the rights both verbally and in writing and signed a waiver, and a detective testified that the detective secured the defendant's Miranda waiver before interrogating the defendant. Funes v. State, 289 Ga. 793, 716 S.E.2d 183 (2011) (decided under former O.C.G.A. § 24-3-50).

Due process clause of the Fourteenth Amendment to the United States Constitution requires that the trial judge

Constitutional Considerations (Cont'd)

determine whether a confession is voluntary before permitting the jury to consider the confession. Stone v. State, 155 Ga. App. 357, 271 S.E.2d 22 (1980) (decided under former Code 1933, § 38-411).

Defendant's constitutional rights are violated when defendant's challenged confession is introduced without a determination by the trial judge of the confession's voluntariness after an adequate hearing. Strickland v. State, 226 Ga. 750, 177 S.E.2d 238 (1970) (decided under former Code 1933, § 38-411).

Right to counsel violated by last but not earlier statements. — While non-custodial and custodial statements were properly admitted as not vitiating the defendant's constitutional rights once defendant invoked the right to counsel, a subsequent interview initiated by police violated this right; as a result, cocaine seized through information obtained from the interview had to be suppressed as fruit of the poisonous tree. Vergara v. State, 283 Ga. 175, 657 S.E.2d 863 (2008) (decided under former O.C.G.A. § 24-3-50).

Due process not violated. — When evidence shows that confessions were voluntarily made and were not induced by another by hope of award or fear of punishment, or when it is an issue of fact as to whether the confessions were properly obtained, defendant is not denied due process of law as guaranteed by the state and federal constitutions, by their introduction in evidence against the defendant. Claybourn v. State, 190 Ga. 861, 11 S.E.2d 23 (1940) (decided under former Code 1933, § 38-411).

Voluntariness

Voluntary character of the confession depends on the question whether the making of the statement was voluntary, and not whether the particular communication contained in the confession was voluntary. Turner v. State, 203 Ga. 770, 48 S.E.2d 522 (1948) (decided under former Code 1933, § 38-411).

Officer's knowledge of defendant. — Fact that the interrogating officer did not know the defendant's age, education, or familiarity with the "custodial experience" did not render the defendant's confession invalid or involuntary; further, the failure to advise the defendant as to the crimes about which the defendant was to be questioned before a Miranda waiver was irrelevant to whether the waiver was knowing and voluntary. Rivera v. State, 279 Ga. App. 1, 630 S.E.2d 152 (2006) (decided under former O.C.G.A. § 24-3-50).

Totality of the circumstances. — To determine whether the state has proven that a confession was made voluntarily, the trial court must consider the totality of the circumstances. Presley v. State, 251 Ga. App. 823, 555 S.E.2d 156 (2001) (decided under former O.C.G.A. § 24-3-50); Harrison v. State, 253 Ga. App. 179, 558 S.E.2d 760 (2002) (decided under former O.C.G.A. § 24-3-50).

Given the totality of the circumstances, and the defendant's age, education, and knowledge of both the substance of the charge and nature of the rights to an attorney and to remain silent, because the defendant voluntarily gave a statement to a police detective about an uncharged armed robbery, absent any threats, coercion, or promises in exchange for doing so, the statement was admissible. Swain v. State, 285 Ga. App. 550, 647 S.E.2d 88 (2007) (decided under former O.C.G.A. § 24-3-50).

Based on the totality of the circumstances and the undisputed evidence, because the defendant's confession to a police detective was voluntary and admissible under former O.C.G.A. § 24-3-50, not coerced or received as a result of promises made, and not subject to exclusion due to improper methods used by the police, the trial court did not err in admitting the confession; further, exclusion of the confession was not required based on a violation of the defendant's right to counsel. Swain v. State, 285 Ga. App. 550, 647 S.E.2d 88 (2007) (decided under former O.C.G.A. § 24-3-50).

With regard to a defendant's conviction for rape of a minor relative, the trial court did not err by denying the defendant's motion to suppress a non-custodial audio recording of a statement the defendant made to the victim that the victim ob-

tained via a hidden recorder as a hearing was held by the trial court on the admissibility of the recording at which time the trial court concluded that, under the totality of the circumstances, the defendant's statement was made voluntarily and the victim did not promise the defendant anything to make the statement and did not threaten the defendant into making the statement. Flournoy v. State, 299 Ga. App. 377, 682 S.E.2d 632 (2009) (decided under former O.C.G.A. § 24-3-50).

Implicit finding of voluntariness in admission of confession. — When the court denied the defendants' motions to suppress the defendant's confessions, implicit in the ruling was the court's finding that the statements were freely and voluntarily made, without hope of benefit or reward. Eady v. State, 182 Ga. App. 293, 355 S.E.2d 778 (1987) (decided under former O.C.G.A. § 24-3-50).

A person who is mentally ill can be competent to make a voluntary confession. Johnson v. State, 256 Ga. 259, 347 S.E.2d 584 (1986) (decided under former O.C.G.A. § 24-3-50).

When an admission of guilt was not product of interrogation but was spontaneous statement of the defendant the statement is admissible. Williams v. State, 159 Ga. App. 772, 285 S.E.2d 232 (1981) (decided under former O.C.G.A. § 24-3-50).

Hope of reward or fear of punishment which renders confession inadmissible is that which is induced by another. Jones v. State, 18 Ga. App. 310, 89 S.E. 347 (1916) (decided under former Penal Code 1910, § 1032); Phinazee v. State, 22 Ga. App. 258, 95 S.E. 878 (1918) (decided under former Penal Code 1910, § 1032); Hill v. State, 148 Ga. 521, 97 S.E. 442 (1918) (decided under former Penal Code 1910, § 1032); Abrams v. State, 223 Ga. 216, 154 S.E.2d 443 (1967) (decided under former Code 1933, § 38-411); Dickey v. State, 157 Ga. App. 13, 276 S.E.2d 75 (1981) (decided under former Code 1933, § 38-411).

Although the interrogating officer did tell defendant that the defendant was helping defendant by telling the truth, that judges love to hear that defendants helped the police, and that although telling the truth put defendant right in the hot seat, it also showed that the defendant cooperated, these statements, when combined with repeated statements that the officer could not promise any help, did not constitute the kind of "hope of benefit" which was contemplated by former O.C.G.A. § 24-3-50. Stephens v. State, 164 Ga. App. 398, 297 S.E.2d 90 (1982) (decided under former O.C.G.A. § 24-3-50).

Even though interrogating officer's deception may not have been intended to procure an untrue statement, since the deception was intended and indeed did induce defendant to confess in the hope of receiving a lighter punishment, the confession was not voluntary. State v. Ritter, 268 Ga. 108, 485 S.E.2d 492 (1997) (decided under former O.C.G.A. § 24-3-50).

Defendant's claim that defendant's statement was inadmissible on the basis that the statement was obtained by a threat of an increased punishment was not valid because the challenged words could only have been construed as the officer's assessment that the defendant's credibility was being destroyed and that defendant was imperiling any claim of innocence by insisting on a version of the facts which was so dramatically contrary to the evidence gathered by the police. Robinson v. State, 272 Ga. 752, 533 S.E.2d 718 (2000) (decided under former O.C.G.A. § 24-3-50).

Court of appeals erred in affirming the defendant's conviction for criminal attempt to commit armed robbery and aggravated assault and in determining that the trial court did not err by denying the defendant's motion to suppress the confession as involuntary and induced by an improper hope of benefit because the defendant's confession had to be considered involuntary and inadmissible when the record showed that the defendant gave self-incriminating statement only after being told that the defendant could receive a "shorter term" by doing so, which was exactly the hope of benefit that was prohibited under former O.C.G.A. § 24-3-50; as a result, the defendant's confession was induced by a hope of benefit, it had to be presumed to be legally false, and it could not be the underlying

Voluntariness (Cont'd)

basis of a conviction. Canty v. State, 286 Ga. 608, 690 S.E.2d 609 (2010) (decided under former O.C.G.A. § 24-3-50).

"Hope of benefit" contemplated by former O.C.G.A. § 24-3-50 must be induced by another; therefore, any hope which originated in the mind of the person making a confession would not exclude admission of the confession. Wesley v. State, 177 Ga. App. 877, 341 S.E.2d 507 (1986), overruled on other grounds, Gilbert v. State, 193 Ga. App. 283, 388 S.E.2d 18 (1989) (decided under former O.C.G.A. § 24-3-50).

Hope or fear which originates in the mind of the person making the confession and which originates from seeds of the person's own planting would not exclude a confession. The hope or fear must be induced by another. Hall v. State, 180 Ga. App. 366, 349 S.E.2d 255 (1986) (decided under former O.C.G.A. § 24-3-50); Shelton v. State, 196 Ga. App. 163, 395 S.E.2d 618 (1990) (decided under former O.C.G.A. § 24-3-50); Ramos v. State, 198 Ga. App. 65, 400 S.E.2d 353 (1990) (decided under former O.C.G.A. § 24-3-50).

While former O.C.G.A. § 24-3-50 prohibits the introduction of a statement induced "by the slightest hope of benefit," the hope contemplated must be induced by another. Bryant v. State, 193 Ga. App. 840, 389 S.E.2d 405 (1989) (decided under former O.C.G.A. § 24-3-50); Vineyard v. State, 195 Ga. App. 788, 395 S.E.2d 49 (1990) (decided under former O.C.G.A. § 24-3-50).

A hope or fear which originates in the mind of the person making a confession and which originates from seeds of one's own planting would not exclude a confession, and defendant's contention that the defendant viewed the investigative detective as a "mother figure" did not exclude defendant's confession. Owens v. State, 209 Ga. App. 272, 433 S.E.2d 382 (1993) (decided under former O.C.G.A. § 24-3-50).

Confessions made as a tactical decision are admissible when the hope or fear is a product of the defendant's own mind rather than the result of inducement by others. Gray v. State, 240 Ga. App. 716, 523 S.E.2d 626 (1999) (decided under former O.C.G.A. § 24-3-50).

Offer to obtain psychologist. — Police officer's offer to assist defendant in finding a psychologist and the officer's suggestions that it best behooved the defendant to tell the truth did not constitute the hope of benefit prohibited by former O.C.G.A. § 24-3-50. Clay v. State, 209 Ga. App. 266, 433 S.E.2d 377 (1993) (decided under former O.C.G.A. § 24-3-50).

Hope of benefit not created. — Officer's testimony that the officer would inform the district attorney of defendant's cooperation was not sufficient to create a hope of benefit within the meaning of former O.C.G.A. § 24-3-50. Autry v. State, 210 Ga. App. 150, 435 S.E.2d 512 (1993) (decided under former O.C.G.A. § 24-3-50); McFadden v. State, 251 Ga. App. 342, 554 S.E.2d 323 (2001) (decided under former O.C.G.A. § 24-3-50).

Any promise made to defendant to facilitate a change in defendant's jail cell was not a promise or hope of benefit which would taint defendant's otherwise voluntary confession. Billings v. State, 212 Ga. App. 125, 441 S.E.2d 262 (1994) (decided under former O.C.G.A. § 24-3-50).

No hope of benefit was created when the defendant asked the interrogating officer, "What should I do? Should I talk?" and the officer replied, "That's up to you, man. All you're going to do is help yourself out." Lee v. State, 270 Ga. 798, 514 S.E.2d 1 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999) (decided under former O.C.G.A. § 24-3-50).

Defendant's statement given during an interview by a Department of Family and Children Services (DFACS) caseworker in the presence of two police officers was voluntary and not induced by deceit because neither the police nor DFACS offered defendant anything for the testimony. Moss v. State, 244 Ga. App. 295, 535 S.E.2d 292 (2000) (decided under former O.C.G.A. § 24-3-50).

Officer's statements during interrogation to the effect that it would look better to the judge if defendant would confess to committing the murder rather than denying committing murder when the police could prove defendant was the murderer did not constitute a hope of benefit to elicit

a statement. Taylor v. State, 274 Ga. 269, 553 S.E.2d 598 (2001) (decided under former O.C.G.A. § 24-3-50).

In defendant's trial on charges of malice murder, felony murder, and armed robbery, there was no evidence in the record that a police officer who took defendant's statement referred to any possibility of a lighter sentence when the officer questioned defendant, and the trial court properly rejected defendant's claim that defendant's statement to police should be suppressed because the officer who interviewed the defendant attempted to coerce defendant into giving a statement by informing defendant that police had defendant's fingerprints or because defendant held only a general equivalency diploma. Evans v. State, 277 Ga. 51, 586 S.E.2d 326 (2003) (decided under former O.C.G.A. § 24-3-50).

There was no violation of former O.C.G.A. § 24-3-50 regarding coercion of a statement because the officers made no promise to defendant that the defendant would not go to jail or that the defendant might receive a lighter sentence; the detectives only indicated that the detectives would note defendant's cooperation and the defendant's efforts to straighten out the defendant's life. Jones v. State, 270 Ga. App. 233, 606 S.E.2d 288 (2004) (decided under former O.C.G.A. § 24-3-50).

Defendant's statements, wherein the defendant admitted the defendant's culpability in a victim's murder, were properly admitted as voluntary in the defendant's criminal trial as the defendants' claim that defendants were each induced by the hope of receiving benefits pursuant to former O.C.G.A. § 24-3-50 lacked merit; the claims were contradicted by other testimony given by defendant that the defendant offered the statements freely, and one statement was not given in exchange for a plea agreement, as such agreement was already in place when the statement was made. Redwine v. State, 280 Ga. 58, 623 S.E.2d 485 (2005) (decided under former O.C.G.A. § 24-3-50).

While the defendant testified that the officers made certain promises to free the defendant, the interviewing officers testified that the officers made no promises or threats to the defendant, and the defendant signed a document in which the defendant acknowledged that no benefits had been promised the defendant, because some evidence supported the trial court's finding that defendant's confession was voluntary, those findings were not clearly erroneous. Bowden v. State, 279 Ga. App. 173, 630 S.E.2d 792 (2006) (decided under former O.C.G.A. § 24-3-50).

Defendant's statement to police was not rendered involuntary because the statement was given based upon a hope of benefit as there was no evidence in the record to suggest that the police offered the defendant the hope of lighter punishment in exchange for that statement. Givens v. State, 281 Ga. App. 370, 636 S.E.2d 94 (2006) (decided under former O.C.G.A. § 24-3-50).

Statements by interrogating officers that the defendant should help oneself, that it was in the defendant's best interest to tell what the defendant knew, and that the officers would show the district attorney and the judge that the defendant did not want to help oneself, did not constitute a hope of benefit under former O.C.G.A. § 24-3-50. Stinski v. State, 281 Ga. 783, 642 S.E.2d 1 (2007) (decided under former O.C.G.A. § 24-3-50).

Defendant's confession was not rendered involuntary merely because the confession was made with the hope of benefit from the interrogating officers because the evidence demonstrated that any hope of benefit given by the officers was dispelled by one officer's statement that the officers had no influence over the defendant's possible punishment. Valentine v. State, 289 Ga. App. 60, 656 S.E.2d 208 (2007) (decided under former O.C.G.A. § 24-3-50).

Given evidence that the defendant was not provided any assurances by law enforcement that any assistance offered to the defendant would prove beneficial, the defendant's subsequent statement to law enforcement was voluntarily made. Garcia v. State, 290 Ga. App. 164, 658 S.E.2d 904 (2008) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in admitting an alleged confession the defendant made to an investigator because the defendant gave a statement that implicated both the defendant and the defendant's sibling,

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and the trial court was fully authorized to find that the statement was not induced by any hope of benefit extended by a sergeant; thus, former O.C.G.A. § 24-3-50 did not prevent admission of the statement. Mitchell v. State, 292 Ga. App. 124, 663 S.E.2d 800 (2008) (decided under former O.C.G.A. § 24-3-50).

In a prosecution for felony murder, armed robbery, and burglary, a defendant's post-Miranda statements were properly admitted at trial as a detective's telling the defendant the detective knew the defendant was not the shooter did not constitute the hope of a lighter sentence that tainted the voluntariness of the defendant's statements. Jackson v. State, 284 Ga. 484, 668 S.E.2d 700 (2008) (decided under former O.C.G.A. § 24-3-50).

Second defendant's statements were voluntary because the statements were not obtained by deceit intended to elicit an untrue response and were not induced by the hope of benefit; the investigators' alleged deception regarding whether the investigators had articulated a belief as to the second defendant's participation in the crimes, or indeed had probable cause to obtain an arrest warrant, had no bearing on the voluntariness of the defendant's statement in the absence of any evidence that the investigative technique was designed to procure a false statement. Moreover, the description of the second defendant as "not a suspect" offered no hope of benefit because the statement offered no potential future outcome. Daniel v. State, 285 Ga. 406, 677 S.E.2d 120 (2009) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in failing to suppress the defendant's post-Miranda confession because the confession was not induced by the hope of benefit in violation of former O.C.G.A. § 24-3-50; the interrogating officer repeatedly told the defendant that the officer could not offer any deals for lighter punishment. State v. Folsom, 286 Ga. 105, 686 S.E.2d 239 (2009) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in refusing to suppress statements the defendant made after an officer told the defendant that withholding information would make things worse for the defendant because the officer's statement to the defendant was, in context, an admonition not to damage the defendant's credibility but to tell the truth, and the statement did not show the physical or mental torture or the coercion by threats that constitutes the remotest fear of injury forbidden by former O.C.G.A. § 24-3-50; since no promises of lighter punishment were made, such an admonition to tell the truth did not constitute hope of benefit so as to render involuntary any statement made thereafter. Madrigal v. State, 287 Ga. 121, 694 S.E.2d 652 (2010), overruled on other grounds, State v. Kelly, 290 Ga. 29, 718 S.E.2d 232 (2011) (decided under former O.C.G.A. § 24-3-50).

Defendant waived the defendant's claim that the defendant's confession to the murder of the defendant's spouse was induced by a hope of benefit or a fear of injury, in violation of former O.C.G.A. § 24-3-50, by failing to raise the issue at the Jackson v. Denno hearing, at a renewed Jackson v. Denno motion made at trial, or when the statements were introduced at trial. Turner v. State, 287 Ga. 793, 700 S.E.2d 386 (2010) (decided under former O.C.G.A. § 24-3-50).

Trial court erred in granting the defendant's motion to suppress a confession because investigators' statements that the defendant would go home after the interview did not offer the defendant a "hope of benefit" that would otherwise render the defendant's confession inadmissible, and the investigators' statement that the defendant would not be arrested on the spot was collateral and not the type of "hope of benefit" contemplated by former O.C.G.A. § 24-3-50; even assuming that the statement was not collateral, any hope of benefit was dispelled by the officers' assertions that the officers had no control over what would ultimately happen to the defendant, and throughout the interview, the defendant expressed an understanding that there would be consequences for the defendant's actions. State v. Brown, 308 Ga. App. 480, 708 S.E.2d 63 (2011), aff'd, 290 Ga. 865, 725 S.E.2d 320 (2012) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in admitting the defendant's pre-arrest statements because the offer to obtain counseling for the defendant did not bear on the question of punishment but involved a collateral benefit, and promises of a collateral benefit did not impact a statement's admissibility; the defendant offered no evidence that the officers induced the defendant to believe the defendant would receive a three year sentence, but the defendant came up with that scenario on the defendant's own, and the trial court, therefore, properly found the defendant's statements were voluntary and admissible. Dunson v. State, 309 Ga. App. 484, 711 S.E.2d 53 (2011) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err by allowing the defendant's inculpatory statements to police. An investigator's statement that defendant's lack of cooperation showed that the defendant was "not trying to help" oneself was an encouragement to tell the truth and did not constitute an impermissible hope of benefit under former O.C.G.A. § 24-3-50. Rogers v. State, 289 Ga. 675, 715 S.E.2d 68 (2011) (decided under former O.C.G.A. § 24-3-50).

Trial court's decision to admit the defendant's apology letter to the victims was not erroneous because the trial court was authorized to find that the investigative officer's techniques were not impermissible and did not render the apology letter involuntary; the investigating officer's request for an apology letter did not induce the defendant's confession because the investigating officer stated that the officer did not promise the defendant a reduced charge or sentence in exchange for the defendant's cooperation. Edwards v. State, 312 Ga. App. 141, 717 S.E.2d 722 (2011), cert. denied, No. S12C0363, 2012 Ga. LEXIS 221 (Ga. 2012) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in admitting statements the defendant made during a custodial interrogation under former O.C.G.A. § 24-3-50 because officers' statements that the defendant had to "man up" and "own up" to the charges and that the defendant's assistance would go a long way in helping the defendant out did not constitute promises of a lighter sentence; upon beginning the interview with the police, the defendant immediately told the officers that the defendant was willing to work with the officers if the officers were willing to work with the defendant, and the officers responded by stating that the officers had no authority to make promises but would listen. Nowell v. State, 312 Ga. App. 150, 717 S.E.2d 730 (2011) (decided under former O.C.G.A. § 24-3-50).

Smoking does not render hope of benefit. — Permitting defendant to smoke was a collateral benefit and was insufficient hope of benefit to render defendant's statement inadmissible. White v. State, 266 Ga. 134, 465 S.E.2d 277 (1996) (decided under former O.C.G.A. § 24-3-50).

Notifying prosecution of cooperation does not render hope of benefit. — Merely telling a defendant that his or her cooperation will be made known to the prosecution does not constitute the "hope of benefit" sufficient to render a statement inadmissible. Leigh v. State, 223 Ga. App. 726, 478 S.E.2d 905 (1996) (decided under former O.C.G.A. § 24-3-50); Lawrence v. State, 227 Ga. App. 70, 487 S.E.2d 608 (1997) (decided under former O.C.G.A. § 24-3-50).

Officer's statement that defendant's cooperation would be made known to the prosecutor did not render defendant's confession to molesting defendant's stepdaughter involuntary. Frei v. State, 252 Ga. App. 535, 555 S.E.2d 530 (2001) (decided under former O.C.G.A. § 24-3-50).

Notifying judge of cooperation does not render hope of benefit. — Detective's implied promises to tell the judge of defendant's cooperation did not constitute the kind of hope of benefit contemplated by former O.C.G.A. § 24-3-50. Tucker v. State, 231 Ga. App. 210, 498 S.E.2d 774 (1998) (decided under former O.C.G.A. § 24-3-50).

Though the defendant enumerated as error the admission of a custodial statement into evidence, claiming the statement was induced by hope of benefit of a lesser sentence in that a detective stated that the detective was going to be the prosecuting officer and that the detective would like to be able to tell the judge that the defendant was honest and cooperated

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with the detective since the detective specifically testified that the detective did not promise the defendant any hope of benefit, the statement was not coerced under former O.C.G.A. § 24-3-50 and was admissible. Cooper v. State, 257 Ga. App. 896, 572 S.E.2d 417 (2002) (decided under former O.C.G.A. § 24-3-50).

Detectives did not improperly induce or promise defendant that they would talk to the judge and the prosecutor about defendant being cooperative, which might increase defendant's chances of getting a bond, as these statements did not guarantee defendant anything. Jackson v. State, 262 Ga. App. 451, 585 S.E.2d 745 (2003) (decided under former O.C.G.A. § 24-3-50).

An officer's implied promise to tell the trial judge of the defendant's cooperation was not a "hope of benefit" making defendant's statements involuntary under former O.C.G.A. § 24-3-50. Davis v. State, 292 Ga. App. 782, 666 S.E.2d 56 (2008) (decided under former O.C.G.A. § 24-3-50).

Statement that defendant was in big trouble. — Interrogating officer's statements to defendant that defendant was in big trouble and, in effect, that the officer could help defendant if defendant cooperated were not offers of hope of benefit or threat of injury. Davis v. State, 245 Ga. App. 508, 538 S.E.2d 159 (2000) (decided under former O.C.G.A. § 24-3-50).

Mere explanations of defendant's arrest and of the law did not constitute an improper offer of some hope of benefit. State v. Todd, 250 Ga. App. 265, 549 S.E.2d 821 (2001) (decided under former O.C.G.A. § 24-3-50).

Officer's urging defendant to tell the truth if defendant wanted ":the officer] to be in a position to do anything to say that you cooperated" did not create a hope of a lighter sentence or any other hope of benefit. Caldwell v. State, 249 Ga. App. 885, 549 S.E.2d 449 (2001) (decided under former O.C.G.A. § 24-3-50).

Nothing officer said implied freedom for confession. — Defendant's custodial statement to the police was admissible because it was made voluntarily as defendant did not contend that an interrogating officer mentioned a confession or sentence, only that the officer periodically stated that defendant would soon be released, while questioning continued; nothing suggested that freedom would be forthcoming if defendant confessed to committing crimes. Brown v. State, 278 Ga. 724, 609 S.E.2d 312 (2004) (decided under former O.C.G.A. § 24-3-50).

Promise of benefit to relatives. — While the defendant claimed that a custodial statement was made to keep defendant's spouse from going to jail, and therefore was made under duress, an agent testified that the agent told the defendant that the spouse was not going to be arrested, and denied telling the spouse that the spouse was going to be arrested, so a trial court's ruling that the defendant's statement was voluntary pursuant to former O.C.G.A. § 24-3-50 was not error. Kania v. State, 280 Ga. App. 356, 634 S.E.2d 146 (2006) (decided under former O.C.G.A. § 24-3-50).

Denial of a defendant's motion to suppress a confession was proper as a police officer testified that the confession was not given in reliance on a promise not to arrest the two women in the house; further, the defendant's testimony that the confession was given in exchange for not arresting the women did not render the confession involuntary since there was no promise to treat the defendant favorably and any promise of a benefit to the defendant's relatives was collateral to the defendant. Jackson v. State, 280 Ga. App. 716, 634 S.E.2d 846 (2006) (decided under former O.C.G.A. § 24-3-50).

Officer's promise to help the defendant with a drug problem was a collateral benefit, and did not bear on the question of punishment; hence, the trial court did not clearly err in admitting the defendant's statement in evidence as such did not amount to a promise of leniency in exchange for the statement. Smith v. State, 281 Ga. App. 91, 635 S.E.2d 385 (2006) (decided under former O.C.G.A. § 24-3-50).

Investigator's actions in requesting that the defendant's bond be lowered did not amount to the slightest hope of benefit under former O.C.G.A. § 24-3-50.

Gonzalez v. State, 283 Ga. App. 843, 643 S.E.2d 8 (2007) (decided under former O.C.G.A. § 24-3-50).

Arranging meeting between spouses is not hope of benefit. — Accommodating a meeting between the defendant's wife and the defendant did not amount to the "slightest hope of benefit" which would have rendered the defendant's statement involuntary and inadmissible as it was not uncommon for a suspect in custody to be allowed to speak with a family member, and the record showed that the defendant reinitiated further communication with police and made a knowing and intelligent waiver of any right to counsel previously invoked. Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007) (decided under former O.C.G.A. § 24-3-50).

Officer's comments about punishment did not impact confession. — Defendant's statement introduced into evidence was voluntarily given without any hope of benefit; the interrogating officer's comments about punishment amounted to no more than an explanation of the seriousness of the defendant's situation, and the officer's requests to the defendant to permit the officer to help were the equivalent of the officer's urging the defendant to tell the truth, which would not invalidate a confession. Preston v. State, 282 Ga. 210, 647 S.E.2d 260 (2007) (decided under former O.C.G.A. § 24-3-50).

Officer's statement regarding children when parents are in custody. — An officer's statement that if adults were arrested, their children would routinely be taken to the county department of family and children services was merely a recounting of fact, not a threat of injury or promise of hope of benefit within the meaning of former O.C.G.A. § 24-3-50. Rubia v. State, 287 Ga. App. 122, 650 S.E.2d 797 (2007) (decided under former O.C.G.A. § 24-3-50).

Coaxing by investigator did not render statement inadmissible. — With regard to a defendant's conviction for child molestation, the trial court did not err by admitting the defendant's confession at trial as although the defendant may have been coaxed into providing the statement by an investigator, in doing so, the investigator did not offer any hope of benefit or fear of injury. Dexter v. State, 293 Ga. App. 388, 667 S.E.2d 172 (2008) (decided under former O.C.G.A. § 24-3-50).

Use of word "favors" by officer does create hope of benefit. — An officer told the defendant that one of the defendant's accomplices had told the officer the truth but the other two had not, so those accomplices would get no "favors" from the officer. As the officer's reference to "favors" did not suggest that the defendant might receive a lighter sentence by cooperating, the defendant's subsequent statement was admissible under former O.C.G.A. § 24-3-50. Simpson v. State, 293 Ga. App. 760, 668 S.E.2d 451 (2008) (decided under former O.C.G.A. § 24-3-50).

Officer informing of potential legal consequences. — Defendant's convictions for armed robbery and robbery by intimidation were appropriate because the defendant voluntarily confessed to the defendant's involvement in the crimes. A statement by police that made the defendant aware of the potential legal consequences was in the nature of a mere truism and did not constitute a threat of injury or promise of benefit within the meaning of former O.C.G.A. § 24-3-50. Cantrell v. State, 299 Ga. App. 746, 683 S.E.2d 676 (2009) (decided under former O.C.G.A. § 24-3-50).

Detective made no promises, just general statement. — When the detective told defendant that the detective could not and would not make any promises, just that any cooperation would be favorable to the investigation, defendant's statement was made voluntarily without the slightest hope of benefit. Evans v. State, 248 Ga. App. 99, 545 S.E.2d 641 (2001) (decided under former O.C.G.A. § 24-3-50).

Codefendant's motion to suppress was properly denied as the codefendant's confession was not made with a hope of benefit in violation of former O.C.G.A. § 24-3-50 since the codefendant told the detectives that the codefendant wanted to go home and a detective replied "let's straighten this out and we'll see about getting you home"; the statement did not relate to either the charge or sentence

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that the codefendant was facing, nor did the detective give codefendant a hope of a lighter sentence in return for the codefendant's statement. Smith v. State, 269 Ga. App. 133, 603 S.E.2d 445 (2004) (decided under former O.C.G.A. § 24-3-50).

Promise of leniency contingent on future assistance. — Defendant's confession was admissible because the trial court could have concluded that any promise of leniency for defendant was contingent on future assistance by defendant and was unrelated to defendant's confession. Bailey v. State, 248 Ga. App. 120, 545 S.E.2d 659 (2001) (decided under former O.C.G.A. § 24-3-50).

Victim's mother promised leniency. — Although the victim's mother allegedly agreed to have the charges dropped if the defendant confessed, pursuant to former O.C.G.A. § 24-3-50, the confession was made voluntarily, and could be submitted to the jury for consideration. Davenport v. State, 277 Ga. App. 758, 627 S.E.2d 133 (2006) (decided under former O.C.G.A. § 24-3-50).

Confessions made during plea negotiations with the prosecutor are not admissible because the confessions are made in the hope that the defendant will get a better deal than otherwise possible. Gray v. State, 240 Ga. App. 716, 523 S.E.2d 626 (1999) (decided under former O.C.G.A. § 24-3-50).

Express language not required. — When a conviction was based upon confessions induced by the threatening acts of the parties obtaining the confessions, though no language was used expressly extending the hope of benefit or fear of injury, a new trial will be ordered. Irwin v. State, 54 Ga. 39 (1875) (decided under former Code 1873, § 3793).

Slightest hope or remotest fear excludes. — Confessions are not admissible if there is evidence, arising from the testimony as to the circumstances under which the confession was made, that the making of the confession was induced by the slightest hope of benefit or the remotest fear of injury. King v. State, 155 Ga. 707, 118 S.E. 368 (1923) (decided under former Penal Code 1910, § 1032); Goodwin v. State, 45 Ga. App. 593, 165 S.E. 453 (1932) (decided under former Penal Code 1910, § 1032); McLemore v. State, 181 Ga. 462, 182 S.E. 618 (1935) (decided under former Code 1933, § 38-411); Jordan v. State, 77 Ga. App. 656, 48 S.E.2d 756 (1948) (decided under former Code 1933, § 38-411); Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626 (1950) (decided under former Code 1933, § 38-411); Harrison v. State, 253 Ga. App. 179, 558 S.E.2d 760 (2002) (decided under former O.C.G.A. § 24-3-50).

Although inducement was held out by one person, and the confession was subsequently made to another, who has no knowledge of such inducement, and who offers none personally, such confession is involuntary. Thomas v. State, 169 Ga. 182, 149 S.E. 871 (1929) (decided under former Penal Code 1910, § 1032).

Custody does not render confession involuntary. — Mere fact that the accused was in custody, or under arrest at the time the confession was made, did not render the confession incompetent if in fact it was made voluntarily within the legal meaning of the term. Wilburn v. State, 141 Ga. 510, 81 S.E. 444 (1914) (decided under former Penal Code 1910, § 1032); Bradberry v. State, 170 Ga. 859, 154 S.E. 344 (1930) (decided under former Penal Code 1910, § 1032); Russell v. State, 196 Ga. 275, 26 S.E.2d 528 (1943) (decided under former Code 1933, § 38-411).

Even if arrest is illegal. — Voluntary confession or incriminatory statement is not inadmissible merely because it was made pending an illegal arrest. Campbell v. State, 90 Ga. App. 1, 81 S.E.2d 880 (1954) (decided under former Code 1933, § 38-411).

Statements made when reason for arrest is unknown. — Statement made by an accused is not rendered inadmissible solely because the accused has not been told why the accused was under arrest at the time of the making of the statement. Moses v. State, 245 Ga. 180, 263 S.E.2d 916, cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60 (1980), overruled on other grounds, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993)

(decided under former Code 1933, § 38-411).

Failure to inform defendant. — Fact that the state did not show that the defendant prior to making certain incriminatory statements had been apprised by the interrogating officers of the nature of the investigation and its possible consequences did not affect the admissibility or voluntary character of the statements made by the defendant. Gossett v. State, 105 Ga. App. 17, 123 S.E.2d 322 (1961) (decided under former Code 1933, § 38-411).

Surroundings by which the declarant may be environed may be more ominous and more potential in inducing a confession than the use of threats. Moon v. State, 12 Ga. App. 614, 77 S.E. 1088 (1913) (decided under former Penal Code 1910, § 1032).

Legality, duration, and conditions of detention are relevant in the determination of voluntariness of an accused's statement. Pless v. State, 142 Ga. App. 594, 236 S.E.2d 842 (1977) (decided under former Code 1933, § 38-411).

Statement that it is always better to tell the truth is not such a hope of benefit as would render a confession inadmissible. Wilson v. State, 19 Ga. App. 759, 92 S.E. 309 (1917) (decided under former Penal Code 1910, § 1032); Hicks v. State, 178 Ga. 561, 173 S.E. 395 (1934) (decided under former Code 1933, § 38-411); McKennon v. State, 63 Ga. App. 466, 11 S.E.2d 416 (1940) (decided under former Code 1933, § 38-411); Turner v. State, 203 Ga. 770, 48 S.E.2d 522 (1948) (decided under former Code 1933, § 38-411); Daniel v. State, 150 Ga. App. 798, 258 S.E.2d 604 (1979) (decided under former Code 1933, § 38-411); Askea v. State, 153 Ga. App. 849, 267 S.E.2d 279 (1980) (decided under former Code 1933, § 38-411); Fowler v. State, 246 Ga. 256, 271 S.E.2d 168 (1980) (decided under former Code 1933, § 38-411); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549 (1981) (decided under former Code 1933, § 38-411); Caffo v. State, 247 Ga. 751, 279 S.E.2d 678 (1981) (decided under former Code 1933, § 38-411); Kettman v. State, 257 Ga. 603, 362 S.E.2d 342 (1987) (decided under former O.C.G.A. § 24-3-50); Stowers v. State, 205 Ga. App. 518, 422 S.E.2d 870 (1992), cert. denied, 205 Ga. App. 901, 422 S.E.2d 870 (1992) (decided under former O.C.G.A. § 24-3-50); Henry v. State, 265 Ga. 732, 462 S.E.2d 737 (1995) (decided under former O.C.G.A. § 24-3-50); Duke v. State, 268 Ga. 425, 489 S.E.2d 811 (1997) (decided under former O.C.G.A. § 24-3-50); Gilliam v. State, 268 Ga. 690, 492 S.E.2d 185 (1997) (decided under former O.C.G.A. § 24-3-50); Collis v. State, 252 Ga. App. 659, 556 S.E.2d 221 (2001) (decided under former O.C.G.A. § 24-3-50).

Statements neither coerced nor hope induced. — Trial court did not err by admitting into evidence defendant's pretrial statements in response to allegations of physical child abuse by officers from another jurisdiction and officials' statements telling defendant defendant's cooperation would be conveyed to the prosecuting attorney because the defendant personally never claimed defendant's statement was given either under the force of coercion or in the hope of a benefit. Helton v. State, 206 Ga. App. 600, 426 S.E.2d 172 (1992) (decided under former O.C.G.A. § 24-3-50).

Officer discussing right to bury relatives after suspect invoking right to counsel. — Officer's statement to the defendant, given after the defendant invoked the right to counsel, in which the officer expressed the officer's knowledge of the request for a lawyer, urged the defendant not to say anything, and told the defendant that everyone should have the opportunity to bury their loved ones, as did the officer recently when the officer's father and brother died, was not calculated to procure an untrue statement, and because the defendant was not threatened with fear of injury nor promised hope of benefit, because there was no deception, nor did the police inject religion into the exchange, and because the officer's speech was not coercive police activity, the police did not violate the defendant's Fifth Amendment right against coerced self-incrimination; however, while the defendant's statements themselves, in which the defendant confessed to killing the defendant's uncle and told the police where the defendant disposed of the body,

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were inadmissible based on the defendant's invocation of the right to counsel, nevertheless the fruits of the statements were admissible. State v. Woods, 280 Ga. 758, 632 S.E.2d 654 (2006) (decided under former O.C.G.A. § 24-3-50).

Statement by officer that the officer was considering charging defendant's girlfriend was a mere "truism" or recounting of facts, rather than a threat of injury or promise of benefit. Anderson v. State, 224 Ga. App. 608, 481 S.E.2d 595 (1997) (decided under former O.C.G.A. § 24-3-50).

Advice from officer that suspect will feel better if the suspect tells the truth will not render confession inadmissible. Caffo v. State, 247 Ga. 751, 279 S.E.2d 678 (1981) (decided under former Code 1933, § 38-411).

Officer's statement that "it would mean a lot in the end." — Juvenile's statement was not induced in the hope of benefit based on an officer's comment that the juvenile needed to tell the truth "because it would mean a lot in the end." In re J.L., 229 Ga. App. 447, 494 S.E.2d 274 (1997) (decided under former O.C.G.A. § 24-3-50).

Officer's statement after arrest that "no lawyer can do you any good at this point" did not render defendant's statements involuntary. Gober v. State, 264 Ga. 226, 443 S.E.2d 616 (1994) (decided under former O.C.G.A. § 24-3-50).

Officer's statement that spouse was target of investigation. — When an officer interviewing the defendant told the defendant that the defendant's spouse was the target of an investigation, this did not make the defendant's confession involuntary under former O.C.G.A. § 24-3-50. The officer, who sought to deflect attention from the spouse's role as the tipster who led police to the defendant, had not created a fear of injury invalidating the confession as the defendant had not exonerated the spouse during the interview but implicated the spouse in other illegal activity. Smith v. State, 291 Ga. App. 535, 662 S.E.2d 305 (2008) (decided under former O.C.G.A. § 24-3-50).

Fact that a confession was procured by the employment of falsehood by a police officer, detective, or other person does not alone exclude the confession, where not calculated to do other than elicit the truth and does not prevent the confession from being free and voluntary. Moore v. State, 230 Ga. 839, 199 S.E.2d 243 (1973) (decided under former Code 1933, § 38-411).

Confession otherwise admissible is not inadmissible because the confession was prompted by advice of a relative of the defendant. Dick v. State, 246 Ga. 697, 273 S.E.2d 124 (1980), cert. denied, 451 U.S. 976, 101 S. Ct. 2059, 68 L. Ed. 2d 357 (1981) (decided under former Code 1933, § 38-411); Cunningham v. State, 248 Ga. 835, 286 S.E.2d 427 (1982) (decided under former Code 1933, § 38-411).

Confession obtained through trickery. — Defendant's custodial statement to the police was admissible because the statement was made voluntarily as even if an interrogating officer allowed defendant to overhear a coconspirator's implication of defendant, there was no evidence that the officer was attempting to procure an untrue statement from defendant. Brown v. State, 278 Ga. 724, 609 S.E.2d 312 (2004) (decided under former O.C.G.A. § 24-3-50).

Hope of lighter punishment, induced by other person, is usually "hope of benefit" referred to in former O.C.G.A. § 24-3-50. Wesley v. State, 177 Ga. App. 877, 341 S.E.2d 507 (1986), overruled on other grounds, Gilbert v. State, 193 Ga. App. 283, 388 S.E.2d 18 (1989) (decided under former O.C.G.A. § 24-3-50); State v. Barber, 197 Ga. App. 353, 398 S.E.2d 419 (1990) (decided under former O.C.G.A. § 24-3-50); In re R.J.C., 210 Ga. App. 286, 435 S.E.2d 759 (1993) (decided under former O.C.G.A. § 24-3-50).

Confession inadmissible after sheriff promised prosecution on only one count. — Defendant's confessions made to a sheriff were based on a promise that the defendant would be prosecuted on only one count of burglary and were therefore involuntary under former O.C.G.A. § 24-3-50. However, the defendant had identified defendant's connection with the defendant's accomplices prior to the invol-

untary statements, and the defendant's accomplices' testimony against the defendant was still admissible. Stidham v. State, 299 Ga. App. 858, 683 S.E.2d 906 (2009) (decided under former O.C.G.A. § 24-3-50).

Statement induced by written promise not to press additional charges held involuntary. — Defendant was granted new trial for convictions for felony murder and other crimes after it was determined that defendant's statement to detectives as to the location of the gun used in the murder and defendant's provision of the gun to two co-indictees was involuntary and inadmissible under former O.C.G.A. § 24-3-50 as the statement was induced by a written promise not to press any additional weapons charges against defendant. Foster v. State, 283 Ga. 484, 660 S.E.2d 521 (2008) (decided under former O.C.G.A. § 24-3-50).

Statement that others will remain under arrest until possessor of contraband determined. — When the officers told the defendant that defendant's stepfather and girlfriend, who were also arrested at the trailer, were going to remain under arrest pending a determination of who was in possession of the contraband, such a statement falls into the category of a mere "truism" or "recounting of the facts," rather than an offer of benefit or threat of injury. Sampson v. State, 165 Ga. App. 833, 303 S.E.2d 77 (1983) (decided under former O.C.G.A. § 24-3-50).

Statement that cooperation would be noted in court not hope of benefit. — Police officer's statement to a 17-year-old defendant that it would be better if the defendant cooperated with the police, and if the defendant does so, the officer will have to say in court that the defendant cooperated, does not constitute a "hope of benefit" making a subsequent confession inadmissible. Rounds v. State, 166 Ga. App. 212, 303 S.E.2d 543 (1983) (decided under former O.C.G.A. § 24-3-50).

Offering to make known a suspect's confession to the district attorney and the trial judge is not an offer of benefit. McKenzie v. State, 187 Ga. App. 840, 371 S.E.2d 869, cert. denied, 187 Ga. App. 907, 371 S.E.2d 869 (1988) (decided under former O.C.G.A. § 24-3-50); Sims v. State, 197 Ga. App. 214, 398 S.E.2d 244 (1990) (decided under former O.C.G.A. § 24-3-50).

Agreeing to tell the trial judge of the defendant's cooperation if the defendant confesses does not constitute the "hope of benefit" contemplated by former O.C.G.A. § 24-3-50. Moore v. State, 179 Ga. App. 488, 347 S.E.2d 318 (1986) (decided under former O.C.G.A. § 24-3-50); Butler v. State, 194 Ga. App. 208, 390 S.E.2d 278 (1990) (decided under former O.C.G.A. § 24-3-50); Carswell v. State, 268 Ga. 531, 491 S.E.2d 343 (1997) (decided under former O.C.G.A. § 24-3-50); Martin v. State, 271 Ga. 301, 518 S.E.2d 898 (1999) (decided under former O.C.G.A. § 24-3-50).

Encouraging cooperation by a defendant and promising to bring defendant's cooperation to the attention of the prosecutor or the trial judge does not constitute the "hope of benefit" contemplated by former O.C.G.A. § 24-3-50. Bussey v. State, 202 Ga. App. 483, 414 S.E.2d 710 (1992) (decided under former O.C.G.A. § 24-3-50).

Investigator's statement to defendant that if the defendant cooperated, the investigator would let the district attorney know and it might help the defendant did not impermissibly hold out some hope of benefit so as to make defendant's confession inadmissible. Lyles v. State, 221 Ga. App. 560, 472 S.E.2d 132 (1996) (decided under former O.C.G.A. § 24-3-50).

Evidence that investigator suggested defendant could be charged with lesser offense. — An investigating officer's admission that the officer discussed bringing a lesser charge of theft by taking rather than armed robbery with a defendant, and the specific language in the defendant's written statement expressly admitting to the lesser offense, along with the statement to another officer that the crime was theft by taking, supported the trial court's factual finding that the defendant gave the custodial statement with the hope of benefit. Thus, the trial court properly granted the defendant's motion to suppress the statement. State v. Klepper, 301 Ga. App. 753, 688

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S.E.2d 673 (2009) (decided under former O.C.G.A. § 24-3-50).

Officer's statement that the officer wanted to "help" the defendant was not an offer of reward which tainted the confession by inducing a hope of benefit in the defendant making the statement involuntary under former O.C.G.A. § 24-3-50. Cooper v. State, 256 Ga. 234, 347 S.E.2d 553 (1986) (decided under former O.C.G.A. § 24-3-50).

Officer's statement to a suspect that the officer was trying to help the suspect did not constitute the "slightest hope of benefit" under former O.C.G.A. § 24-3-50 and did not require the exclusion of an inculpatory statement the defendant made in response to the officer's statement. Stringer v. State, 285 Ga. 842, 684 S.E.2d 590 (2009) (decided under former O.C.G.A. § 24-3-50).

Promises to obtain psychiatric help and medical attention for defendant were not the kind of "hope of benefit" which would invalidate defendant's subsequent confession. Head v. State, 180 Ga. App. 901, 350 S.E.2d 854 (1986) (decided under former O.C.G.A. § 24-3-50).

Hope of benefit raised initially by defendant does not render confession inadmissible. — When the officer who took defendant's statement testified that it was defendant who first raised the notion of a reduction of bail bond, defendant's hope of benefit was not induced by another and would not serve to render defendant's confession inadmissible. Heard v. State, 165 Ga. App. 252, 300 S.E.2d 213 (1983) (decided under former O.C.G.A. § 24-3-50); Pounds v. State, 189 Ga. App. 809, 377 S.E.2d 722 (1989) (decided under former O.C.G.A. § 24-3-50).

Attorney's advice that statement might lead to plea negotiation not inducement by state. — Even though attorney's advice to defendant was that if the defendant made a statement the state might negotiate a plea, defendant's statement was not the result of inducement by others since the questioning police officer made it clear that no promises were to be made in exchange for the statement. Williams v. State, 250 Ga. 553, 300 S.E.2d 301, cert. denied, 462 U.S. 1124, 103 S. Ct. 3097, 77 L. Ed. 2d 1356 (1983) (decided under former O.C.G.A. § 24-3-50).

Codefendant's prior confession does not affect voluntariness. — That one party to the commission of a crime has confessed to that party's participation in the crime does not render the defendant's later confession involuntary. Whittington v. State, 252 Ga. 168, 313 S.E.2d 73 (1984) (decided under former O.C.G.A. § 24-3-50).

Promise to help keep defendant out of certain prison. — Confession is not rendered inadmissible by an assurance that whatever help could be given would be given in keeping the defendant out of a certain prison, since this is similar to a promise to inform the court of a defendant's cooperation. Patrick v. State, 169 Ga. App. 302, 312 S.E.2d 385 (1983), aff'd, 252 Ga. 509, 314 S.E.2d 909 (1984) (decided under former O.C.G.A. § 24-3-50).

Promise to end adverse publicity. — When an inculpatory statement was made by the fire department lieutenant in return for the investigator's alleged promise to "stop all the publicity against the fire and police department and not arrest and persecute anyone else," the promise pertained to collateral benefits and the trial court did not err in ruling the statement to be voluntary and admissible. Johnson v. State, 170 Ga. App. 71, 316 S.E.2d 160 (1984) (decided under former O.C.G.A. § 24-3-50).

Promise of collateral benefit. — An investigator's statement that the investigator would talk to the district attorney's office at a later time about having a warrant against the defendant dismissed was no more than a promise of a collateral benefit and thus did not make the defendant's custodial statement inadmissible under former O.C.G.A. §§ 24-3-50 and 24-3-51 (see now O.C.G.A. § 24-8-824 and 24-8-825). Boone v. State, 293 Ga. App. 654, 667 S.E.2d 880 (2008) (decided under former O.C.G.A. § 24-3-50).

It was not error for a trial court to decline to exclude the defendant's custodial statements on the theory that the statements were made based on an improper hope of benefit because an officer's promise not to tell the defendant's wife

that the defendant had been arrested merely promised a collateral benefit which did not render the statements excludable. Millsaps v. State, 310 Ga. App. 769, 714 S.E.2d 661 (2011) (decided under former O.C.G.A. § 24-3-50).

Statement that the defendant "needed" to tell the police officers if defendant knew anything about the crime does not render the confession involuntary. Whittington v. State, 252 Ga. 168, 313 S.E.2d 73 (1984) (decided under former O.C.G.A. § 24-3-50).

Confession not induced by fear. — Trial court's determination that defendant's confession was not rendered involuntary because the confession was induced by fear because of a deputy's statement during the post arrest interview purportedly threatening the defendant with a life sentence was supported by sufficient evidence. Baker v. State, 211 Ga. App. 515, 439 S.E.2d 668 (1993) (decided under former O.C.G.A. § 24-3-50).

Hollering by interrogating officer not "fear of injury" negating voluntariness. — Defendant's fear when the detective interrogating defendant "hollered" at defendant was self-induced and not the "fear of injury" contemplated by former O.C.G.A § 24-3-50 since there was no evidence that the police had threatened to harm the defendant if the defendant did not make a statement. Mungin v. State, 183 Ga. App. 290, 358 S.E.2d 673, cert. denied, 183 Ga. App. 906, 358 S.E.2d 673 (1987), cert. denied, 485 U.S. 908, 108 S. Ct. 1083, 99 L. Ed. 2d 242 (1988) (decided under former O.C.G.A. § 24-3-50).

Intimidation not established. — Defendant's claim that defendant's confession was the product of intimidation was not established by defendant's testimony that one of the interrogating officers became angry and brushed the officer's jacket back, revealing the officer's gun. Raulerson v. State, 268 Ga. 623, 491 S.E.2d 791 (1997), cert. denied, 523 U.S. 1127, 118 S. Ct. 1815, 140 L. Ed. 2d 953 (1998) (decided under former O.C.G.A. § 24-3-50).

Withholding medical attention from defendant until after an interrogation was concluded does not render the defendant's statement to the police involuntary and having been induced by the hope of benefit since the evidence upholds the voluntariness of the statement. Cannon v. State, 257 Ga. 475, 360 S.E.2d 592 (1987) (decided under former O.C.G.A. § 24-3-50).

Absence of counsel. — It is not the law of this state that when a prisoner is known by police to be represented by counsel, anything the prisoner says to police in absence of counsel is per se inadmissible, whether voluntary or not. Pierce v. State, 235 Ga. 237, 219 S.E.2d 158 (1975) (decided under former Code 1933, § 38-411).

Considering the totality of the circumstances a confession may be shown to be voluntary even though made in the absence of counsel after counsel has been retained or appointed. Pierce v. State, 235 Ga. 237, 219 S.E.2d 158 (1975) (decided under former Code 1933, § 38-411).

Offer of settlement. — Confession freely and voluntarily made is admissible in evidence against the defendant, although such confession is coupled with the proposition on defendant's part to settle or compromise the case or charge against the defendant; such an offer of settlement not being induced by another. Hecox v. State, 105 Ga. 625, 31 S.E. 592 (1898) (decided under former law); Grubbs v. State, 53 Ga. App. 377, 186 S.E. 140 (1936) (decided under former Code 1933, § 38-411).

Defendant's confession made to the victim's parents was not involuntary on the basis that the confession was induced by the hope of benefit—specifically, the victim's parents' representation that the parents would not involve the police. Wiley v. State, 245 Ga. App. 580, 538 S.E.2d 483 (2000) (decided under former O.C.G.A. § 24-3-50).

Defendant must object to confession. — When evidence of a confession is offered by the state in a criminal case, and there is no objection by the defendant upon the ground that the alleged confession was not voluntarily made, the confession is admissible as a voluntary confession. Washington v. State, 24 Ga. App. 65, 100 S.E. 31 (1919) (decided under former Penal Code 1910, § 1032).

Presumption of waiver. — If a prima facie case of admissibility of a confession

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is sought to be improperly established, but no proper objections are made to its insufficiency at the trial, the right to object will be presumed to have been waived. McLemore v. State, 181 Ga. 462, 182 S.E. 618 (1935) (decided under former Code 1933, § 38-411).

If a prima facie case of admissibility is sought to be improperly established, but no proper objections are made to its sufficiency at the trial, the right to object will be presumed to have been waived, and where timely objection or motion is made to exclude such testimony which at best still leaves in doubt whether statements were made which may have induced the confession or inculpatory statement, it is error not to reject such testimony of the confession or inculpatory statement. Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626 (1950) (decided under former Code 1933, § 38-411).

Failure to object when confession involuntary. — When not made freely and voluntarily, a confession is presumed to be legally false, and cannot be the underlying basis of a conviction; the failure to object to such evidence does not give the confession probative value where it is shown without dispute that the confession was not freely and voluntarily made. McKennon v. State, 63 Ga. App. 466, 11 S.E.2d 416 (1940) (decided under former Code 1933, § 38-411).

If the confession is admitted without timely objection and the evidence shows without dispute that the confession was not voluntary, then, whether the confession is objected to or not it is not legal evidence and has no probative value. The evidence, exclusive of the confession, must be sufficient to authorize a verdict of guilty after it appears that the confession was not voluntary, for the failure to object to the confession would not give the confession probative value; and since, without the confession, the verdict is unsupported by the evidence, the case, if not reversed on some other special ground, must be reversed solely on the general grounds. Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504 (1942) (decided under former Code 1933, § 38-411).

Absence of a signed waiver of rights does not render a confession inadmissible if the evidence otherwise authorized a finding of voluntariness. Patterson v. State, 149 Ga. App. 438, 254 S.E.2d 445 (1979) (decided under former Code 1933, § 38-411).

Fact that no signed waiver was obtained from defendant did not militate against the finding that defendant's confession was freely and voluntarily given. Miller v. State, 155 Ga. App. 587, 271 S.E.2d 719 (1980) (decided under former Code 1933, § 38-411).

Objection after verdict. — Confessions are legal evidence. Unless the circumstances under which the confessions were made show the confessions were not voluntary, the confessions are admissible. If they are given in, and not objected to, it is too late after the verdict to say there was not sufficient inquiry into the circumstances. Hill v. State, 214 Ga. 794, 107 S.E.2d 662 (1959) (decided under former Code 1933, § 38-411).

Capacity to waive. — Mere fact that the defendant was 21 years old with a sixth grade education does not lead to the conclusion that the defendant was incapable of knowingly, voluntarily, and intelligently waiving defendant's constitutional rights. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980) (decided under former Code 1933, § 38-411); Cunningham v. State, 248 Ga. 835, 286 S.E.2d 427 (1982) (decided under former Code 1933, § 38-411).

Lack of literacy does not dictate determination that there has been no voluntary knowledgeable waiver. Watson v. State, 159 Ga. App. 618, 284 S.E.2d 636 (1981) (decided under former Code 1933, § 38-411).

A statement may be voluntary even if the suspect has a limited education. Harrison v. State, 253 Ga. App. 179, 558 S.E.2d 760 (2002) (decided under former O.C.G.A. § 24-3-50).

Subsequent waiver valid. — Although defendant had refused to sign a written acknowledgment that defendant had been informed of defendant's right to remain silent and right to representation, defendant's subsequent acknowledgment

in writing two hours later that the defendant had been informed of these rights supported the trial court's findings that defendant's statement was freely and voluntarily given. Pierce v. State, 209 Ga. App. 366, 433 S.E.2d 641 (1993) (decided under former O.C.G.A. § 24-3-50).

Time lapse. — Ten-hour lapse between the time of the waiver of rights and the actual confession at which time previous warnings were reiterated does not render a confession inadmissible. Dick v. State, 246 Ga. 697, 273 S.E.2d 124 (1980), cert. denied, 451 U.S. 976, 101 S. Ct. 2059, 68 L. Ed. 2d 357 (1981) (decided under former Code 1933, § 38-411).

Erroneous promise by police did not make confession inadmissible. — Detective erroneously promised during an interview that a defendant would not be charged with an offense that required sex offender registration because a conviction for electronically furnishing obscene material to a minor under O.C.G.A. § 16-12-100.1 would require registration as a sex offender under O.C.G.A. § 42-1-12(e)(2); prior to the erroneous promise, the defendant's confession was voluntarily made under former O.C.G.A. § 24-3-50 as the confession was made without the slightest hope of benefit. State v. Lee, 295 Ga. App. 49, 670 S.E.2d 879 (2008) (decided under former O.C.G.A. § 24-3-50).

Question to witness as to voluntariness of confession does not call for conclusion. — When a witness testified to the circumstances surrounding the confession, showing clearly that the confession was voluntary, a question then posed to the witness regarding the confession's voluntariness does not call for a conclusion. Satterfield v. State, 248 Ga. 538, 285 S.E.2d 3 (1981) (decided under former Code 1933, § 38-411).

Juvenile's confession voluntary despite officer's statement to drive home. — Because a police officer's statement to defendant juvenile that the officer would drive defendant home once they were through, even if construed as the promise of a benefit for defendant's confession, was only a collateral benefit that would not implicate the provisions of former O.C.G.A. § 24-3-50; thus, the trial court did not clearly err in finding the juvenile's statements to police were voluntary. In re D. T., 294 Ga. App. 486, 669 S.E.2d 471 (2008) (decided under former O.C.G.A. § 24-3-50).

Facts sufficient to support voluntariness. — When a police officer testified that the officer twice read defendant the defendant's rights, that the defendant indicated that the defendant did not want a lawyer but wanted to make a statement, that the defendant did not appear to be under the influence of alcohol or drugs, and that the defendant's statement was made without threat or coercion or under any offer of hope or benefit, there was no error in admitting the defendant's statement. Jones v. State, 194 Ga. App. 746, 391 S.E.2d 663 (1990) (decided under former O.C.G.A. § 24-3-50).

Defendant's interrogation in the office of a retail store by as many as five police officers at different times did not evince an unduly coercive environment since the main interrogating officer testified and denied the making of any promises or threats to defendant. Pinson v. State, 207 Ga. App. 734, 429 S.E.2d 106 (1993) (decided under former O.C.G.A. § 24-3-50).

In defendant's trial on charges of child molestation and statutory rape, the trial court found that defendant's waiver of Miranda rights applied to statements defendant made after defendant took a polygraph examination and not just to statements defendant made while taking the test, and the appellate court sustained that finding and held that the trial court properly admitted defendant's statements. Little v. State, 260 Ga. App. 87, 579 S.E.2d 84 (2003) (decided under former O.C.G.A. § 24-3-50).

Prisoner's habeas petition under 28 U.S.C. § 2254 was properly denied because the state habeas court correctly applied controlling federal precedent in finding that there was no ineffective assistance of counsel under the Sixth Amendment in that the prisoner's confession was made while the prisoner was sober and there was nothing to support an argument of involuntariness or intoxication. Therefore, the confession was admissible both under the due process clause of the Fourteenth Amendment and former O.C.G.A.

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§ 24-3-50. Newland v. Hall, 527 F.3d 1162 (11th Cir. 2008), cert. denied, 555 U.S. 1183, 129 S. Ct. 1336, 173 L. Ed. 2d 607 (2009) (decided under former O.C.G.A. § 24-3-50).

Defendant's statements to a local detective regarding the defendant's role in three robberies were voluntary and, thus, admissible under former O.C.G.A. § 24-3-50 because the defendant was told that the defendant was not in custody when initially interviewed, defendant was not a suspect at that time, and defendant did not make a confession in the hope of some benefit; defendant was thought to be a witness to a robbery. Dean v. State, 292 Ga. App. 695, 665 S.E.2d 406 (2008) (decided under former O.C.G.A. § 24-3-50).

Defendant's custodial statements were properly deemed voluntary under former O.C.G.A. § 24-3-50. The defendant was advised of defendant's Miranda rights; signed a waiver of those rights; admitted no threats or promises were made; and, although the defendant claimed not to understand the Miranda rights due to limited mental capacity, there was no evidence the defendant was mentally or cognitively impaired. Inman v. State, 295 Ga. App. 461, 671 S.E.2d 921 (2009) (decided under former O.C.G.A. § 24-3-50).

In a statutory rape case, as the record showed that police had not misrepresented the 12-year-old victim's status to the defendant or promised that the defendant would be charged with rape only if the investigation established that the defendant had committed forcible rape, the defendant's confession and DNA test results which showed that the defendant was the parent of the victim's child were not inadmissible as having been obtained through trickery and deceit. Henry v. State, 295 Ga. App. 758, 673 S.E.2d 120 (2009) (decided under former O.C.G.A. § 24-3-50).

With regard to a defendant's malice murder conviction arising from the suffocation death of the defendant's newborn daughter, the trial court did not err by admitting into evidence the defendant's confession that acknowledged that the baby was breathing and whimpering after birth since, given the totality of the circumstances, the trial court's ruling that the confession was given freely and voluntarily after the court viewed the videotapes of the police interviews was not clearly erroneous and there was no merit to the defendant's contention that the confession was encouraged by threats, including that the investigation would turn to a romantic friend, since under former O.C.G.A. § 24-3-50, the remotest fear of injury that rendered a confession involuntary and inadmissible was physical or mental torture, which was not claimed. Wright v. State, 285 Ga. 428, 677 S.E.2d 82 (2009), cert. denied, 558 U.S. 1123, 130 S. Ct. 1076, 175 L. Ed. 2d 903 (2010) (decided under former O.C.G.A. § 24-3-50).

Even if investigators' statements that the defendant would be allowed to go home after the interview constituted an improper "hope of benefit," the investigators did not actually induce the defendant's confession because the defendant made the incriminatory statements voluntarily; the defendant was familiar with the defendant's constitutional rights, was 19 years old at the time of the interview, was a high school graduate, was aware of the allegations against the defendant, was not in custody when the defendant initially confessed, was not yet indicted, and was questioned for approximately two hours but confessed after less than one hour. State v. Brown, 308 Ga. App. 480, 708 S.E.2d 63 (2011), aff'd, 290 Ga. 865, 725 S.E.2d 320 (2012) (decided under former O.C.G.A. § 24-3-50).

Trial court properly ruled that the defendant's inculpatory statement was not subject to suppression as involuntary because the defendant received Miranda warnings at the beginning of the interview, before making the statement, and the defendant acknowledged those warnings again part-way through the interview. Williams v. State, 314 Ga. App. 840, 726 S.E.2d 66 (2012) (decided under former O.C.G.A. § 24-3-50).

Defendant was not in custody for purposes of Miranda at the time the defendant gave the defendant's statement, and the statement was properly admitted into evidence, because defen-

dant went to the police station voluntarily and was allowed to leave once the questioning was finished; thus, a reasonable person in defendant's position would have concluded that the defendant was not under formal arrest and that the defendant's freedom was not restrained. Jones v. State, 270 Ga. App. 233, 606 S.E.2d 288 (2004) (decided under former O.C.G.A. § 24-3-50).

Defendant's statement was not involuntary under former O.C.G.A. § 24-3-50 because the defendant agreed to be interviewed at the police station, with an attorney, before the defendant was charged, and before the interview, the defendant and the attorney were told by the interviewer that the interviewer wanted to hear the defendant's side of the story relating to allegations of sexual battery and child molestation; no promises were made to the defendant regarding arrest or sentencing. Pollio v. State, 278 Ga. App. 729, 629 S.E.2d 583 (2006) (decided under former O.C.G.A. § 24-3-50).

Testimony that the defendant, who worked as a detention officer, might be fired if the defendant did not talk to the investigator who questioned the defendant was true and was simply a recounting of fact and, thus, did not support a finding that the defendant's confession was coerced under former O.C.G.A. § 24-3-50. Duncan v. State, 315 Ga. App. 67, 726 S.E.2d 558 (2012) (decided under former O.C.G.A. § 24-3-50).

Promise not to seek divorce. — Because the promise made by the defendant's spouse not to seek a divorce if the defendant talked to police regarding the crimes charged did not bear on the question of punishment, and served as merely a collateral benefit, the trial court did not err in finding the defendant's statement to be voluntary and in denying a motion to suppress the statement. Robbins v. State, 290 Ga. App. 323, 659 S.E.2d 628 (2008) (decided under former O.C.G.A. § 24-3-50).

Confessions were found to be involuntary in the following cases. — See Frain v. State, 40 Ga. 529 (1869) (decided under former Code 1868, § 3740); Earp v. State, 55 Ga. 136 (1875) (decided under former Code 1873, § 3793); Burns v. State, 61 Ga. 192 (1878) (decided under former Code 1873, § 3793); Byrd v. State, 68 Ga. 661 (1882) (decided under former Code 1873, § 3793); Johnson v. State, 76 Ga. 76 (1885) (decided under former Code 1882, § 3793); Green v. State, 88 Ga. 516, 15 S.E. 10, 30 Am. St. R. 167 (1891) (decided under former Penal Code 1895, § 1006); Smith v. State, 125 Ga. 252, 54 S.E. 190 (1906) (decided under former Penal Code 1895, § 1006); Johnson v. State, 1 Ga. App. 129, 57 S.E. 934 (1907) (decided under former Penal Code 1895, § 1006); Adams v. State, 129 Ga. 248, 58 S.E. 822, 17 L.R.A. (n.s.) 468, 12 Ann. Cas. 158 (1907) (decided under former Penal Code 1895, § 1006); Hawkins v. State, 6 Ga. App. 109, 64 S.E. 289 (1909) (decided under former Penal Code 1910, § 1032); Morris v. State, 33 Ga. App. 53, 125 S.E. 508 (1924) (decided under former Penal Code 1910, § 1032); Lee v. State, 168 Ga. 554, 148 S.E. 400 (1929) (decided under former Code 1933, § 38-411); Brown v. State, 52 Ga. App. 536, 183 S.E. 848 (1936) (decided under former Code 1933, § 38-411); Turner v. State, 203 Ga. 770, 48 S.E.2d 522 (1948) (decided under former Code 1933, § 38-411); Biddy v. State, 127 Ga. App. 212, 193 S.E.2d 31 (1972) (decided under former Code 1933, § 38-411); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975) (decided under former Code 1933, § 38-411); Porter v. State, 143 Ga. App. 640, 239 S.E.2d 694 (1977) (decided under former Code 1933, § 38-411); State v. Ray, 272 Ga. 450, 531 S.E.2d 705 (2000) (decided under former O.C.G.A. § 24-3-50); Patterson v. State, 274 Ga. 713, 559 S.E.2d 472 (2002) (decided under former O.C.G.A. § 24-3-50).

Confessions were properly admitted in the following cases. — See Smith v. State, 139 Ga. 230, 76 S.E. 1016 (1913) (decided under former Penal Code 1910, § 1032); Sledge v. State, 24 Ga. App. 698, 102 S.E. 31 (1920) (decided under former Penal Code 1910, § 1032); Whitworth v. State, 155 Ga. 395, 117 S.E. 450 (1923) (decided under former Penal Code 1910, § 1032); Bradberry v. State, 170 Ga. 859, 154 S.E. 344 (1930) (decided under former Penal Code 1910, § 1032); White v. State, 177 Ga. 115, 169 S.E. 499 (1933) (decided under former Penal Code 1910, § 1032);

Voluntariness (Cont'd)

Riley v. State, 180 Ga. 869, 181 S.E. 154 (1935) (decided under former Code 1933, § 38-411); Simmons v. State, 181 Ga. 761, 184 S.E. 291 (1936) (decided under former Code 1933, § 38-411); Mincey v. State, 187 Ga. 281, 200 S.E. 144 (1938) (decided under former Code 1933, § 38-411); Bryant v. State, 191 Ga. 686, 13 S.E.2d 820 (1941) (decided under former Code 1933, § 38-411); Russell v. State, 196 Ga. 275, 26 S.E.2d 528 (1943) (decided under former Code 1933, § 38-411); James v. State, 86 Ga. App. 282, 71 S.E.2d 568 (1952) (decided under former Code 1933, § 38-411); Blackwell v. State, 113 Ga. App. 536, 148 S.E.2d 912 (1966) (decided under former Code 1933, § 38-411); Williams v. State, 244 Ga. 485, 260 S.E.2d 879 (1979) (decided under former Code 1933, § 38-411); Gray v. State, 151 Ga. App. 684, 261 S.E.2d 402 (1979) (decided under former Code 1933, § 38-411); Riden v. State, 151 Ga. App. 654, 261 S.E.2d 409 (1979) (decided under former Code 1933, § 38-411); Clayton v. State, 156 Ga. App. 285, 274 S.E.2d 682 (1980) (decided under former Code 1933, § 38-411); Lane v. State, 247 Ga. 19, 273 S.E.2d 397 (1981) (decided under former Code 1933, § 38-411); Copeland v. State, 162 Ga. App. 398, 291 S.E.2d 560 (1982) (decided under former O.C.G.A. § 24-3-50); McLeod v. State, 170 Ga. App. 415, 317 S.E.2d 253 (1984) (decided under former O.C.G.A. § 24-3-50); Smith v. State, 190 Ga. App. 702, 379 S.E.2d 643 (1989) (decided under former O.C.G.A. § 24-3-50); Sparks v. State, 232 Ga. App. 179, 501 S.E.2d 562 (1998) (decided under former O.C.G.A. § 24-3-50); Gidden v. State, 234 Ga. App. 268, 506 S.E.2d 448 (1998) (decided under former O.C.G.A. § 24-3-50); Heidler v. State, 273 Ga. 54, 537 S.E.2d 44 (2000), cert denied, 532 U.S. 1029, 121 S. Ct. 1979, 149 L. Ed. 2d 771 (2001) (decided under former O.C.G.A. § 24-3-50); King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000), cert. denied, 536 U.S. 957, 122 S. Ct. 2659, 153 L. Ed. 2d 834 (2002) (decided under former O.C.G.A. § 24-3-50).

Trial court's determination that a law enforcement agent's claim that the defendant orally confessed to selling crack cocaine was more credible than the defendant's claim that there was no such oral confession was not clearly erroneous, such that the confession was properly admitted pursuant to former O.C.G.A. § 24-3-50. Harris v. State, 297 Ga. App. 589, 677 S.E.2d 763 (2009) (decided under former O.C.G.A. § 24-3-50).

Defendant's testimony supported findings of coercion and duress. — Trial court did not err in suppressing the defendant's pre-trial statement on voluntariness grounds because the defendant's testimony regarding statements made by police officers fully supported the trial court's findings of coercion and duress, and the testimony regarding statements police officers made, expressing anger at the defendant and blaming the defendant for damage to a police car and the death of police dogs, did not constitute inadmissible hearsay when those statements were not offered to prove the truth of the facts asserted therein but to show the defendant's fear of injury by the officers; the trial court did not err in believing the defendant's testimony over that of a detective because a portion of the detective's testimony was successfully impeached, none of the officers testified, and the state did not offer the officers as witnesses until its motion for reconsideration was filed. State v. Lynch, 286 Ga. 98, 686 S.E.2d 244 (2009) (decided under former O.C.G.A. § 24-3-50).

Procedural Considerations

1. Use as Evidence

Voluntariness not a defense. — Accused cannot defend against a criminal charge on the basis that a confession was not voluntary. Robinson v. State, 272 Ga. 752, 533 S.E.2d 718 (2000) (decided under former O.C.G.A. § 24-3-50).

Involuntary statement may not be used for any purpose at trial. — It is a denial of due process of law for the state to use an involuntary statement against a defendant at trial for any purpose. Fain v. State, 165 Ga. App. 188, 300 S.E.2d 197 (1983) (decided under former O.C.G.A. § 24-3-50).

Even though defendant exposed existence of statement. — Fact that defen-

dant exposed the existence of a statement does not render the substance of the statement immune from the requirement for admissibility that the statement be given voluntarily. Fain v. State, 165 Ga. App. 188, 300 S.E.2d 197 (1983) (decided under former O.C.G.A. § 24-3-50).

Hearing required before state seeks to use statement for impeachment or rebuttal. — Once defendant raises the issue of voluntariness of a statement the state wishes to use for impeachment purposes and with a rebuttal witness, the defendant is entitled to a determination of the issue by the trial court before the statement can be used, although not to a separate "Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)" hearing. Fain v. State, 165 Ga. App. 188, 300 S.E.2d 197 (1983) (decided under former O.C.G.A. § 24-3-50).

Reversible error. — It is always reversible error to allow a confession or incriminatory admission in evidence against the maker thereof when the confession or admission is not free and voluntary or made with the hope of reward or immunity. Bryant v. State, 132 Ga. App. 186, 207 S.E.2d 671 (1974) (decided under former Code 1933, § 38-411).

Not illegal evidence. — Without doubt, confessions must be voluntary, that is, if the confessions are made under the hope of reward or fear of hurt the confessions are not competent; but confessions are not illegal evidence, standing alone. Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504 (1942) (decided under former Code 1933, § 38-411); Harrison v. State, 83 Ga. App. 367, 64 S.E.2d 83 (1951) (decided under former Code 1933, § 38-411).

Probative value. — If it does not appear that the confessions were not voluntary, and the confessions are introduced without objection, the confessions or incriminating statements are admissible and have probative value. Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504 (1942) (decided under former Code 1933, § 38-411).

Confession made involuntarily within the meaning of the former statute was without probative value. Allen v. State, 85 Ga. App. 355, 69 S.E.2d 638 (1952) (decided under former Code 1933, § 38-411).

If a confession is inadmissible because not voluntarily made, the confession may not be used for impeachment. Green v. State, 154 Ga. App. 295, 267 S.E.2d 898 (1980) (decided under former Code 1933, § 38-411).

Confessions of a principal felon, as to the felon's own guilt, are competent evidence to show that fact on the trial of the accessory, but the confessions must be such as would be competent evidence on the trial of the principal, and must not be induced by another with the slightest hope of benefit or remotest fear of injury to the party making the confessions. Smith v. State, 46 Ga. 298 (1872) (decided under former Code 1868, § 3740).

Codefendant's confession. — Defendant has no standing to complain of the voluntariness of the codefendant's confession. Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637 (1980) (decided under former Code 1933, § 38-411).

When oral confession was incorporated in written confession, any error in the confession's admission for jury consideration is harmless. Hammond v. State, 157 Ga. App. 647, 278 S.E.2d 188 (1981) (decided under former Code 1933, § 38-411).

New trial not required. — Admission into evidence of testimony as to a confession by defendant given in hope of reward did not require a new trial since another witness testified without objection to the same facts. Jones v. State, 181 Ga. 19, 181 S.E. 80 (1935) (decided under former Code 1933, § 38-411).

Videotaped confession not admissible after plea agreement void. — When a plea agreement was conditioned on defendant's giving a videotaped statement and, after defendant accepted the deal and gave the statement, defendant decided to plead not guilty, the statement was not admissible at defendant's trial. Corthran v. State, 268 Ga. 443, 491 S.E.2d 66 (1997) (decided under former O.C.G.A. § 24-3-50).

Defendants taped telephone conversation properly admitted. — Admission of the defendant's secretly-taped telephone conversation with a coconspira-

Procedural Considerations (Cont'd)
1. Use as Evidence (Cont'd)

tor did not violate former O.C.G.A. §§ 24-3-50 and 24-9-20 (see now O.C.G.A. §§ 24-5-506 and 24-8-824); the elicitation of the defendant's unguarded response to a perceived confidante regarding the circumstances of the crimes in which they had both participated was clearly designed to procure an unfiltered, genuine statement from the defendant. Further, absent any evidence that the police investigative techniques were designed to induce the slightest hope of benefit or fear of injury, the resulting statements were not rendered involuntary. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913 (2009) (decided under former O.C.G.A. § 24-3-50).

Admonishment to tell the truth and that defendant safer in custody. — With regard to a defendant's convictions for felony murder, with the underlying felony being rape, among other crimes, the trial court did not err by admitting the defendant's statements made to the police into evidence since the statements were not induced by fear of injury and hope of benefit. Specifically, the detectives' admonishing the defendant to be truthful was not a hope of benefit rendering the defendant's confession inadmissible nor did the detectives' suggestion that the defendant would be safer in custody induce fear of injury. Mangrum v. State, 285 Ga. 676, 681 S.E.2d 130 (2009) (decided under former O.C.G.A. § 24-3-50).

Voluntariness established. — A defendant's contention that the defendant's custodial statements, made without counsel present, should have been suppressed under former O.C.G.A. § 24-3-50 because the defendant was read the defendant's rights, confirmed that those rights were understood, and signed a waiver of rights, and the officer repeatedly told the defendant that the officer could not promise the defendant any benefit. Stevens v. State, 286 Ga. 692, 690 S.E.2d 816 (2010) (decided under former O.C.G.A. § 24-3-50).

Trial court properly admitted the defendant's jailhouse statements as voluntary, spontaneous outbursts, made in an encounter that the defendant initiated, not in response to any questioning as the statements were made several hours after the defendant's interrogation, the statements were made in a different location than that interrogation, and the statements were made to different officers, which demonstrated a sufficient break from the defendant's earlier, involuntary statements to render the defendant's jailhouse statements voluntary and admissible. Ellington v. State, 292 Ga. 109, 735 S.E.2d 736 (2012) (decided under former O.C.G.A. § 24-3-50).

2. Preliminary Proceedings

Former statute required as an indispensable foundation to the introduction of an alleged confession a showing that the confession was freely and voluntarily made and that the confession was not induced by another by the slightest fear of punishment nor the remotest hope of reward. Sims v. State, 221 Ga. 190, 144 S.E.2d 103 (1965), rev'd on other grounds, 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593, later appeal, 223 Ga. 465, 156 S.E.2d 65, rev'd on other grounds, 389 U.S. 404, 88 S. Ct. 523, 19 L. Ed. 2d 634 (1967) (decided under former O.C.G.A. § 24-3-50).

Equal application to state and private actions. — Requirement of former O.C.G.A. § 24-3-50 for a hearing on the voluntariness of confessions applies equally to state and private actions. Griffin v. State, 230 Ga. App. 318, 496 S.E.2d 480 (1998) (decided under former O.C.G.A. § 24-3-50).

Separate hearing required. — When a confession is challenged, as by objection to the confession's introduction in evidence, a separate hearing on the question of voluntariness must be held before the trial judge but when no challenge is made or ruling invoked, there is no requirement for such a hearing. Smith v. State, 131 Ga. App. 605, 206 S.E.2d 708 (1974) (decided under former Code 1933, § 38-411).

When the voluntariness of a confession is questioned it is necessary under the decision in Jackson v. Denno, 378 U.S. 368, 378 U.S. 368, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964) to have a separate hearing as to the confession's voluntariness before the confession is finally presented to the jury for consider-

ation as to the confession's voluntariness. In the absence of a proper objection, however, there is no requirement for such a hearing. James v. State, 223 Ga. 677, 157 S.E.2d 471 (1967) (decided under former Code 1933, § 38-411); Royals v. State, 155 Ga. App. 378, 270 S.E.2d 906 (1980) (decided under former Code 1933, § 38-411).

In a prosecution for theft by taking, defendants were entitled to a preliminary hearing and threshold determination by the trial court on the voluntariness of written confessions defendants gave to an employee of a retail store. Griffin v. State, 230 Ga. App. 318, 496 S.E.2d 480 (1998) (decided under former O.C.G.A. § 24-3-50).

Requirement for a hearing on the issue of voluntariness applies only if the evidence presents a fair question as to the confession's voluntariness. Carter v. State, 239 Ga. App. 549, 521 S.E.2d 590 (1999) (decided under former O.C.G.A. § 24-3-50).

Burden of proof as to the voluntariness of a confession is upon the state. McLemore v. State, 181 Ga. 462, 182 S.E. 618 (1935) (decided under former Code 1933, § 38-411); Smith v. State, 132 Ga. App. 491, 208 S.E.2d 351 (1974) (decided under former Code 1933, § 38-411); Jones v. State, 245 Ga. 592, 266 S.E.2d 201 (1980) (decided under former Code 1933, § 38-411); Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981) (decided under former Code 1933, § 38-411).

Burden of proof can shift. When such confession is shown to have been freely and voluntarily made, the burden is then on the defendant to show that the confession was not so made. Bradberry v. State, 170 Ga. 859, 154 S.E. 344 (1930) (decided under former Penal Code 1910, § 1032).

Standard for determining the admissibility of confessions is the preponderance of the evidence. Pierce v. State, 235 Ga. 237, 219 S.E.2d 158 (1975) (decided under former Code 1933, § 38-411); Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979) (decided under former Code 1933, § 38-411); Jones v. State, 245 Ga. 592, 266 S.E.2d 201 (1980) (decided under former Code 1933, § 38-411); Lee v. State, 154 Ga. App. 562, 269 S.E.2d 65 (1980) (decided under former Code 1933, § 38-411); Etterle v. State, 155 Ga. App. 210, 270 S.E.2d 376 (1980) (decided under former Code 1933, § 38-411); Whitacre v. State, 155 Ga. App. 359, 270 S.E.2d 894 (1980) (decided under former Code 1933, § 38-411); Bridges v. State, 155 Ga. App. 369, 271 S.E.2d 25 (1980) (decided under former Code 1933, § 38-411); Fowler v. State, 246 Ga. 256, 271 S.E.2d 168 (1980) (decided under former Code 1933, § 38-411); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549, cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981) (decided under former Code 1933, § 38-411).

Prima facie showing as to a confession's voluntary character must be made before the confession is admissible into evidence, and if this preliminary proof fails to make such a showing, the confession or statement must be excluded. Bryant v. State, 191 Ga. 686, 13 S.E.2d 820 (1941) (decided under former Code 1933, § 38-411); Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504 (1942) (decided under former Code 1933, § 38-411); Garrett v. State, 203 Ga. 756, 48 S.E.2d 377 (1948) (decided under former Code 1933, § 38-411); Phillips v. State, 206 Ga. 418, 57 S.E.2d 555 (1950) (decided under former Code 1933, § 38-411); Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626 (1950) (decided under former Code 1933, § 38-411).

Grounds for exclusion. — Until it affirmatively appears from testimony, without question, that proposed confession was freely and voluntarily made, without any extraneous inducement, the statement alleged to have been a confession must be excluded. McLemore v. State, 181 Ga. 462, 182 S.E. 618 (1935) (decided under former Code 1933, § 38-411); Russell v. State, 196 Ga. 275, 26 S.E.2d 528 (1943) (decided under former Code 1933, § 38-411).

Requirements for prima facie case. — Alleged confession should be affirmatively shown to have been made without the slightest hope of benefit or remotest fear of injury before the state has succeeded in making a prima facie case as will establish that the confession was free from extraneous inducement. McLemore v. State, 181 Ga. 462, 182 S.E. 618 (1935)

Procedural Considerations (Cont'd)
2. Preliminary Proceedings (Cont'd)

(decided under former Code 1933, § 38-411); Russell v. State, 196 Ga. 275, 26 S.E.2d 528 (1943) (decided under former Code 1933, § 38-411); Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626 (1950) (decided under former Code 1933, § 38-411).

Trial court must consider the totality of the circumstances to determine whether the state has proven that a confession was made voluntarily. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980) (decided under former Code 1933, § 38-411); Lee v. State, 154 Ga. App. 562, 269 S.E.2d 65 (1980) (decided under former Code 1933, § 38-411); Fowler v. State, 246 Ga. 256, 271 S.E.2d 168 (1980) (decided under former Code 1933, § 38-411); Bassett v. State, 154 Ga. App. 829, 285 S.E.2d 260 (1981) (decided under former Code 1933, § 38-411); Franklin v. State, 249 Ga. App. 834, 549 S.E.2d 794 (2001) (decided under former O.C.G.A. § 24-3-50).

Inferences not acceptable. — On preliminary examination by the court, a witness should be permitted, over objection, to state an inference drawn from "collective facts" or to state in a shorthand way that a confession was freely and voluntarily made, without stating the circumstances under which the confession was made. Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626 (1950) (decided under former Code 1933, § 38-411).

Defendant's evidence. — If the evidence for the state makes out a prima facie case for the admission of such a confession, the court is not bound, before admitting the confession, to hear evidence on behalf of the accused, tending to show coercion or improper inducement in the confession's procurement. McLemore v. State, 181 Ga. 462, 182 S.E. 618 (1935) (decided under former Code 1933, § 38-411); Lemon v. State, 80 Ga. App. 854, 57 S.E.2d 626 (1950) (decided under former Code 1933, § 38-411).

A hearing at which the defendant is not allowed to present testimony on the surrounding circumstances affecting the voluntariness of the defendant's statements does not meet the standards of Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) (decided under former Code 1933, § 38-411); Pittman v. State, 245 Ga. 453, 265 S.E.2d 592 (1980) (decided under former Code 1933, § 38-411).

In making a determination of the voluntariness of a confession the defendant's testimony is relevant and such proof must be allowed if the defendant elects to testify in this regard. Stone v. State, 155 Ga. App. 357, 271 S.E.2d 22 (1980) (decided under former Code 1933, § 38-411).

When the voluntariness of a statement is not challenged, no violation of former O.C.G.A. § 24-3-50 is asserted, and no hearing under Jackson v. Denno, 378 U.S. 368 (84 SC 1774, 12 L. Ed. 2d 908) (1964) is required. Ward v. State, 242 Ga. App. 246, 529 S.E.2d 378 (2000), appeal dismissed, 299 Ga. App. 63, 682 S.E.2d 128 (2009) (decided under former O.C.G.A. § 24-3-50).

Question for jury. — Once the state had made a prima facie showing of voluntariness, the question of whether or not defendant's statement was freely and voluntarily given is one of fact for the jury's determination. Griner v. State, 121 Ga. 614, 49 S.E. 700 (1905) (decided under former Penal Code 1895, § 1006); Cantrell v. State, 141 Ga. 98, 80 S.E. 649 (1913) (decided under former Penal Code 1910, § 1032); Thomas v. State, 169 Ga. 182, 149 S.E. 871 (1929) (decided under former Penal Code 1910, § 1032); Bradberry v. State, 170 Ga. 859, 154 S.E. 344 (1930) (decided under former Penal Code 1910, § 1032); Goodwin v. State, 45 Ga. App. 593, 165 S.E. 453 (1932) (decided under former Code 1933, § 38-411); McLemore v. State, 181 Ga. 462, 182 S.E. 618 (1935) (decided under former Code 1933, § 38-411); Bryant v. State, 191 Ga. 686, 13 S.E.2d 820 (1941) (decided under former Code 1933, § 38-411); Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504 (1942) (decided under former Code 1933, § 38-411); Russell v. State, 196 Ga. 275, 26 S.E.2d 528 (1943) (decided under former Code 1933, § 38-411); Stroup v. Mount, 197 Ga. 804, 30 S.E.2d 477 (1944)

(decided under former Code 1933, § 38-411); Byars v. State, 73 Ga. App. 727, 38 S.E.2d 53 (1946) (decided under former Code 1933, § 38-411); Garrett v. State, 203 Ga. 756, 48 S.E.2d 377 (1948) (decided under former Code 1933, § 38-411); Jackson v. State, 77 Ga. App. 635, 49 S.E.2d 198 (1948), cert. denied, 335 U.S. 905, 69 S. Ct. 403, 93 L. Ed. 439 (1949) (decided under former Code 1933, § 38-411); Moore v. State, 221 Ga. 636, 146 S.E.2d 895 (1966) (decided under former Code 1933, § 38-411); Walker v. State, 226 Ga. 292, 174 S.E.2d 440 (1970), vacated on other grounds, 408 U.S. 936, 92 S. Ct. 2845, 33 L. Ed. 2d 754 (1972) (decided under former Code 1933, § 38-411); Trask v. State, 132 Ga. App. 645, 208 S.E.2d 591 (1974) (decided under former Code 1933, § 38-411); Frazier v. State, 150 Ga. App. 343, 258 S.E.2d 29 (1979) (decided under former Code 1933, § 38-411); Meyer v. State, 150 Ga. App. 613, 258 S.E.2d 217 (1979) (decided under former Code 1933, § 38-411); Simonton v. State, 151 Ga. App. 431, 260 S.E.2d 487 (1979) (decided under former Code 1933, § 38-411); Doucet v. State, 153 Ga. App. 775, 266 S.E. 554 (1980) (decided under former Code 1933, § 38-411); Myrick v. State, 155 Ga. App. 496, 271 S.E.2d 637 (1980) (decided under former Code 1933, § 38-411).

3. Instructions

Omission to charge on the law of confessions, in the absence of a timely request, is not error. Allen v. State, 187 Ga. 178, 200 S.E. 109 (1938) (decided under former Code 1933, § 38-411); Mims v. State, 188 Ga. 702, 4 S.E.2d 831 (1939) (decided under former Code 1933, § 38-411); Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504 (1942) (decided under former Code 1933, § 38-411); Murray v. State, 214 Ga. 350, 104 S.E.2d 905 (1958) (decided under former Code 1933, § 38-411); Staggers v. State, 101 Ga. App. 463, 114 S.E.2d 142 (1960) (decided under former Code 1933, § 38-411); McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3223, 49 L. Ed. 2d 1218 (1976) (decided under former Code 1933, § 38-411); Welch v. State, 235 Ga. 243, 219 S.E.2d 151 (1975) (decided under former Code 1933, § 38-411).

Charge on the law of confessions, when unauthorized by the evidence, constitutes reversible error. Allen v. State, 187 Ga. 178, 200 S.E. 109 (1938) (decided under former Code 1933, § 38-411); Johnson v. State, 240 Ga. 528, 50 S.E.2d 334 (1948) (decided under former Code 1933, § 38-411); Carter v. State, 90 Ga. App. 61, 81 S.E.2d 868 (1954) (decided under former Code 1933, § 38-411); Sanford v. State, 153 Ga. App. 541, 265 S.E.2d 868 (1980) (decided under former Code 1933, § 38-411).

Charge embodying the principles of law contained in former Code 1933, §§ 38-411 and 38-420 (see O.C.G.A. §§ 24-3-50 and 24-3-53) is not error because of the failure to charge the principles of law which deal with the admissibility of such statement into evidence. Walker v. State, 226 Ga. 292, 174 S.E.2d 440 (1970), vacated on other grounds, 408 U.S. 936, 92 S. Ct. 2845, 33 L. Ed. 2d 754 (1972) (decided under former Code 1933, § 38-411).

Law on confessions was properly charged in the following cases. — See Oglesby v. State, 80 Ga. App. 493, 56 S.E.2d 637 (1949) (decided under former Code 1933, § 38-411); Philpot v. State, 212 Ga. 79, 90 S.E.2d 577 (1955) (decided under former Code 1933, § 38-411); Weatherby v. State, 213 Ga. 188, 97 S.E.2d 698 (1957) (decided under former Code 1933, § 38-411); Kennedy v. State, 156 Ga. App. 792, 275 S.E.2d 339 (1980) (decided under former Code 1933, § 38-411); Kirton v. State, 246 Ga. App. 670, 541 S.E.2d 673 (2000) (decided under former O.C.G.A. § 24-3-50).

If the defendant wanted an elaboration of the charge actually given on confessions, the defendant should have submitted a timely written request. Webb v. State, 73 Ga. App. 748, 38 S.E.2d 54 (1946) (decided under former Code 1933, § 38-411).

Trial court not required to give instruction absent specific request. — Because the defendant failed to request a charge on voluntariness of confessions and consideration of statements, admissions, and confessions, the defendant was precluded from asserting error on that

Procedural Considerations (Cont'd)
3. Instructions (Cont'd)

basis; the trial court did not need to give an instruction on voluntariness of confessions absent a specific request therefor. Thorpe v. State, 285 Ga. 604, 678 S.E.2d 913 (2009) (decided under former O.C.G.A. § 24-3-50).

4. Review

Failure of defendant to request hearing. — When the defendant did not request a hearing under former O.C.G.A. § 24-3-50 as to the admissibility and voluntariness of defendant's non-custodial admission, the appellate court had no jurisdiction to address the failure of the trial court to conduct a hearing as to that issue. Hawkins v. State, 236 Ga. App. 346, 512 S.E.2d 59 (1999) (decided under former O.C.G.A. § 24-3-50).

Since there was no evidence a confession was false, the conclusion that the confession was voluntary was not clearly erroneous. Pinckney v. State, 259 Ga. App. 309, 576 S.E.2d 574 (2003) (decided under former O.C.G.A. § 24-3-50).

Failure to include videotaped statement within appellate record. — Defendant failed to include the videotape or a transcript of the audio portion in the appellate record and the appellate court was unable to review defendant's contention that the trial court erred by denying the motion to suppress the videotaped statement to the police on the ground that certain comments by the interviewing detective constituted a hope of benefit. Clark v. State, 279 Ga. 243, 611 S.E.2d 38 (2005) (decided under former O.C.G.A. § 24-3-50).

Judge's conclusion that the confession is voluntary must appear from the record with unmistakable clarity, although the judge need not make formal findings of fact or write an opinion. When there has been no ruling on the issue of voluntariness made with the required "unmistakable clarity," remand with instruction to conduct a further hearing and make a determination of voluntariness may be appropriate. Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981) (decided under former Code 1933, § 38-411).

It is the duty of the Supreme Court of Georgia to independently review the evidence to determine whether the state has carried the state's burden of proving the admissibility of the accused's confession by a preponderance of the evidence. Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979), sentence vacated, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980) (decided under former Code 1933, § 38-411).

Appellate court upholds Jackson v. Denno findings. — Trial court sits as the factfinder in a Jackson-Denno hearing (Jackson v. Denno, 378 U.S. 368 (1964)) regarding the voluntariness of a confession and its resolution of factual issues will be upheld by an appellate court unless it is clearly erroneous. Harrison v. State, 253 Ga. App. 179, 558 S.E.2d 760 (2002) (decided under former O.C.G.A. § 24-3-50).

Unless clearly erroneous, a trial court's findings as to factual determinations and credibility relating to the admissibility of a confession will be upheld on appeal. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980) (decided under former Code 1933, § 38-411); Green v. State, 154 Ga. App. 295, 267 S.E.2d 898 (1980) (decided under former Code 1933, § 38-411); Etterle v. State, 155 Ga. App. 210, 270 S.E.2d 376 (1980) (decided under former Code 1933, § 38-411); Phipps v. State, 155 Ga. App. 229, 270 S.E.2d 393 (1980) (decided under former Code 1933, § 38-411); Whitacre v. State, 155 Ga. App. 359, 270 S.E.2d 894 (1980) (decided under former Code 1933, § 38-411); Fowler v. State, 246 Ga. 256, 271 S.E.2d 168 (1980) (decided under former Code 1933, § 38-411); Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981) (decided under former Code 1933, § 38-411); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549 (1981) (decided under former Code 1933, § 38-411); Caffo v. State, 247 Ga. 751, 279 S.E.2d 678 (1981) (decided under former Code 1933, § 38-411).

Determinations regarding the facts and witness credibility are entirely within the purview of the trial court and will not be disturbed unless such determinations are clearly erroneous. Ward v. State, 234 Ga.

App. 610, 507 S.E.2d 506 (1998) (decided under former O.C.G.A. § 24-3-50).

Trial court's denial of defendant's motion to suppress defendant's statement to police was proper and not clearly erroneous because the statement was found to have been made voluntarily, without the slightest hope of benefit or remotest fear of injury under former O.C.G.A. § 24-3-50; as the police officer's statements to defendant were nothing more than routine police questioning, aimed at eliciting a response from defendant in custody, and statements from the officer that defendant may not have intended to kill the victim did not amount to a hope of benefit, nor did a statement that defendant would not be prosecuted on drug charges give defendant any hope of benefit, as it was made because there was no evidence of the drugs. Pittman v. State, 277 Ga. 475, 592 S.E.2d 72 (2004) (decided under former O.C.G.A. § 24-3-50).

Law of the case. — Because the supreme court ruled adversely to the defendant in the defendant's first appeal on the issue of whether an incriminating statement the defendant made during a custodial interrogation should have been suppressed as involuntarily made, that decision was the law of the case. Foster v. State, 290 Ga. 599, 723 S.E.2d 663 (2012) (decided under former O.C.G.A. § 24-3-50).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 720.

Am. Jur. Proof of Facts. — Involuntary Confession — Psychological Coercion, 22 POF2d 539.

Custodial Interrogation Under Miranda v. Arizona, 23 POF2d 713.

Invalidity of Suspect's Waiver of Miranda Rights, 42 POF2d 617.

Invalidity of Confession or Waiver of Miranda Rights by Mentally Retarded Person, 42 POF3d 147.

ALR. — Necessity that confession in prosecution for homicide during perpetration of another felony be corroborated by other evidence of the commission of the other felony, 79 ALR 508.

Right of defendant in criminal case, where state has introduced incriminating portion of conversation or statements made by him, to elicit or introduce in evidence his exculpatory statements, 118 ALR 138.

Constitutional aspects of procedure for determining voluntariness of pretrial confession, 1 ALR3d 1251; 132 ALR Fed. 415.

Mental subnormality of accused as affecting voluntariness or admissibility of confession, 8 ALR4th 16.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 ALR4th 419.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment — modern state cases, 28 ALR4th 1121.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 ALR4th 495.

Confession by one who has been subjected to or threatened with physical suffering, 24 ALR 703.

Voluntariness of confession admitted by court as question for jury, 85 ALR 870; 170 ALR 567.

Admissibility, on question as to voluntariness of confession, of events occurring, or statement made after the confession by defendant or others not as witnesses at trial, 85 ALR 942.

Offer of defendant in criminal case to concede or stipulate fact, or his admission of same, as affecting prosecution's right to introduce evidence thereof, 91 ALR 1478.

Duty of court to institute preliminary investigation as to voluntary or involuntary character of confession, 102 ALR 605.

Presumption and burden of proof as to voluntariness of nonjudicial confession, 102 ALR 641.

Right of witness to state his conclusion or opinion that confession was voluntary or involuntary, 114 ALR 974.

Presence of jury during preliminary inquiry of court as to voluntariness of confession as prejudicial, 148 ALR 546.

Suppression before indictment or trial of confession unlawfully obtained, 1 ALR2d 1012.

Admissibility in evidence of unsigned confession, 23 ALR2d 919.

Right of accused to show body to jury as evidence of violence by police in securing confession, 72 ALR2d 1322.

Voluntariness and admissibility of minor's confession, 87 ALR2d 624.

Impeachment of accused as witness by use of involuntary or not properly qualified confession, 89 ALR2d 478.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud, 99 ALR2d 772.

Admissibility of confession by one accused of felonious homicide, as affected by its inducement through compelling, or threatening to compel, accused to view victim's corpse, 27 ALR3d 1185.

What constitutes "custodial interrogation" within rule of Miranda v. Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation, 31 ALR3d 565.

Admissibility, in civil action, of confession or admission which could not be used against party in criminal prosecution because obtained by improper police methods, 43 ALR3d 1375.

Admissibility of defense communications made in connection with plea bargaining, 59 ALR3d 441.

Confession as defense in action for malicious prosecution, 66 ALR3d 95.

Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination, 89 ALR3d 230.

Admissibility of polygraph evidence at trial on issue of voluntariness of confession made by accused, 92 ALR3d 1317.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters, 7 ALR4th 180.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 ALR4th 419.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment — modern state cases, 28 ALR4th 1121.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 ALR4th 495.

Duty of court, in federal criminal prosecution, to conduct inquiry into voluntariness of accused's statement — modern cases, 132 ALR Fed. 415.

24-8-825. Confessions under spiritual exhortation, promise of secrecy, or collateral benefit admissible.

The fact that a confession has been made under a spiritual exhortation, a promise of secrecy, or a promise of collateral benefit shall not exclude it. (Code 1981, § 24-8-825, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3794, former Code 1882, § 3794, former Penal Code 1910, § 1033, former Code 1933, § 38-412, and former O.C.G.A. § 24-3-51 are included in the annotations for this Code section.

Reason for rule. — Keeping in view the true reason upon which confession evidence is excluded, and the test by which the courts have sought to determine whether or not the truthfulness of the confession is sufficiently evidenced to admit the evidence thereof to the jury, it is clear that a confession should not be excluded because made under spiritual exhortation, or promise of secrecy, or promise of collateral benefit, since these means, or none of them, have the slightest tendency in a proper sense to induce one to confess falsely. Wilson v. State, 19 Ga. App. 759, 92 S.E. 309 (1917) (decided under former Penal Code 1910, § 1033).

Confessions otherwise admissible are not rendered inadmissible because

the accused was told by another in substance that it was always best to tell the truth. Turner v. State, 203 Ga. 770, 48 S.E.2d 522 (1948) (decided under former Code 1933, § 38-412); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549, cert. denied, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981) (decided under former Code 1933, § 38-412).

Prayers overheard. — Testimony that the defendant while alone in defendant's cell was overheard to say, "Lord, have mercy upon me for what I have done; the only thing I regret is killing my father," was not incompetent because the witness was the jailer in charge of the defendant, the law not disqualifying a jailer from testifying as to voluntary acts and confessions of prisoners under the jailer's charge. Testimony as to prayers in which the defendant declared defendant's innocence of the crime, although offered in reply to the above, was properly rejected, the rule being to admit inculpatory declarations or confessions, and to exclude those which are exculpatory, when disconnected therewith. Woolfolk v. State, 85 Ga. 69, 11 S.E. 814 (1890) (decided under former Code 1882, § 3794).

Spiritual exhortations. — Confession made by the defendant to a fellow-prisoner, who was in jail for stealing, and grossly irreligious, as appears from defendant's own evidence, but who read the Bible and sang Psalms to the defendant, and told the defendant that if the defendant were guilty the defendant had better confess and seek the defendant's God, was admissible. Stafford v. State, 55 Ga. 591 (1876) (decided under former Code 1873, § 3794).

Fact that the statements made by the defendant were in response to an appeal made by defendant's sister, in which she alluded to the death of defendant's brother and incarceration of defendant's mother as results of the crime, would not render the statements inadmissible. The appeal was not stronger than "spiritual exhortations," which the Code declares shall not exclude a confession. White v. State, 177 Ga. 115, 169 S.E. 499 (1933) (decided under former Penal Code 1910, § 1033).

Promise to help keep defendant out of certain prison. — Confession is not rendered inadmissible by an assurance that whatever help could be given would be given in keeping the defendant out of a certain prison, since this is similar to a promise to inform the court of a defendant's cooperation. Patrick v. State, 169 Ga. App. 302, 312 S.E.2d 385 (1983), aff'd, 252 Ga. 509, 314 S.E.2d 909 (1984) (decided under former O.C.G.A. § 24-3-51).

Investigator offered collateral benefit by talking to DA office. — An investigator's statement that the investigator would talk to the district attorney's office at a later time about having a warrant against the defendant dismissed was no more than a promise of a collateral benefit and thus did not make the defendant's custodial statement inadmissible under former O.C.G.A. §§ 24-3-50 and 24-3-51 (see now O.C.G.A. §§ 24-8-824 and 24-8-825). Boone v. State, 293 Ga. App. 654, 667 S.E.2d 880 (2008) (decided under former O.C.G.A. § 24-3-51).

Promises to obtain psychiatric help and medical attention for defendant were not the kind of "hope of benefit" which would invalidate defendant's subsequent confession. Head v. State, 180 Ga. App. 901, 350 S.E.2d 854 (1986) (decided under former O.C.G.A. § 24-3-51).

Promise to secure counseling. — With regard to an alleged promise by a detective to help secure counseling for the defendant when the defendant got to prison, the benefit involved was no hope of lighter punishment (induced by a person other than the defendant) but was a collateral benefit which did not render defendant's confession inadmissible. Hall v. State, 180 Ga. App. 366, 349 S.E.2d 255 (1986) (decided under former O.C.G.A. § 24-3-51).

Trial court did not err in admitting the defendant's pre-arrest statements because the offer to obtain counseling for the defendant did not bear on the question of punishment but involved a collateral benefit, and promises of a collateral benefit did not impact a statement's admissibility; the defendant offered no evidence that the officers induced the defendant to believe the defendant would receive a three year sentence, but the defendant came up with that scenario on the defendant's own, and the trial court, therefore, properly

found the defendant's statements were voluntary and admissible. Dunson v. State, 309 Ga. App. 484, 711 S.E.2d 53 (2011) (decided under former O.C.G.A. § 24-3-51).

Promise to end adverse publicity. — When an inculpatory statement was made by the fire department lieutenant in return for the investigator's alleged promise to "stop all the publicity against the fire and police department and not arrest and persecute anyone else," the promise pertained to collateral benefits and the trial court did not err in ruling the statement to be voluntary and admissible. Johnson v. State, 170 Ga. App. 71, 316 S.E.2d 160 (1984) (decided under former O.C.G.A. § 24-3-51).

Promise to get help for drug problem. — Officer's promise to help the defendant with a drug problem was a collateral benefit and did not bear on the question of punishment; hence, the trial court did not clearly err in admitting the defendant's statement in evidence as such did not amount to a promise of leniency in exchange for the statement. Smith v. State, 281 Ga. App. 91, 635 S.E.2d 385 (2006) (decided under former O.C.G.A. § 24-3-51).

Reduction in bond. — Reduction of bond is in the same class of collateral benefits as the promises of a solitary cell, a psychiatric examination, and communication to the judge of the defendant's cooperation. Heard v. State, 165 Ga. App. 252, 300 S.E.2d 213 (1983) (decided under former O.C.G.A. § 24-3-51); Pounds v. State, 189 Ga. App. 809, 377 S.E.2d 722 (1989) (decided under former O.C.G.A. § 24-3-51).

Long relationship as confidential informant. — Statements of an inculpatory nature made while in custody were not inadmissible under former O.C.G.A. § 24-3-51 on the theory that defendant worked with law enforcement officers as a confidential informant for many years and that it was understood that the defendant would be "taken care of" and the sheriff admitted that in the sheriff's own mind the sheriff felt the sheriff owed defendant something, since there were no overt promises made and the understanding was subjective in nature. Tyson v. State, 165 Ga. App. 22, 299 S.E.2d 69 (1983) (decided under former O.C.G.A. § 24-3-51).

Waiver. — Because defendant requested the future assistance of an attorney, not immediate assistance, and because defendant knew that defendant's confession would be handed over to law enforcement, the clergy-parishioner privilege in former O.C.G.A. §§ 24-3-51 and 24-9-22 (see now O.C.G.A. §§ 24-8-825 and 24-5-502) was inapplicable; therefore, defendant's confession to the crimes was voluntary. Willis v. State, 287 Ga. 703, 699 S.E.2d 1 (2010) (decided under former O.C.G.A. § 24-3-51).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 740, 741, 745.

ALR. — Voluntariness of confession admitted by court as question for jury, 85 ALR 870; 170 ALR 567.

Suppression before indictment or trial of confession unlawfully obtained, 1 ALR2d 1012.

Voluntariness and admissibility of minor's confession, 87 ALR2d 624.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud, 99 ALR2d 772.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 ALR4th 495.

Voluntary nature of confession as affected by appeal to religious beliefs, 20 ALR6th 479.

24-8-826. Medical reports in narrative form.

(a) Upon the trial of any civil proceeding involving injury or disease, any medical report in narrative form which has been signed and dated by an examining or treating licensed physician, dentist, orthodontist,

podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist shall be admissible and received in evidence insofar as it purports to represent the history, examination, diagnosis, treatment, prognosis, or interpretation of tests or examinations, including the basis therefor, by the person signing the report, the same as if that person were present at trial and testifying as a witness; provided, however, that such report and notice of intention to introduce such report shall first be provided to the adverse party at least 60 days prior to trial. A statement of the qualifications of the person signing such report may be included as part of the basis for providing the information contained therein, and the opinion of the person signing the report with regard to the etiology of the injury or disease may be included as part of the diagnosis. Any adverse party may object to the admissibility of any portion of the report, other than on the ground that it is hearsay, within 15 days of being provided with the report. Further, any adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony. The party tendering the report may also introduce testimony of the person signing the report for the purpose of supplementing the report or otherwise.

(b) The medical narrative shall be presented to the jury as depositions are presented to the jury and shall not go out with the jury as documentary evidence. (Code 1981, § 24-8-826, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Hearing before administrative law judge, § 34-9-102.

Law reviews. — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-3-18 are included in the annotations for this Code section.

Admission of records in medical malpractice action. — Trial court did not err in admitting the podiatrist's medical records on the patient into evidence in the patient's medical malpractice case. Kohl v. Tirado, 256 Ga. App. 681, 569 S.E.2d 576 (2002) (decided under former O.C.G.A. § 24-3-18).

Records properly excluded when 60-day notice requirement not met. — In a premises liability suit, the trial court properly excluded certified copies of some of an invitee's medical records under former O.C.G.A. § 24-7-8 (see now O.C.G.A. § 24-9-902) because the invitee had not provided the requisite 60-day notice under former O.C.G.A. § 24-3-18. Former O.C.G.A. § 24-7-8 concerned only the authentication of medical records and did not allow the invitee to circumvent other evidentiary rules; furthermore, the invitee failed to provide a record citation for the specific medical records that the invitee claimed should have been admitted and thus it was unclear whether those records were narratives, to which former § 24-3-18(a) applied, or other types of records. Fuller v. Flash Foods, Inc., 298 Ga. App. 217, 679 S.E.2d 775 (2009) (decided under former O.C.G.A. § 24-3-18).

Admissibility on summary judg-

ment. — In a wrongful death suit brought by a minor child's parents, alleging negligence and police misconduct arising out of an incident in which emergency surgery on their child was delayed due to police detention of the doctor who was to perform the surgery, summary judgment was improperly granted; the medical narrative report prepared by the doctor was admissible evidence under former O.C.G.A. § 24-3-18(a) and could be considered in opposition to a motion for summary judgment under O.C.G.A. § 9-11-56(c), in that the doctor's opinion in the report that the son, "in all likelihood," would have survived had the doctor not been prevented from caring for the son constituted a properly expressed medical opinion. Dalton v. City of Marietta, 280 Ga. App. 202, 633 S.E.2d 552 (2006) (decided under former O.C.G.A. § 24-3-18).

Neurologist's notes improperly admitted. — In a personal injury suit, it was error to admit a neurologist's notes under former O.C.G.A. § 24-3-18(a), as the notes were replete with unexplained medical terms and test results and thus did not comprise a medical narrative "in story form" as contemplated by the former statute; the error was not harmless, as the notes constituted the vast majority of appellees' medical evidence and for the most part were not cumulative of other testimony. Lott v. Ridley, 285 Ga. App. 513, 647 S.E.2d 292 (2007) (decided under former O.C.G.A. § 24-3-18).

Neurologist report inadmissible in undue influence case. — Daughter failed to carry the daughter's burden of showing a genuine issue of fact as to her parent's testamentary capacity or undue influence at the time the parent signed a will excluding her as a beneficiary although the parent became ill and died soon after executing the will. A neurologist report was not admissible under former O.C.G.A. § 24-3-18(a) because the report was not in narrative form and relied on unexplained medical terms and lab results. Prine v. Blanton, 290 Ga. 307, 720 S.E.2d 600 (2012) (decided under former O.C.G.A. § 24-3-18).

Report prepared by others inadmissible. — Trial court did not err in refusing to permit the manufacturer's two expert witnesses to testify to asbestos fiber counts on the manufacturer's packing in decedent's case against the manufacturer for decedent's exposure to asbestos that allegedly was in the manufacturer's packing material used in the plant where decedent worked as that testimony was inadmissible hearsay since neither of the expert witnesses were involved in preparing those counts; absent a witness from the laboratory that performed the counts of a report that complied with former O.C.G.A. § 24-3-18(a), such testimony was inadmissible. John Crane, Inc. v. Jones, 262 Ga. App. 531, 586 S.E.2d 26 (2003) (decided under former O.C.G.A. § 24-3-18).

Chiropractor's report properly admitted. — In a personal injury suit, it was proper to admit a chiropractor's report under former O.C.G.A. § 24-3-18(a); as the report was in a narrative form, summarized a patient's injuries and treatment, and presented the relevant aspects of the patient's injury, diagnosis, treatment, and prognosis in a logical form; although it contained medical terms, it attempted to explain those terms in the context of the report. Lott v. Ridley, 285 Ga. App. 513, 647 S.E.2d 292 (2007) (decided under former O.C.G.A. § 24-3-18).

Recitation of records was not a narrative. — In a personal injury suit, a bare recitation of a doctor's unedited records was not a medical narrative in story form, as contemplated by former O.C.G.A. § 24-3-18(a); therefore, a trial court committed reversible error by allowing plaintiffs' counsel to merely read into the record the doctor's notes, with no attempt to organize the doctor's notes or structure the notes to make the notes more readily understandable to the jury. Lott v. Ridley, 285 Ga. App. 513, 647 S.E.2d 292 (2007) (decided under former O.C.G.A. § 24-3-18).

Medical narrative in undue influence claim. — In a probate action, an oncologist's opinion, when considered along with other evidence of a testator's mental impairment and weakness after being prescribed drugs, was relevant in determining the amount of influence necessary to dominate the testator's mind and destroy free agency and willpower.

Bailey v. Edmundson, 280 Ga. 528, 630 S.E.2d 396 (2006) (decided under former O.C.G.A. § 24-3-18).

Filing notice intending to introduce medical narratives did not relinquish lack of service defenses. — In a personal injury suit that was dismissed for failing to serve the defendant, the defendant's filing of the notice of the defendant's intention to introduce the plaintiff's medical narratives did not manifest an intention on the defendant's part to relinquish the defendant's service defenses, but simply preserved an evidentiary issue should the issue arise later. Ragan v. Mallow, No. A12A1182, 2012 Ga. App. LEXIS 991 (Nov. 26, 2012) (decided under former O.C.G.A. § 24-3-18).

CHAPTER 9

AUTHENTICATION AND IDENTIFICATION

Article 1
General Provisions

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24-9-902. Self-authentication.
24-9-903. Subscribing witness's testimony.
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24-9-920. Authentication of Georgia state and county records.
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24-9-924. Admissibility of records of Department of Driver Services; admissibility of computer transmitted records.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011).

ARTICLE 1
GENERAL PROVISIONS

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-9-901. Requirement of authentication or identification.

(a) The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Code section:

(1) Testimony of a witness with knowledge that a matter is what it is claimed to be;

(2) Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation;

(3) Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated. Such specimens shall be furnished to the opposite party no later than ten days prior to trial;

(4) Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances;

(5) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker;

(6) Telephone conversations, by evidence that a call was made to the number assigned at the time by a telephone service provider to a particular person or business, if:

(A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone;

(7) Evidence that a document authorized by law to be recorded or filed and in fact recorded or filed in a public office or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept;

(8) Evidence that a document or data compilation, in any form:

(A) Is in such condition as to create no suspicion concerning its authenticity;

(B) Was in a place where it, if authentic, would likely be; and

(C) Has been in existence 20 years or more at the time it is offered;

(9) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result; or

(10) Any method of authentication or identification provided by law. (Code 1981, § 24-9-901, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Authenticating or identifying evidence, Fed. R. Evid. 901.

Law reviews. — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For comment on Copeland v. State, 66 Ga. App. 142, 17 S.E.2d 288 (1941), see 4 Ga. B.J. 53 (1942).

JUDICIAL DECISIONS

Analysis

General Consideration
Proof of Authenticity of Writing
Authentication of Document Submitted for Comparison
Documents Affecting Party's Character or Reputation
Letters
Source of Knowledge of Witnesses
Authentication by Expert Witnesses
Authentication by Nonexpert Witnesses
Authenticity Is Question for Jury

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, §§ 3762, 3763, former Code 1868, §§ 3786, 3787, former Code 1873, §§ 3839, 3840, former Code 1882, §§ 3839, 3840, former Civil Code 1895, §§ 5239, 5246, 5247, former Penal Code 1895, § 1016, former Civil Code 1910, §§ 5828, 5835, 5836, former Penal Code 1910, § 1042, former Code 1933, § 38-701, 38-708, and former O.C.G.A. §§ 24-7-1, 24-7-6, and 24-7-7 are included in the annotations for this Code section. The reader is advised to also consult the annotations following O.C.G.A. § 24-9-920, for annotations regarding authentication of Georgia state and county records.

In general. — Law applied only where the contents of the missing writing are in issue. Springer v. State, 238 Ga. 81, 230 S.E.2d 883 (1976) (decided under former Code 1933, § 38-701); Pryor v. State, 238 Ga. 698, 234 S.E.2d 918, cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006) (decided under former Code 1933, § 38-701).

Handwriting inadmissible without proof. — Writing, alleged to be in the handwriting or signature of a party, is inadmissible unless the writing is proved or acknowledged to be genuine. Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979) (decided under former Code 1933, § 38-708).

Witnesses to the authenticity of handwriting may be illiterate. Smith v. State, 77 Ga. 705 (1886) (decided under former Code 1882, § 3839).

Document to show that party can sign name in writing and not by mark is admissible. Stewart v. White, 143 Ga. 22, 84 S.E. 63 (1915) (decided under former Civil Code 1910, § 5836); Corley v. Parson, 236 Ga. 346, 223 S.E.2d 708 (1976) (decided under former Code 1933, § 38-709).

Document in possession of opposing party. — When the document was in the defendant's possession, a witness for the plaintiff in fieri facias was not allowed to testify as to the witness's examination of the document since the document itself was the best evidence. Hawes v. Red Oak Hauling Co., 116 Ga. App. 302, 157 S.E.2d 38 (1967) (decided under former Code 1933, § 38-701).

Circumstantial evidence. — Authenticity of the writing may be proved by circumstantial evidence. Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979) (decided under former Code 1933, § 38-708).

Copies made in same operation. — Court did not err in admitting in evidence copies or duplicate licenses for operation of hotel when the city clerk testified that the duplicate documents were made at the same time as the originals, with the same operation. Hannifin v. Wolpert, 56 Ga. App. 466, 193 S.E. 81 (1937) (decided under former Code 1933, § 38-701).

Alterations in original writing. — It was presumed, absent a contrary showing, or a denial by the signer, that alterations, erasures, or corrections in a writing were made prior to the signing of the writing. Kingston v. State, 127 Ga. App. 660, 194 S.E.2d 675 (1972) (decided under former Code 1933, § 38-701).

Writings admitted as evidence. — When a plea of guilty from a prior crimi-

nal case was admitted in a subsequent civil case for impeachment, the plea was not admitted as a court paper but as a private writing. Webb v. May, 91 Ga. App. 437, 85 S.E.2d 641 (1955) (decided under former Code 1933, § 38-701).

Admission of prejudicial hearsay testimony held harmless error. — Because the trial court's admission of prejudicial hearsay testimony regarding the authenticity of the victim's ministry ordination certificates was harmless error, given the overwhelming evidence of the defendant's guilt, a voluntary manslaughter conviction, as a lesser-included offense of murder, was upheld on appeal. Smith v. State, 283 Ga. App. 722, 642 S.E.2d 399 (2007) (decided under former O.C.G.A. § 24-7-1).

Lease need not be introduced in action for rent. — When the landlord's testimony that the tenant did not pay the tenant's rent as agreed under the lease was based on the tenant's personal knowledge, this was primary evidence and there was no reason why the original writing needed to be produced. McKinnon v. Shoemaker, 166 Ga. App. 231, 303 S.E.2d 770 (1983) (decided under former Code 1933, § 38-701).

Presumption of authenticity. — When a witness swore positively to the genuineness of handwriting, and when other handwriting by the same author was submitted to the jury for comparison, an inference of genuineness was proper. Boggus v. State, 34 Ga. 275 (1866) (decided under former Code 1863, § 3762); Gatlin v. State, 18 Ga. App. 9, 89 S.E. 345 (1916) (decided under former Civil Code 1910, § 38-708).

Witness must express opinion. — Before the testimony of a witness as to the identity of handwriting can go to the jury, the witness must express what amounts to an opinion, one way or the other, at the time when the witness is testifying, under the circumstances then existing. Foster v. Jenkins & Belt, 30 Ga. 476 (1860) (decided under former law).

Comparison with signature on pleading in case. — Defendant's handwriting may not be measured in genuineness by a comparison with defendant's signature to a plea filed in the case, merely because such plea is in the case. Washington v. State, 124 Ga. 423, 52 S.E. 910 (1905) (decided under former Civil Code 1895, § 5246).

Documents admitted for comparison only. — Law may be applied to writings not normally admissible if the documents are to be used for a comparison of handwriting and not for documents' content. Mitchell v. State, 89 Ga. App. 80, 78 S.E.2d 563 (1953) (decided under former Code 1933, § 38-709); Guy v. State, 138 Ga. App. 11, 225 S.E.2d 492 (1976) (decided under former Code 1933, § 38-709).

Writings admitted solely for comparison. — Former Code 1933, § 38-708, together with former Code 1933, § 38-709, may be applied to writings not normally admissible under former Code 1933, § 38-418 if the documents were not to be used for their content, but rather for the limited use of a comparison of the handwritings. Guy v. State, 138 Ga. App. 11, 225 S.E.2d 492 (1976) (decided under former Code 1933, § 38-708).

Improperly admitted testimony harmless when relevant only to counts on which defendant acquitted. — When handwriting testimony was improperly admitted but was relevant only to those counts of the indictment of which defendant was acquitted, the admission of such testimony was clearly harmless. Dowdy v. State, 159 Ga. App. 805, 285 S.E.2d 764 (1981) (decided under former O.C.G.A. § 24-7-6).

Federal interpretation on admission of ancient documents. — The Eleventh Circuit held that, once an ancient document has been authenticated under Fed. R. Evid. 901(b)(8), the admission of the document under the hearsay exception in Fed. R. Evid. 902 is automatic. United States v. Koizy, 728 F.2d 1314 (11th Cir. 1984).

Proof of Authenticity of Writing

Kinds of proof acceptable. — Execution of a deed may be proven by: (1) its ancientness and self-contained evidence of genuineness; (2) by admission of the opposite party; (3) by registration according to law; and (4) by witnesses. Gibson v. Causey, 223 Ga. 135, 153 S.E.2d 704

Proof of Authenticity of Writing (Cont'd)

(1967) (decided under former Code 1933, § 38-701).

Ancient documents. — Deed more than 30 years old (now 20 years under current O.C.G.A. § 24-9-901), having the appearance of genuineness on inspection, and coming from the proper custody, if possession had been consistent therewith, was admissible in evidence without proving the deed's execution. McArthur v. Morrison, 107 Ga. 796, 34 S.E. 205 (1899) (decided under former Civil Code 1895, § 5239).

Email not properly authenticated. — In a child molestation prosecution, an email that the defendant claimed the victim sent, which the defendant sought to introduce for impeachment, was properly excluded because defendant as offering party did not tender proof of the writing's authenticity. The victim denied writing the email, and the only proof the defendant offered to authenticate the email was the fact that the email came from the victim's email address, which did not prove the email's genuineness. Hollie v. State, 298 Ga. App. 1, 679 S.E.2d 47 (2009), aff'd, 287 Ga. 389, 696 S.E.2d 642 (2010) (decided under former O.C.G.A. § 24-7-1).

Admission of opposite party. — When the plaintiff admitted the execution of the deed offered in evidence by the defendant, further proof of execution was unnecessary. Ward-Truitt Co. v. Nicholson, 23 Ga. App. 672, 99 S.E. 153 (1919) (decided under former Civil Code 1910, § 5828).

Circumstantial evidence. — Genuineness of a writing may be proved by circumstantial evidence. State v. Smith, 246 Ga. 129, 269 S.E.2d 21 (1980) (decided under former Code 1933, § 38-701).

Possession combined with other circumstances required. — While possession alone was insufficient to establish a prima facie showing of authenticity, possession, together with other circumstances, could meet the burden. Martin v. State, 135 Ga. App. 4, 217 S.E.2d 312 (1975) (decided under former Code 1933, § 38-701); State v. Smith, 246 Ga. 129, 269 S.E.2d 21 (1980) (decided under former Code 1933, § 38-701); Hull v. State, 265 Ga. 757, 462 S.E.2d 596 (1995) (decided under former O.C.G.A. § 24-7-1).

Burden of proof. — Burden of proving the genuineness of a writing rests upon the party introducing the writing. Anderson v. Cuthbert, 103 Ga. 767, 30 S.E. 244 (1898) (decided under former Civil Code 1895, § 5239); State v. Smith, 246 Ga. 129, 269 S.E.2d 21 (1980) (decided under former Code 1933, § 38-701).

Laying a proper foundation. — When a writing other than an original is introduced into evidence, a proper foundation must be laid including evidence that the original is not available and that the evidence being introduced is a fair and correct representation of what it purports to show. Matthews & Son v. Richards, 13 Ga. App. 412, 79 S.E. 227 (1913), later appeal, 19 Ga. App. 489, 91 S.E. 914 (1917) (decided under former Civil Code 1910, § 5828); Ward-Truitt Co. v. Nicholson, 23 Ga. App. 672, 99 S.E. 153 (1919) (decided under former Civil Code 1910, § 5828); Swiney v. State Hwy. Dep't, 116 Ga. App. 667, 158 S.E.2d 321 (1967) (decided under former Code 1933, § 38-701).

Authentication of Document Submitted for Comparison

Writing must be either proven or acknowledged before admissible in evidence for comparison. McVicker v. Conkle, 96 Ga. 584, 24 S.E. 23 (1895) (decided under former Civil Code 1895, § 5247); Vizard v. Moody, 119 Ga. 918, 47 S.E. 348 (1904) (decided under former Civil Code 1895, § 5247); Chicago Bldg. & Mfg. Co. v. Butler, 139 Ga. 816, 78 S.E. 244 (1913) (decided under former Civil Code 1910, § 5836); Ginn v. Ginn, 142 Ga. 420, 83 S.E. 118 (1914) (decided under former Civil Code 1910, § 5836); Smith v. State, 138 Ga. App. 226, 225 S.E.2d 744 (1976) (decided under former Code 1933, § 38-709); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979) (decided under former Code 1933, § 38-709).

An ancient deed was so far proven to be the genuine deed of the grantor, and so far established the genuineness of the grantor's signature thereto as to authorize the deed's admission in evidence for the

purpose of a comparison of handwriting, upon the trial of a cause involving the question of the genuineness of the signature of such grantor to another instrument. Goza v. Browning, 96 Ga. 421, 23 S.E. 842 (1895) (decided under former Civil Code 1895, § 5247).

Circumstantial evidence. — Genuineness of the writing may be proved by circumstantial evidence. Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979) (decided under former Code 1933, § 38-709).

Circumstantial evidence of a postmark and a return address for a handwritten letter, along with a witness's testimony that the witness received the letter in the mail, was not sufficient authentication of the letter. Ross v. State, 194 Ga. App. 464, 390 S.E.2d 671 (1990) (decided under former O.C.G.A. § 24-7-7).

Possession not proof of authenticity. — Possession of letters was not of itself sufficient to prove that the possessor wrote letters, and thus establish the handwriting thereof as a standard with which to compare the handwriting. McCombs v. State, 109 Ga. 496, 34 S.E. 1021 (1900) (decided under former Civil Code 1895, § 5247).

Plea in another action. — When the deed was signed by mark instead of by the signature of the vendor, and it was shown that the vendor could write, it was not error to allow the plaintiff to introduce in evidence the original plea, filed in another suit brought against the vendor about the time of the execution of the deed alleged to be forged, with the signature of the vendor affixed to such plea, for the purpose of showing that the vendor could write and that the vendor signed the vendor's name in writing and not by mark. Stewart v. White, 143 Ga. 22, 84 S.E. 63 (1915) (decided under former Civil Code 1910, § 5836).

Documents Affecting Party's Character or Reputation

In general. — Upon the trial of one accused of murder it was not error to admit signatures of defendant on two pleas of guilty on two indictments for check forgery for comparison over the objection that this evidence put the defendant's character in issue. Hyde v. State, 196 Ga. 475, 26 S.E.2d 744 (1943) (decided under former Code 1933, § 38-709); Watkins v. State, 151 Ga. App. 496, 260 S.E.2d 547 (1979) (even though other samples of defendant's handwriting were available) (decided under former Code 1933, § 38-709).

Documents showing another crime. — Checks which were the basis for a prior forgery conviction could be offered for a comparison with the handwriting on the 34 checks at issue in the forgery case on trial as those checks had a direct relevancy to the case and, therefore, were not objectionable because those checks also tended to show a distinct and separate crime on the part of appellant. Watkins v. State, 151 Ga. App. 510, 260 S.E.2d 547 (1979) (decided under former Code 1933, § 38-709).

Letters

For proof necessary to authenticate an unsigned letter, see Rumph v. State, 91 Ga. 20, 16 S.E. 104 (1892) (decided under former Code 1882, § 3839).

Last letters. — Contents of a lost note are not proven when the witness can give no evidence of knowledge of the handwriting of the person alleged to have written the note. Bone v. State, 86 Ga. 108, 12 S.E. 205 (1890) (decided under former Code 1882, § 3839).

Possession not proof of authenticity. — Proof that letters were found in the defendant's possession is not proof that the handwriting in the letters was defendant's handwriting. McCombs v. State, 109 Ga. 496, 34 S.E. 1021 (1900) (decided under former Penal Code 1895, § 1016).

Authentication sufficient. — Testimony by the recipient of a letter that the handwriting on the letter appeared to be that of the defendant was sufficient authentication of the letter to allow the letter's admission against defendant during defendant's trial for aggravated assault. Harrison v. State, 253 Ga. App. 179, 558 S.E.2d 760 (2002) (decided under former O.C.G.A. § 24-7-6).

Handwritten note, in which the first of two defendants admitted to killing the victim in order to prevent the victim from testifying was properly authenticated because the letter was consistent with prior

Letters (Cont'd)

conversations involving the non-accomplice witness and the first defendant, and was personally addressed to the non-accomplice. Williams v. State, 280 Ga. 584, 630 S.E.2d 370 (2006) (decided under former O.C.G.A. § 24-7-6).

Trial court did not err in the admission of two letters handwritten by the defendant that were used by the state to cast doubt on the defendant's mental retardation claim with regard to the defendant's murder conviction and the death sentence imposed as a Department of Corrections employee authenticated the letters after testifying that the employee would recognize the defendant's handwriting because the employee observed the defendant sign the defendant's name and had received written communications from the defendant. The employee's statement that the handwriting in the body of the letters "appears to be that of" the defendant did not render the employee's testimony too tentative to support a finding of authenticity. Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007), cert. denied, 552 U.S. 1311, 128 S. Ct. 1882, 170 L. Ed. 2d 747; reh'g denied, 554 U.S. 930, 128 S. Ct. 2988, 171 L. Ed. 2d 907 (2008) (decided under former O.C.G.A. § 24-7-6).

Any error in the admission of a defendant's response to a detective's statement that the co-indictee had implicated the defendant in a murder and robbery made before Miranda warnings were administered was harmless as the statement was cumulative of a non-expert's admissible testimony authenticating letters from the defendant to the co-indictee under former O.C.G.A. § 24-7-6 containing a certain racial epithet also used by the defendant in the response. Phillips v. State, 285 Ga. 213, 675 S.E.2d 1 (2009) (decided under former O.C.G.A. § 24-7-6).

Letter received in mail. — Letter received through the mail was not admissible in evidence when offered by the recipient, without proof of the letter's authenticity, but proof of the letter's execution could be shown by circumstantial evidence. Deaderick v. Deaderick, 182 Ga. 96, 185 S.E. 89 (1936) (decided under former Code 1933, § 38-701).

Source of Knowledge of Witnesses

Knowledge from business correspondence. — When a witness testified that from business correspondence the witness was acquainted with the handwriting of the writer of a letter received by due course of mail, such testimony was enough to carry to the jury as evidence, and the court was right to admit the evidence. Pearson & Co. v. McDaniel, 62 Ga. 100 (1878) (decided under former Code 1873, § 3839).

Witness comparing by recollection. — Witness was not competent to testify as to the genuineness of a signature to a lost writing when all the knowledge that the witness had upon the subject was based upon a comparison of the witness's recollection of such signature with writing proved by other witnesses to be that of the person whose name was signed to the lost instrument. Gress Lumber Co. v. Georgia Pine Shingle Co., 120 Ga. 751, 48 S.E. 115 (1904) (decided under former Civil Code 1895, § 5246).

Manner in which a witness acquired knowledge of a person's handwriting was immaterial. Reid v. State, 20 Ga. 681 (1856) (decided under former law); Bruce v. Crews, 39 Ga. 544, 99 Am. Dec. 467 (1869) (decided under former Code 1863, § 3762); Shaw v. Chiles, 9 Ga. App. 460, 71 S.E. 745 (1911) (decided under former Civil Code 1910, § 5835); Notis v. State, 84 Ga. App. 199, 65 S.E.2d 622 (1951) (decided under former Code 1933, § 38-708).

Authentication by Expert Witnesses

In general. — When two other letters, purporting to come from the same source as the first, were shown to experts, who compared the letters with the first letter and testified that the experts were of the opinion that the letters were all in the same handwriting, this was sufficient to admit the letters in evidence. Smith v. State, 77 Ga. 705 (1886) (decided under former Code 1882, § 3840).

Trial court did not err in admitting in evidence two notebooks, representing handwriting samples, for comparison with the kidnapping ransom note, and in refusing to strike the testimony of the state's

expert witness as to comparison of these notebooks with the ransom note. Gross v. State, 161 Ga. App. 489, 288 S.E.2d 733 (1982) (decided under former O.C.G.A. § 24-7-7).

Handwriting expert may testify as to the genuineness of handwriting. Borders v. City of Macon, 18 Ga. App. 333, 89 S.E. 451 (1916) (decided under former Penal Code 1910, § 1042).

When handwriting expert's testimony was based upon the expert's comparison between admitted exemplars of defendant's handwriting and other unadmitted documents, introduction of such testimony into the record was error. Dowdy v. State, 159 Ga. App. 805, 285 S.E.2d 764 (1981) (decided under former O.C.G.A. § 24-7-6).

Authentication by Nonexpert Witnesses

In general. — A nonexpert witness may identify the handwriting of a particular individual (as the witness would identify the individual personally), provided the witness knows the handwriting or is so familiar with the handwriting that the witness would recognize the handwriting, but such witness may not testify as to the identity of handwriting if the witness's opinion is founded solely on a comparison of a handwriting brought into court and proved to be genuine with the handwriting in question. Copeland v. State, 66 Ga. App. 142, 17 S.E.2d 288 (1941), for comment, see 4 Ga. B.J. 53 (1942) (decided under former Code 1933, § 38-709).

Basis for testimony of nonexpert witness. — Anyone familiar with the handwriting of another may offer opinion testimony as to its authenticity based on that person's knowledge and belief. Bates v. State, 18 Ga. App. 718, 90 S.E. 481 (1916) (decided under former Civil Code 1910, § 5835); Waddell v. Watkins Medical Co., 25 Ga. App. 657, 104 S.E. 250 (1920) (decided under former Civil Code 1910, § 5835); Haygood v. Clark Co., 27 Ga. App. 101, 107 S.E. 379 (1921) (decided under former Civil Code 1910, § 5835); Copeland v. State, 66 Ga. App. 142, 17 S.E.2d 288 (1941) (decided under former Code 1933, § 38-708); Gaulding v. Courts, 90 Ga. App. 472, 83 S.E.2d 288 (1954) (decided under former Code 1933, § 38-708); Wooten v. Life Ins. Co., 93 Ga. App. 665, 92 S.E.2d 567 (1956) (decided under former Code 1933, § 38-708); Kinney v. Youngblood, 216 Ga. 354, 116 S.E.2d 608 (1960) (decided under former Code 1933, § 38-708).

Nonexpert witness may identify the handwriting of a particular individual (as the witness would identify the individual personally), provided the witness knows the handwriting or is so familiar with the handwriting that the witness would recognize the handwriting. Quick v. State, 256 Ga. 780, 353 S.E.2d 497 (1987) (decided under former O.C.G.A. § 24-7-6); Summerour v. State, 211 Ga. App. 65, 438 S.E.2d 176 (1993) (decided under former O.C.G.A. § 24-7-6).

Availability of direct evidence of execution. — Former O.C.G.A. § 24-7-6 did not exclude opinion testimony on the authenticity of a signature when direct evidence of execution was available. Ham v. Ham, 257 Ga. App. 415, 571 S.E.2d 441 (2002) (decided under former O.C.G.A. § 24-7-6).

Nonexpert witness must have reasons for recognizing the writing in question. Bruce v. Crews, 39 Ga. 544, 99 Am. Dec. 467 (1869) (decided under former Code 1868, § 3786); Wimbish v. State, 89 Ga. 294, 15 S.E. 325 (1892) (decided under former Code 1882, § 3839); Haygood v. Clark Co., 27 Ga. App. 101, 107 S.E. 379 (1921) (decided under former Civil Code 1910, § 5835).

Comparison with other handwriting. — Nonexpert witness could not testify as to the identity of handwriting if the witness's opinion was based solely on comparison with handwriting proved to be genuine. Copeland v. State, 66 Ga. App. 142, 17 S.E.2d 288 (1941), for comment, see 4 Ga. B.J. 53 (1942) (decided under former Code 1933, § 38-708).

Trial court did not err in allowing a police detective, who gained knowledge of defendant's signature by witnessing the defendant sign the arraignment form, from identifying the signature on an indictment from a prior conviction; the source of the detective's knowledge was a proper question for investigation and went entirely to the credit and weight of

Authentication by Nonexpert Witnesses (Cont'd)

the detective's evidence. Williams v. State, 259 Ga. App. 742, 578 S.E.2d 128 (2003) (decided under former O.C.G.A. § 24-7-6).

Employee's recognition of supervisor's signature. — Employee's testimony that the employee transmitted a document to a supervisor and received the document back with the supervisor's signature and that the employee recognized the signature as that of the supervisor because the employee was familiar with the signature satisfied the requirements of former O.C.G.A. § 24-7-6. Malin v. Servisco, Inc., 172 Ga. App. 418, 323 S.E.2d 278 (1984) (decided under former O.C.G.A. § 24-7-6).

Authenticity Is Question for Jury

In general. — It is the duty of the jury to compare the disputed writing with admittedly or proven authentic writings and then determine the authenticity of the disputed writing. Boggus v. State, 34 Ga. 275 (1866) (decided under former Code 1863, § 3763); Bruce v. Crews, 39 Ga. 544, 99 Am. Dec. 467 (1869) (decided under former Code 1868, § 3787); Collins v. Glisson, 35 Ga. App. 111, 132 S.E. 114 (1926) (decided under former Civil Code 1910, § 5836); Rogers v. Rogers, 52 Ga. App. 548, 184 S.E. 404 (1936) (decided under former Code 1933, § 38-709).

Jury instructions. — If any specific instruction was desired as to the jury's duty to compare such writings with the signature on the note alleged to have been forged, a special written request should have been made. McRae v. Wilby, 59 Ga. App. 401, 1 S.E.2d 77 (1939) (decided under former Code 1933, § 38-709).

Authenticity was question for jury. — Statement that the handwriting was that of a certain person was to be taken not as a conclusion but merely as an opinion the weight of which was a matter entirely for the jury. Borders v. City of Macon, 18 Ga. App. 333, 89 S.E. 451 (1916) (decided under former Civil Code 1910, § 5835); Bates v. State, 18 Ga. App. 718, 90 S.E. 481 (1916) (decided under former Civil Code 1910, § 5835); Rogers v. Rogers, 52 Ga. App. 548, 184 S.E. 404 (1936) (decided under former Code 1933, § 38-708); Notis v. State, 84 Ga. App. 199, 65 S.E.2d 622 (1951) (decided under former Code 1933, § 38-708); Gaulding v. Courts, 90 Ga. App. 472, 83 S.E.2d 288 (1954) (decided under former Code 1933, § 38-708).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 1045, 1209.

C.J.S. — 32 C.J.S., Evidence, §§ 820 et seq., 835 et seq., 891 et seq., 974 et seq.

ALR. — Admissibility in evidence, for purpose of comparison, of writing made by accused person at request of public authorities, 1 ALR 1304.

Use of photographs in examination and comparison of handwriting or typewriting, 31 ALR 1431; 17 ALR2d 308.

Admissibility and weight of opinion evidence as to genuineness of signature by mark, 101 ALR 767.

Authorship or authenticity of written or printed matter as inferable without extrinsic proof from name used therein or from its contents or subject matter, 131 ALR 301.

Changes in handwriting as evidence of change in physical or mental condition, 134 ALR 641.

Probative value of opinion testimony of handwriting experts that document is not genuine, opposed to testimony of persons claiming to be attesting witnesses, 154 ALR 649.

Mode and degree of proof required to establish genuineness of handwriting offered as standard or exemplar for comparison with a disputed writing or signature, 41 ALR2d 575.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 ALR2d 308.

Competency, as a standard of comparison to establish genuineness of handwriting, of writings made after controversy arose, 72 ALR2d 1274.

Propriety of jury, or court sitting as trier of facts, making a comparison of a dis-

puted writing with a standard produced in court, without the aid of an expert witness, 80 ALR2d 272.

Proof of authorship or identity of sender of telegram as prerequisite of its admission in evidence, 5 ALR3d 1018.

Unaccepted offer for purchase of real property as evidence of its value, 25 ALR4th 571.

Unaccepted offer to sell or buy comparable real property as evidence of value of property in issue, 25 ALR4th 615.

Unaccepted offer to sell or listing of real property as evidence of its value, 25 ALR4th 983.

Admissibility of evidence as to linguistics of typing style (forensic linguistics) as basis of identification of typist or author, 36 ALR4th 598.

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 18 ALR6th 613.

Authentication of electronically stored evidence, including text messages and e-mail, 45 ALR4th 602.

Authentication and admission of foreign business records in federal criminal proceeding pursuant to 18 USCS § 3505. 41 ALR Fed. 2d 537.

Admissibility of handwriting expert's testimony in federal criminal case, 183 ALR Fed. 333.

24-9-902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility shall not be required with respect to the following:

(1) A document bearing a seal purporting to be that of the United States or of any state, district, commonwealth, territory, or insular possession thereof or the Panama Canal Zone or the Trust Territory of the Pacific Islands or of a political subdivision, department, officer, or agency thereof or of a municipal corporation of this state and bearing a signature purporting to be an attestation or execution;

(2) A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) of this Code section having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine;

(3) A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make such execution or attestation and accompanied by a final certification as to the genuineness of the signature, official position of the executing or attesting person, or of any foreign official whose certificate of genuineness of signature and official position relates to such execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to such execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate

the authenticity and accuracy of official documents, the court may, for good cause shown, order that such documents be treated as presumptively authentic without final certification or permit such documents to be evidenced by an attested summary with or without final certification;

(4) A duplicate of an official record or report or entry therein or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification by certificate complying with paragraph (1), (2), or (3) of this Code section or complying with any law of the United States or of this state, including Code Section 24-9-920;

(5) Books, pamphlets, or other publications purporting to be issued by a public office;

(6) Printed materials purporting to be newspapers or periodicals;

(7) Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin;

(8) Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments;

(9) Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law;

(10) Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic;

(11) The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration of its custodian or other qualified person certifying that the record:

(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of such matters;

(B) Was kept in the course of the regularly conducted activity; and

(C) Was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection

sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration; or

(12) In a civil proceeding, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) Was kept in the course of the regularly conducted activity; and

(C) Was made by the regularly conducted activity as a regular practice.

The declaration shall be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration. (Code 1981, § 24-9-902, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-7-25, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived in part from 28 U.S.C. § 1739.

Cross references. — Proof of lack of public record by evidence showing that record cannot be found, § 9-11-44. Records, documents, and papers of public officers generally, T. 50, C. 18. Evidence that is self authenticating, Fed. R. Evid. 902.

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Analysis

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Certificate and Seal

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1830, Cobb's 1851 Digest, p. 273, former Laws 1836, Cobb's 1851 Digest, p. 273, former Ga. L. 1855-56, p. 143, § 1, former Code 1863, §§ 3739, 3753, former Code 1868, §§ 3763, 3777, former Code 1873, §§ 3816, 3829, former Code 1882, § 3816, former Ga. L. 1890-91, p. 109, § 1, former Civil Code 1895, §§ 5211, 5216, 5235, former Penal Code 1895, § 1015, former Civil Code 1910, §§ 5798, 5803, 5822, former Penal Code 1910, § 1041, former Code 1933, §§ 38-601, 38-606, 38-625, 38-627, former Ga. L. 1967, p. 226, § 20, former Ga. L. 1971, p. 441, §§ 1, 2, and former O.C.G.A. §§ 9-11-44, 24-7-8, 24-7-20, 24-7-21, 24-7-23, 24-7-24, 24-7-25, 24-7-26, and 24-7-27 are included in the annotations for this Code section. The reader is also advised to consult the annotations under O.C.G.A. § 24-8-803, for annotations regarding when deeds serve as evidence, O.C.G.A. § 24-9-920 for annotations regarding the authentication of Georgia state and county records, and O.C.G.A. § 24-9-922, for annotations regarding foreign state laws and records.

Form of certificate. — Certificate in the following form: "The above and foregoing is a true copy," etc., was a sufficient authentication of a record. Harden v. Webster, Parmelee & Co., 29 Ga. 427 (1859) (decided under Ga. L. 1855-56, p. 143, § 1).

Sufficiency of certificate. — To make a certificate from the Executive Department admissible in evidence, it was not necessary that the certificate give a copy of that to which it relates. It was sufficient that it gave, substantially, the contents, or a part of the contents, of the thing to which it related. Henderson v. Hackney, 16 Ga. 521 (1854) (decided under Laws 1830, Cobb's 1851 Digest, p. 273).

Validity of record certified. — In action for alimony when plaintiff introduced a certified copy of marriage certificate, no issue as to validity of marriage was made in the absence of a direct attack on the record by the defendant. Guess v. Guess, 202 Ga. 364, 43 S.E.2d 326 (1947) (decided under former Code 1933, § 38-601).

Two sets of protests. — When two sets of notarial protests upon the same bill were filed, both were entitled to be read without further proof by the notary. Southern Bank v. Mechanics Sav. Bank, 27 Ga. 252 (1859) (decided under Laws 1836, Cobb's 1851 Digest, p. 273).

Failing to file in court. — That a certificate may not have been filed in court and there permitted to remain, agreeably to the provisions of the former statute, simply furnished grounds for objecting to the certificate's reception in evidence. Having been regularly admitted in evidence, it was proper for the court to tell the jury what effect the law attached to a notarial certificate of protest. Patton v. Bank of La Fayette, 124 Ga. 965, 53 S.E. 664, 5 L.R.A. (n.s.) 592, 4 Ann. Cas. 639 (1906), overruled on other grounds, Sharpe v. Department of Transp., 267 Ga. 267, 476 S.E.2d 722 (1996) (decided under former Civil Code 1895, § 5243).

Protest rejected for nonfiling. — When considered in connection with the evidence of the notary public who issued a certificate of protest on the paper sued on, the certificate not having been filed in court and permitted to remain there as provided by the former statute, it was not error to reject the certificate from evidence when offered by the plaintiff. Woods v. Mays, 143 Ga. 209, 84 S.E. 450 (1915) (decided under former Civil Code 1910, § 5822).

Protest with notice. — Notarial certificate, which stated that a draft was presented at maturity, and payment demanded and refused for want of funds, and that due notice of the nonpayment was given on the same day to all the parties concerned, was sufficient notice of the dishonor thereof. Fields v. Thornton, 1 Ga. 306 (1846) (decided under Laws 1836, Cobb's 1851 Digest, p. 273).

Law not only made certificates prima facie evidence of the nonpayment of a note, but evidence of notice also, when so stated in the certificate under the hand and seal of the notary. Walker v. Bank of Augusta, 3 Ga. 486 (1847) (decided under Laws 1836, Cobb's 1851 Digest, p. 273).

Protest without notice. — But a notarial certificate reciting the fact of protest for nonpayment, but silent as to whether or not notice of protest was given to the endorser, was no evidence that such notice was in fact given. Hobbs & Tucker v. Chemical Nat'l Bank, 97 Ga. 524, 25 S.E. 348 (1895) (decided under former Civil Code 1895, § 5235).

Nothing in former O.C.G.A. § 24-7-20 required that certified copies be photostatic copies of original documents. Cook v. State, 255 Ga. 565, 340 S.E.2d 843, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986) (decided under former O.C.G.A. § 24-7-20).

Elements of authentication. — Establishment of three elements was commonly spoken of as authentication: the authority of the officer issuing the document, the incumbency of the officer, and the genuineness of the officer's signature or seal. Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24 (1946) (decided under former Code 1933, § 38-627).

Federal interpretation on admission of ancient documents. — The Eleventh Circuit held that, once an ancient document has been authenticated under Fed. R. Evid. 901(b)(8), the admission of the document under the hearsay exception in Fed. R. Evid. 902 is automatic. United States v. Koizy, 728 F.2d 1314 (11th Cir. 1984).

Handwritten signature not required. — Under former O.C.G.A. § 24-7-24, the signature of the clerk need not be handwritten, nor is there a requirement that the foreign judgment itself be explicitly mentioned in the clerk's certificate. Foy v. Lewis, 248 Ga. 234, 282 S.E.2d 295 (1981) (decided under former O.C.G.A. § 24-7-24).

There was no requirement that the signature of the clerk be handwritten rather than stamped. Sandifer v. Lynch, 244 Ga. 369, 260 S.E.2d 78 (1979) (decided under former Code 1933, § 38-627).

Attestation

Contents of record. — Former statute merely required a certificate or attestation, without specifying any detail as to the location and length of the record, by reference to the number of pages, minute book, case number, and similar details. McIntyre v. Balkcom, 229 Ga. 81, 189 S.E.2d 445 (1972) (decided under former Code 1933, § 38-601).

Seal not required. — Former statute required a certificate or attestation without specifying the necessity for the seal by a court reporter. Kinney v. Avery & Co., 14 Ga. App. 180, 80 S.E. 663 (1914) (decided under former Civil Code 1910, § 5798); Canal Ins. Co. v. Tate, 111 Ga. App. 377, 141 S.E.2d 851 (1965) (decided under former Code 1933, § 38-601); McIntyre v. Balkcom, 229 Ga. 81, 189 S.E.2d 445 (1972) (decided under former Code 1933, § 38-601).

Treatment of Specific Records

1. In General

Acknowledgment of service. — There was no error in admitting in evidence the certified copy of an acknowledgment of service. James v. Edward Thompson Co., 17 Ga. App. 578, 87 S.E. 842 (1916) (decided under former Civil Code 1910, § 5798).

Administrative records. — Properly authenticated administrative records are admissible. Niehaus v. State, 149 Ga. App. 575, 254 S.E.2d 895 (1979) (decided under former Code 1933, § 38-601).

Conditional sales contract. — Conditional sales contract duly recorded and on its face properly executed and attested was admissible in evidence. Central Bank & Trust Co. v. Creede, 103 Ga. App. 203, 118 S.E.2d 844 (1961) (decided under former Code 1933, § 38-601).

County bonds. — It was the duty of the clerk of the superior court to sign a validation certificate and attach the seal of the clerk's office to all county bonds regularly validated. Touchton v. Echols County, 211 Ga. 85, 84 S.E.2d 81 (1954) (decided under former Code 1933, § 38-601).

Treatment of Specific Records (Cont'd)
1. In General (Cont'd)

Distribution of estate. — When a division in kind was made between heirs and distributees of a decedent, a certified copy of the return of the commissioners, and of the order of the court approving the return, were admissible in evidence in an action involving title to the land covered by the award. Bell v. Cone, 208 Ga. 467, 67 S.E.2d 558 (1951) (decided under former Code 1933, § 38-601).

Driver's license. — Because a defendant's driver's license was a properly certified public record, the trial court was permitted to infer the reliability of any hearsay contained therein and to conclude that no confrontation clause violation had been shown pursuant to former O.C.G.A. §§ 24-3-17 and 24-7-20 (see now O.C.G.A. §§ 24-8-803 and 24-9-924). Douglas v. State, 312 Ga. App. 585, 718 S.E.2d 908 (2011), cert. denied, No. S12C0470, 2012 Ga. LEXIS 606 (Ga. 2012) (decided under former O.C.G.A. §§ 24-3-17 and 24-7-20).

Fertilizer analysis record. — A certified copy of an analysis of fertilizers to be used in an action for false or incorrect branding should not contain a statement as to the penalty or damage for which the manufacturer or dealer might be deemed to be liable; only the mathematical result of the chemical analysis should be stated. Georgia Fertilizer Co. v. Walker, 45 Ga. App. 68, 163 S.E. 277 (1932) (decided under former Civil Code 1910, § 5798).

Map of county. — Properly certified copy of a map of a county, in the office of the Secretary of State, was admissible in evidence without proof of the correctness or existence of the original. Berry v. Clark, 117 Ga. 964, 44 S.E. 824 (1903) (decided under former Civil Code 1895, § 5211).

Marriage record. — Public record of a ceremonial marriage was conclusive evidence of such marriage, in the absence of a timely direct attack on such record, which attack must be supported by proper proof. Guess v. Guess, 202 Ga. 364, 43 S.E.2d 326 (1947) (decided under former Code 1933, § 38-601).

Intoxilyzer report. — Defendant's conviction for driving under the influence to the extent that defendant's blood-alcohol content exceeded the legal limit was reversed as the trial court erroneously admitted a copy of the Intoxilyzer report over a best evidence objection; the state was unable to explain the absence of the original, the state presented no evidence that the state made any effort to locate the original, and former O.C.G.A. § 24-7-20 did not apply. Lumley v. State, 280 Ga. App. 82, 633 S.E.2d 413 (2006) (decided under former O.C.G.A. § 24-7-20).

Book-in photographs. — Although the appellate court found that book-in photographs which the state offered to prove that defendant was the same person who was convicted of a prior felony, albeit under a different name, could have been admitted under former O.C.G.A. § 24-7-20, and the appellate court recommended that practice, the appellate court held that the trial court did not abuse the court's discretion during the sentencing phase of defendant's trial when the court admitted the photographs and used them to determine that defendant was subject to a sentence of life in prison without parole, pursuant to O.C.G.A. § 17-10-7(c), because defendant had prior felony convictions. Farmer v. State, 268 Ga. App. 831, 603 S.E.2d 16 (2004) (decided under former O.C.G.A. § 24-7-20).

Search warrants. — Rule that a public record could be proved only by a duly certified copy thereof, in the absence of admission in open court that the document was an original public record, did not apply to search warrants. DePalma v. State, 228 Ga. 272, 185 S.E.2d 53 (1971) (decided under former Code 1933, § 38-601).

Secretary of State's office records. — A certified copy of a record in the office of the Secretary of State was held admissible on the question as to who was the grantee of land from the state. Ferrell v. Hurst, 68 Ga. 132 (1881) (decided under former Code 1873, § 3816).

Computer printout from state website. — Former homeowner was required to give notice to a defendant under O.C.G.A. § 10-1-399 even though the defendant was incorporated and had its principal place of business in a different

state. There was no evidence that the defendant did not maintain a place of business in Georgia or keep some assets in Georgia, and the homeowner's contention was predicated on uncertified computer printouts from the Secretary of State's website, which were inadmissible under former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-907). Steed v. Fed. Nat'l Mortg. Corp., 301 Ga. App. 801, 689 S.E.2d 843 (2009) (decided under former O.C.G.A. § 24-7-20).

Transcript of tax records. — Upon the trial of a tax collector for embezzlement, transcripts from the books of the Comptroller General and former Treasurer of the State, certified under the former statute, were admissible in evidence to show a failure on the part of such defendant to pay over the taxes collected by the defendant tax collector. Shivers v. State, 53 Ga. 149 (1874) (decided under former Code 1873, § 3816).

Tax returns. — It was not error to allow material portions of certified copies of tax returns of the defendant in ejectment, as to the number of acres of land given in by the defendant and the value thereof for certain years, to be received in evidence over the objection that the copies were certified to by the tax receiver, and not by the tax collector; that the original returns themselves, and not certified copies of the returns, should be produced in evidence. Jett v. Hart, 152 Ga. 266, 109 S.E. 654 (1921) (decided under former Civil Code 1910, § 5798).

Tax return records of state. — Books of tax returns in the office of the Comptroller General were of equal rank as evidence with those in the proper offices of the respective counties, and the certificate of the Comptroller General touching the contents of such books was no less admissible than the certificates of the proper county officer were. Clark v. Empire Lumber Co., 87 Ga. 742, 13 S.E. 826 (1891) (decided under former Code 1882, § 3816).

Execution for unpaid taxes. — After an execution for unpaid taxes was issued by the Comptroller General against a certain tract of unreturned wild land, and a sale of the land was made thereunder, and the execution was returned to the Comptroller's office with the official entries thereon, it became an office paper, and a certified copy of such execution and entries was admissible in evidence in lieu of the original. Cannon v. Gorham, 136 Ga. 167, 71 S.E. 142, 1912C Ann. Cas. 39 (1911) (decided under former Civil Code 1910, § 5798).

Uncertified copies of computer printouts. — Uncertified copies of computer printouts apparently obtained from the Secretary of State's website could not be used as evidence to show a relationship between corporations because the printouts did not contain a certificate or attestation of a public officer and thus were not properly authenticated. Matson v. Noble Inv. Group, LLC, 288 Ga. App. 650, 655 S.E.2d 275 (2007) (decided under former O.C.G.A. § 24-7-20).

Name search records from Secretary of State in form of computer printouts. — Trial court erred in considering name search documents from the Ohio Secretary of State's office because the documents were not properly authenticated under former O.C.G.A. § 24-7-20. Uncertified copies of computer printouts from a Secretary of State's website were not admissible as evidence unless authenticated. Std. Bldg. Co. v. Wallen Concept Glazing, Inc., 298 Ga. App. 443, 680 S.E.2d 527 (2009) (decided under former O.C.G.A. § 24-7-20).

Talley sheets of election. — Exemplifications of "records and minutes" of municipal corporations did not include talley sheets of former municipal elections. Sewell v. City of Tallapoosa, 145 Ga. 19, 88 S.E. 577 (1916) (decided under former Civil Code 1910, § 5803).

Owner of a lost negotiable promissory note no longer has the option of "establishing" the note pursuant to former O.C.G.A. § 24-7-24 (see now O.C.G.A. §§ 24-9-902 and 24-9-927). The owner must now bring suit directly on the lost note itself pursuant to O.C.G.A. § 11-3-804. Ballard v. Frey, 179 Ga. App. 455, 346 S.E.2d 893 (1986) (decided under former O.C.G.A. § 24-7-24).

Uniform Traffic Citations admissible. — Uniform Traffic Citations that came before the court within the court clerk's file were "certified under seal" as

Treatment of Specific Records (Cont'd)
1. In General (Cont'd)

required by former O.C.G.A. § 24-7-21. Graves v. State, 227 Ga. App. 628, 490 S.E.2d 111 (1997) (decided under former O.C.G.A. § 24-7-21).

Trial court properly admitted certified copy of arrest warrant. — See Elliott v. State, 253 Ga. 417, 320 S.E.2d 361 (1984) (decided under former O.C.G.A. § 24-7-21).

2. Federal Records

Elements of authentication, the authority, the incumbency, and the genuineness of the signature of the certifying custodian, were applicable to records of the federal, not the state, government. O'Connor v. United States, 11 Ga. App. 246, 75 S.E. 110 (1912) (decided under former Civil Code 1910, § 5798); Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24 (1946) (decided under former Code 1933, § 38-601); Pressley v. State, 207 Ga. 274, 61 S.E.2d 113 (1950) (decided under former Code 1933, § 38-601); Mach v. State, 109 Ga. App. 154, 135 S.E.2d 467 (1964) (decided under former Code 1933, § 38-601); Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311 (1973) (decided under former Code 1933, § 38-601).

Former statute applicable to state, territorial and possession, but not federal, records, acts, and proceedings. — Former O.C.G.A. § 24-7-24 (see now O.C.G.A. §§ 24-9-902 and 24-9-922) applied only to acts, records, and judicial proceedings of states, territories, and possessions of the United States. There was no Georgia statute expressly governing the authentication of copies of federal records. Rice v. State, 178 Ga. App. 748, 344 S.E.2d 720 (1986) (decided under former O.C.G.A. § 24-7-24).

3. Court Records

In general. — Clerk of court may certify a copy or transcript of the court record, but the clerk's certificate of the nonexistence on the records of certain facts was not admissible. Miller v. Reinhart, 18 Ga. 239 (1855) (decided under Laws 1830, Cobb's 1851 Digest, p. 273); Dillon v. Mattox, 21 Ga. 113 (1857) (decided under Ga. L. 1855-56, p. 143, § 1); Martin v. Anderson, 21 Ga. 301 (1857) (decided under Ga. L. 1855-56, p. 143, § 1); Walker v. Logan, 75 Ga. 759 (1885) (decided under former Code 1882, § 3816); Lamar v. Pearre, 90 Ga. 377, 17 S.E. 92 (1892) (decided under former Code 1882, § 3816); Hines v. Johnston, 95 Ga. 644, 23 S.E. 470 (1895) (decided under former Civil Code 1895, § 5211); Greer v. Fergerson, 104 Ga. 552, 30 S.E. 943 (1898) (decided under former Civil Code 1895, § 5211); but see for contra implication, Thompson v. Cheatham, 244 Ga. 120, 259 S.E.2d 62 (1979) (decided under former Code 1933, § 38-601).

Court proceedings. — The only legal way to prove proceedings of the superior court was by an extract from the minutes of that court duly certified by the court's clerk. Bowden v. Taylor, 81 Ga. 199, 6 S.E. 277 (1888) (decided under former Code 1882, § 3816); Weaver v. Tuten, 138 Ga. 101, 74 S.E. 835 (1912) (decided under former Civil Code 1910, § 5798).

Criminal proceedings. — Exemplification of the record of an illegality case, under the hand and seal of the clerk, exhibiting among other things, the assignment by the plaintiff of the writ of fi. fa., was admissible in evidence to prove the transfer. Napier v. Neal, 3 Ga. 298 (1847) (decided under Laws 1830, Cobb's 1851 Digest, p. 273).

Guilty plea. — Trial court properly used a prior guilty plea to sentence the defendant as a recidivist when the state had presented a certified copy of the plea that was signed and initialed by defense counsel along with a plea hearing transcript; even if the plea hearing transcript was uncertified and unauthenticated, the certified copy of the plea was admissible under former O.C.G.A. § 24-7-20, and the defendant did not produce evidence of invalidity once the fact of conviction was proved and the state showed that the defendant was represented by counsel. Moorer v. State, 286 Ga. App. 395, 649 S.E.2d 537 (2007), cert. denied, No. S07C1910, 2007 Ga. LEXIS 806 (Ga. 2007) (decided under former O.C.G.A. § 24-7-20).

Proceedings in same court. — Original papers of proceedings in the court were admissible in another case in the same court where otherwise relevant. Sellers v. Page, 127 Ga. 633, 56 S.E. 1011 (1907) (decided under former Civil Code 1895, § 5211); Woods v. Travelers Ins. Co., 53 Ga. App. 429, 186 S.E. 467 (1936) (decided under former Code 1933, § 38-601); Clarkum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936) (decided under former Code 1933, § 38-601); Williford v. State, 55 Ga. App. 40, 192 S.E. 93 (1937) (decided under former Code 1933, § 38-601); Brantley v. State, 121 Ga. App. 79, 172 S.E.2d 852 (1970) (decided under former Code 1933, § 38-601); Thompson v. Cheatham, 244 Ga. 120, 259 S.E.2d 62 (1979) (decided under former Code 1933, § 38-601).

Proceedings in other courts. — Former statute made provision for exemplification by certificate of any public officer of authenticity of any copy or transcript of any record, but had no relation to the court record in another case or cases pending in the same court in which the records were offered in evidence. Brantley v. State, 121 Ga. App. 79, 172 S.E.2d 852 (1970) (decided under former Code 1933, § 38-601).

Certification by superior court clerk. — It was entirely proper for the clerk of the superior court, as custodian of the court's records, to certify what appears or does not appear upon the minutes of the court. Thompson v. Cheatham, 244 Ga. 116, 259 S.E.2d 62 (1979) (decided under former Ga. L. 1967, p. 226, § 20).

Certification of nonconforming record. — Certification by the clerk of court must speak the truth, and the clerk must not be required by a mandamus, or otherwise, to certify an instrument that did not conform to the records in the clerk's office. Touchton v. Echols County, 211 Ga. 85, 84 S.E.2d 81 (1954) (decided under former Code 1933, § 38-601).

Judgment. — Introduction of a certified copy of a judgment against a party was sufficient evidence to prove the existence of that judgment. Gowdey v. Rem Assocs., 176 Ga. App. 83, 335 S.E.2d 309 (1985) (decided under former O.C.G.A. § 24-7-20).

Trial court did not abuse the court's discretion when the court excluded a document purported to be the codefendant's felony conviction, as the document was not a properly certified copy and was unauthenticated. McClendon v. State, 276 Ga. App. 543, 623 S.E.2d 738 (2005) (decided under former O.C.G.A. § 24-7-20).

Record of conviction. — Certification and seal on record of conviction furnished by an officer of the Department of Offender Rehabilitation (now Corrections) who was required by law to keep the records on file was sufficient to qualify the record for admission into evidence to establish the fact of lawfulness of incarceration even though the certification was not by the Superior Court of Whitfield County, the source of the original document. Ward v. State, 165 Ga. App. 163, 300 S.E.2d 528 (1983) (decided under former O.C.G.A. § 24-7-20).

Authentication does not automatically establish admissibility. — Former O.C.G.A. § 24-7-20 did not address hearsay concerns; the former statute did not require the admission of hearsay merely because the hearsay had been recorded in a court of record. McGaha v. State, 221 Ga. App. 440, 471 S.E.2d 533 (1996) (decided under former O.C.G.A. § 24-7-20).

Clerical error in a certified copy of the sentence of one convicted of crime did not render the paper inadmissible in evidence if it clearly appeared from the context what the true purport of the document was. Daniel v. State, 114 Ga. 533, 40 S.E. 805 (1902) (decided under former Penal Code 1895, § 1015).

Objection to admission of record. — It was too late to object to a record for want of proper authentication after the record had been admitted and read to the jury without objection. Williams v. Rawlins, 33 Ga. 117 (1861) (decided under Ga. L. 1855-56, p. 143, § 1).

Uniform Traffic Citations were not evidence, and thus could not provide the factual basis necessary to establish venue. Graves v. State, 269 Ga. 772, 504 S.E.2d 679 (1998), overruled on other grounds, Jones v. State, 272 Ga. 900, 537 S.E.2d 80 (2000), reversing Graves v. State, 227 Ga. App. 628, 490 S.E.2d 111 (1997) (decided

Treatment of Specific Records (Cont'd)
3. Court Records (Cont'd)

under former O.C.G.A. § 24-7-21).

Applicability. — Georgia resident's argument that the supplemental affidavit attached to the motion under the Uniform Act to Secure the Attendance of Witnesses from Without the State was inadmissible because it did not comply with former O.C.G.A. § 24-7-27 failed because former O.C.G.A. § 24-7-27 provided the method for authenticating out-of-state court records and the affidavit was not a court record. Wollesen v. State, 242 Ga. App. 317, 529 S.E.2d 630 (2000) (decided under former O.C.G.A. § 24-7-24).

Traffic citation indicating guilty plea admissible. — In a suit for damages sustained in an automobile collision, alleging that the defendant negligently failed to yield the right-of-way at a stop sign, the trial court did not err by admitting evidence of a traffic citation issued against the defendant in conjunction with the accident. The citation noted entry of a guilty plea, but also indicated the defendant was found guilty by the municipal court. Though ambiguous and subject to conflicting interpretations, the citation was relevant if interpreted by the jury as a plea of guilty. Hunter v. Hardnett, 199 Ga. App. 443, 405 S.E.2d 286, cert. denied, 199 Ga. App. 906, 405 S.E.2d 286 (1991) (decided under former O.C.G.A. § 24-7-20).

Pleading not used as court record. — When a plea of guilty, in a prior criminal proceeding arising from the same occurrence, was admitted in evidence in the subsequent civil case for its impeaching value, the plea was not admitted as a court paper, and the former statute did not apply. Webb v. May, 91 Ga. App. 437, 85 S.E.2d 641 (1955) (decided under former Code 1933, § 38-601).

4. Medical Records

Purpose. — Ga. L. 1971, p. 441, §§ 1 and 2 (see former O.C.G.A. § 24-7-8) and Ga. L. 1970, p. 225, § 1 (see former O.C.G.A. § 24-7-9) deal with the method of authenticating records which are otherwise admissible and are not new rules of admissibility eliminating the hearsay rule. Moody v. State, 244 Ga. 247, 260 S.E.2d 11 (1979) (decided under Ga. L. 1971, p. 441, §§ 1, 2).

Rules of evidence apply. — Admissibility of the contents of hospital records was governed by the rules of admissibility and not by the manner in which the records were obtained, whether the records were obtained through certification, or through subpoena, or notice to produce. Dennis v. Adcock, 138 Ga. App. 425, 226 S.E.2d 292 (1976) (decided under Ga. L. 1971, p. 441, §§ 1, 2).

In a premises liability suit, the trial court properly excluded certified copies of some of an invitee's medical records under former O.C.G.A. § 24-7-8 because the invitee had not provided the requisite 60-day notice under former O.C.G.A. § 24-3-18 (see now O.C.G.A. § 24-8-826). Former § 24-7-8 concerned only the authentication of medical records and did not allow the invitee to circumvent other evidentiary rules; furthermore, the invitee failed to provide a record citation for the specific medical records that the invitee claimed should have been admitted and thus it was unclear whether those records were narratives, to which former § 24-3-18(a) applied, or other types of records. Fuller v. Flash Foods, Inc., 298 Ga. App. 217, 679 S.E.2d 775 (2009) (decided under former O.C.G.A. § 24-7-8).

Hearsay rule applicable. — Former O.C.G.A. § 24-7-8 dealt with the authentication of medical records which were otherwise admissible, and did not eliminate the rule against hearsay or create a new one. Giles v. Taylor, 166 Ga. App. 563, 305 S.E.2d 154 (1983) (decided under former O.C.G.A. § 24-7-8).

Former statutes which pertained to the authentication of documents did not remove hearsay considerations. Manning v. State, 231 Ga. App. 584, 499 S.E.2d 650 (1998) (decided under former O.C.G.A. § 24-7-8).

Effect of certification is to dispense with preliminary proof of authenticity on the part of the custodian of the records, but not to make admissible any matter contained in the reports which is otherwise subject to objection. Smith v. State, 141 Ga. App. 720, 234 S.E.2d 385 (1977)

(decided under Ga. L. 1971, p. 441, §§ 1, 2); Adams v. Metropolitan Atlanta Rapid Transit Auth., 246 Ga. App. 698, 542 S.E.2d 130 (2000) (decided under former O.C.G.A. § 24-7-8).

Certification by custodian. — If a hospital record contained diagnostic opinions and conclusions, the record could not, upon proper objection, be admitted into evidence unless and until the person who entered such diagnostic opinions and conclusions upon the record qualified as an expert and related the facts upon which the entry was based. Dennis v. Adcock, 138 Ga. App. 425, 226 S.E.2d 292 (1976) (decided under Ga. L. 1971, p. 441, §§ 1, 2).

Relevant portion of records admissible. — Records which contain diagnostic opinions, conclusions, and other statements of third parties not before the court are still not admissible if tendered in toto, though relevant portions of such records not subject to such defects may be. Dennis v. Adcock, 138 Ga. App. 425, 226 S.E.2d 292 (1976) (decided under Ga. L. 1971, p. 441, §§ 1, 2); Moody v. State, 244 Ga. 247, 260 S.E.2d 11 (1979) (decided under Ga. L. 1971, p. 441, §§ 1, 2).

Photographs are admissible to show the condition of the body of the deceased and the nature and extent of the deceased's wounds, and when used to illustrate medical testimony as to the cause of death of the deceased, photographs are not inadmissible because the photographs might inflame the jury, but are relevant and material to the issue. Sirmans v. State, 229 Ga. 743, 194 S.E.2d 476 (1972) (decided under Ga. L. 1971, p. 441, §§ 1, 2).

Testimony of preparer of records unnecessary. — When the records in question were certified as accurate by the custodian of the treating hospital and contained no inadmissible hearsay evidence, it was not necessary for foundation to be laid for admitting records in evidence by offering testimony of examining doctor or medical personnel who prepared the records. Venenga v. State, 163 Ga. App. 161, 293 S.E.2d 553 (1982) (decided under former O.C.G.A. § 24-7-8); Wilson v. Childers, 174 Ga. App. 179, 329 S.E.2d 503 (1985) (decided under former O.C.G.A. § 24-7-8).

5. Council Records

Action of city council. — Until the contrary appeared, the action of a city council was supposed to be in writing; and its book of minutes, properly proved as such, or an exemplification of the record, certified by the clerk or keeper of such records, under seal, was the proper mode of placing the evidence before the court. Farrar Lumber Co. v. City of Dalton, 20 Ga. App. 138, 92 S.E. 946 (1917) (decided under former Civil Code 1910, § 5803); Mullis v. State, 197 Ga. 550, 30 S.E.2d 99 (1944) (decided under former Code 1933, § 38-606).

Original book of minutes. — Official minutes of the city council may be proved by the production of the original book of minutes identified as such by the clerk of the corporation, and shown to have come from the clerk's custody. Mullis v. State, 197 Ga. 550, 30 S.E.2d 99 (1944) (decided under former Code 1933, § 38-606).

Certified copy was not the exclusive evidence of the minutes and records of a municipal corporation. Mullis v. State, 197 Ga. 550, 30 S.E.2d 99 (1944) (decided under former Code 1933, § 38-606).

6. Proving Ordinances

a. In General

Two methods of proof of city ordinances were: (1) by an official certified copy thereof under seal as provided by statute; or, (2) by the production of the original book of ordinances, identified as such by the clerk of the corporation and shown to have come from the clerk's custody. Metropolitan St. R.R. v. Johnson, 90 Ga. 500, 16 S.E. 49 (1892) (decided under Ga. L. 1890-91, p. 109, § 1); Western & Atl. R.R. v. Hix, 104 Ga. 11, 30 S.E. 424 (1898) (decided under former Civil Code 1895, § 5216); Southern Ry. v. Thompson, 96 Ga. App. 305, 99 S.E.2d 845 (1957) (decided under former Code 1933, § 38-606); R.O.H. Properties, Inc. v. Westside Elec. Co., 151 Ga. App. 857, 261 S.E.2d 767 (1979) (decided under former Code 1933, § 38-606).

Judicial notice. — That a municipal ordinance could not be judicially noticed by state courts was a well settled rule

Treatment of Specific Records (Cont'd)
6. Proving Ordinances (Cont'd)
a. In General (Cont'd)

since the ordinances were treated as private statutes, and must be alleged and proved as matters of fact. Greenberg v. Rothberg, 72 Ga. App. 882, 35 S.E.2d 485 (1945) (decided under former Code 1933, § 38-606).

If a local ordinance was relied on, the ordinance must be pled and proved in the trial court and, absent a properly admitted copy of the ordinance, neither the trial court nor the court of appeals may take judicial notice of the ordinance's existence. In re J.T., 239 Ga. App. 756, 521 S.E.2d 862 (1999) (decided under former O.C.G.A. § 24-7-21).

Parol evidence insufficient. — An ordinance of a municipality cannot be established by parol evidence. Western & A.R.R. v. Peterson, 168 Ga. 259, 147 S.E. 513 (1929) (decided under former Civil Code 1910, § 5803); Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694 (1931) (decided under former Civil Code 1910, § 5803); Greenberg v. Rothberg, 72 Ga. App. 882, 35 S.E.2d 485 (1945) (decided under former Code 1933, § 38-606); Southern Ry. v. Thompson, 96 Ga. App. 305, 99 S.E.2d 845 (1957) (decided under former Code 1933, § 38-606).

b. Exemplification of City Ordinance

Certification of whole ordinance. — Where it was sought to have the clerk of a municipal corporation certify to a transcript of an ordinance, generally the entire ordinance on the subject in hand should be copied, but the admission of the certified transcript of one section would not always furnish ground for a reversal. Cason v. State, 134 Ga. 786, 68 S.E. 554 (1910) (decided under former Civil Code 1910, § 5803).

Codified ordinances. — When city ordinances were codified, and such codification was adopted by an ordinance, and the clerk copied and certified a section of such codification, and also prepared and certified from the record a copy of the adopting ordinance, this was sufficient to authorize the admission in evidence of the copy of the section of the city code. Nashville, C. & St. L. Ry. v. Peavler, 134 Ga. 618, 68 S.E. 432 (1910) (decided under former Civil Code 1910, § 5803); Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694 (1931) (decided under former Civil Code 1910, § 5803).

Improper certification. — City court did not err in refusing to admit in evidence a copy of an ordinance which copy was not properly exemplified. Carroll v. Yearty, 102 Ga. App. 677, 117 S.E.2d 248 (1960) (decided under former Code 1933, § 38-606).

Ordinance from published book or pamphlet. — Certification that the alleged ordinance was an exemplification from a book gave it no greater dignity than the book itself, as the former statute referred to records and minutes, and the ordinance without proof of the ordinance's validity in the form of proper records or minutes was inadmissible. Western & A.R.R. v. Peterson, 168 Ga. 259, 147 S.E. 513 (1929) (decided under former Civil Code 1910, § 5803); Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694 (1931) (decided under former Civil Code 1910, § 5803); City of Dalton v. Cochran, 80 Ga. App. 252, 55 S.E.2d 907 (1949) (decided under former Code 1933, § 38-606); Southern Ry. v. Thompson, 96 Ga. App. 305, 99 S.E.2d 845 (1957) (decided under former Code 1933, § 38-606).

Constitutionality of ordinance. — When there was no constitutional attack on the former statute permitting a local ordinance, the appeals court was required to hold that a properly certified copy of such ordinance was admissible in evidence on the trial of an automobile negligence case in which it was alleged, and proof was tendered, that the defendants violated such an ordinance. Cambron v. Cogburn, 118 Ga. App. 454, 164 S.E.2d 350 (1968) (decided under former Code 1933, § 38-606).

Validity of ordinance. — City ordinance certified by the clerk and keeper of the records of the municipality was not subject to the objection that it must be shown that the ordinance was duly and properly adopted. Perry v. State, 78 Ga. App. 273, 50 S.E.2d 709 (1948) (decided under former Code 1933, § 38-606);

Cambron v. Cogburn, 118 Ga. App. 454, 164 S.E.2d 350 (1968) (decided under former Code 1933, § 38-606).

c. Production of Original

Municipal ordinance may be proved by the production of the original book of ordinances, identified as such by the clerk of the corporation, and shown to have come from the clerk's custody. Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694 (1931) (decided under former Civil Code 1910, § 5803).

Ordinance proven by original minutes. — It was not error for the court to permit the introduction, under proper proof, of the original minutes showing the adoption of the ordinance in question, rather than to require a certified copy thereof; this was competent evidence of an expression of formal corporate action. Mullis v. State, 197 Ga. 550, 30 S.E.2d 99 (1944) (decided under former Code 1933, § 38-606).

City clerk was the proper person to certify to the ordinance. Cason v. State, 134 Ga. 786, 68 S.E. 554 (1910) (decided under former Civil Code 1910, § 5803).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 38-601 have been included in the opinions for this Code section.

Former statute related only to the certification of state and county records, and did not embrace federal records. 1970 Op. Att'y Gen. No. U70-176 (decided under former Code 1933, § 38-601).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 974 et seq., 1192, 1193, 1272, 1323, 1333 et seq., 1339 et seq. 42 Am. Jur. 2d, Inspection Laws, § 11.

Am. Jur. Pleading and Practice Forms. — 21A Am. Jur. Pleading and Practice Forms, Records and Recording Laws, § 3.

C.J.S. — 32 C.J.S., Evidence, §§ 841 et seq., 886, 896, 897, 900 et seq., 909. 32A C.J.S., Evidence, §§ 1037, 1106.

ALR. — Pendency of appeal from judgment as affecting right to enforce it in another state, 5 ALR 1269.

Weight of oral testimony as to law of another state or country, 6 ALR 1344.

Refusal to entertain an action upon a judgment rendered in another state upon a cause of action which it would have been contrary to statute or public policy of the forum to have entertained, 10 ALR 719; 24 ALR 1437.

Full-faith and credit provision as applying to decree of another state admitting a will to probate, 13 ALR 498.

Right of notary who protests paper to change or contradict his certificate, 28 ALR 543.

Determination of question relating to foreign law as one of law or of fact, 34 ALR 1447.

Conclusiveness of decision of sister state on a contested hearing as to its own jurisdiction, 52 ALR 740.

Foreign judgment based upon, or which fails to give effect to, a judgment previously rendered at the forum, or in a third jurisdiction, 53 ALR 1146.

Construction and effect of foreign statutes or judicial decisions as question for court or for jury, 68 ALR 809.

Conclusiveness as against insured or beneficiary or physician's report made as, or in connection with, proofs of loss or death, 93 ALR 1342.

Judgment or order upholding prior judgment in the same state against direct attack upon ground of lack of jurisdiction, as conclusive in another state under the full faith and credit provision or doctrine of res judicata, 104 ALR 1187.

Full faith and credit provision as affecting insurance contracts, 119 ALR 483; 173 ALR 1138.

Admissibility of hospital chart or other hospital record, 120 ALR 1124.

Admissibility of records of a practicing physician or surgeon as evidence of physical or mental condition of person examined, 135 ALR 1258.

Conflict of laws as to trusts inter vivos, 139 ALR 1129.

Waiver of, or estoppel to assert, failure to plead or prove foreign law (apart from judicial notice), 149 ALR 759.

Decree for alimony in instalments as within full faith and credit provision, 157 ALR 170.

Necessity that the transcript of a judgment of another state upon a cognovit under warrant of attorney shall include the cognovit and the note containing the alleged warrant of attorney, 162 ALR 685.

Right to maintain action or proceeding in one state or country to collect or enforce tax due to another state or country or political subdivision thereof, 165 ALR 796.

Conclusiveness of decree assessing stockholders or policyholders of insolvent corporations or mutual insurance companies, as against nonresidents, not personally served within state in which decree was rendered, 175 ALR 1419.

Recognition as to marital status of foreign divorce decree attached on ground of lack of domicile, since Williams decision, 1 ALR2d 1358; 28 ALR2d 1303.

Admissibility of X-ray report made by physician taking or interpreting X-ray pictures, 6 ALR2d 406.

Foreign divorce decree as subject to attack by spouse in state of which neither spouse is resident, 12 ALR2d 382.

Foreign filiation or support order in bastardy proceedings, requiring periodic payments, as extraterritorially enforceable, 16 ALR2d 1098.

Admissibility, in personal injury or death action arising out of airplane accident, of documents and reports pertaining to investigations, 23 ALR2d 1360.

Presumption and prima facie case as to ownership of vehicle causing highway accident, 27 ALR2d 167.

Admissibility of records or report of welfare department or agency relating to payment to or financial condition of particular person, 42 ALR2d 752.

Injunction against suit in another state or country for divorce or separation, 54 ALR2d 1240.

Identification of parties in action on foreign judgment, 60 ALR2d 1024.

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test, 66 ALR2d 536.

Admissibility of report of police or other public officer or employee, or portions of reports, as to cause of or responsibility for accident, injury to person, or damage to property, 69 ALR2d 1148.

Federal Civil Procedure Rule 44 and Federal Criminal Procedure Rule 27, relating to proof of official records, 70 ALR2d 1227; 41 ALR Fed. 784.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 ALR2d 308.

Choice of law in application of automobile guest statutes, 95 ALR2d 12.

Preliminary proof, verification, or authentication of X-rays requisite to their introduction in evidence in civil cases, 5 ALR3d 303.

Extraterritorial effect of valid award of custody of child of divorced parents, in absence of substantial change in circumstances, 35 ALR3d 520.

Necessity of expert evidence to support action against hospital for injury to or death of patient, 40 ALR3d 515.

Weather reports and records as evidence, 57 ALR3d 713.

Admissibility under business entry statutes of hospital records in criminal case, 69 ALR3d 22.

Admissibility under Uniform Business Records and Evidence Act or similar statute of medical report made by consulting physician to treating physician, 69 ALR3d 104.

Admissibility, under public records exception to hearsay rule, of record kept by public official without express statutory direction or authorization, 80 ALR3d 414.

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, 80 ALR3d 456.

Disbarment or suspension of attorney in one state as affecting right to continue practice in another state, 81 ALR3d 1281.

Choice of law as to application of comparative negligence doctrine, 86 ALR3d 1206.

Admissibility in personal injury action of hospital or other medical bill which includes expenses for treatment of condition unrelated to injury, 89 ALR3d 1012.

Admissibility in evidence of professional directories, 7 ALR4th 638.

Authentication of electronically stored evidence, including text messages and e-mail, 45 ALR4th 602.

Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records, 69 ALR4th 906.

Proof of foreign official record under Rule 44(a)(2) of Federal Rules of Civil Procedure, 41 ALR Fed. 784.

24-9-903. Subscribing witness's testimony.

The testimony of a subscribing witness shall not be necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. (Code 1981, § 24-9-903, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-7-5, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived in part from the decision in McVicker v. Conkle, 96 Ga. 584, 24 S.E. 23 (1895).

Cross references. — Requirements regarding proving of wills by witnesses, § 53-3-13. Subscribing witness's testimony, Fed. R. Evid. 903.

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3837, former Code 1882, § 3837, former Ga. L. 1895, p. 31, § 1, former Civil Code 1895, §§ 5244, 5245, former Civil Code 1910, §§ 5833, 5834, former Code 1933, §§ 38-706, 38-707, and former O.C.G.A. §§ 24-7-4 and 24-7-5 are included in the annotations for this Code section. The reader is also advised to consult the annotations under O.C.G.A. § 24-9-920 for annotations regarding the authentication of Georgia state and county records, and O.C.G.A. § 24-9-922, for annotations regarding foreign state laws and records.

One witness to bill of sale. — Bill of sale to personalty though attested by two subscribing witnesses, is admissible in evidence upon due proof of its execution by only one of them, without calling or accounting for the other. Cooper v. O'Brien, 98 Ga. 773, 26 S.E. 470 (1896) (decided under former Civil Code 1895, § 5244).

Copy of lost original. — Lost original having been accounted for and the copy being relevant to the issue, the latter was admissible in evidence over an objection that there was no proof of the existence and execution of the original. The handwriting of the subscribing witnesses to an inaccessible paper could not possibly be proved. Baker v. Adams, 99 Ga. 135, 25

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S.E. 28 (1896) (decided under former Civil Code 1895, § 5244).

Failure to object to writing. — When a proper plea of non est factum has not been filed, proof of execution of the instrument on which suit is based is not necessary. Diversified Growth Corp. v. Equitable Leasing Corp., 140 Ga. App. 511, 231 S.E.2d 505 (1976) (decided under former Code 1933, § 38-706).

Witnesses not infallible. — Witness can never testify truthfully as to any past transaction with which the witness was connected, except from the witness's recollection, and so a jury is not required to find against the declared recollection of a witness merely because the witness states that the witness may be in error and cannot swear positively — thus recognizing that the witness's memory may not be infallible. Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947) (decided under former Code 1933, § 38-706).

Witnesses were required to authenticate a material writing in the following cases. — See Barron v. Walker, 80 Ga. 121, 7 S.E. 272 (1888) (decided under former Code 1882, § 3837); Coody v. Gress Lumber Co., 82 Ga. 793, 10 S.E. 218 (1889) (contract of sale) (decided under former Code 1882, § 3837); Summerour v. Felker, 102 Ga. 254, 29 S.E. 448 (1897) (decided under former Civil Code 1895, § 5244); Thornton v. Martin, 116 Ga. 115, 42 S.E. 348 (1902) (decided under former Code 1882, § 3837); Singer Sewing Mach. Co. v. Wardlaw, 29 Ga. App. 626, 116 S.E. 207 (1923) (decided under former Civil Code 1910, § 5833); Commercial Credit Co. v. Grant, 33 Ga. App. 31, 125 S.E. 382 (1924) (conveyance not recorded) (decided under former Civil Code 1910, § 5833); Hines v. Moore, 168 Ga. 451, 148 S.E. 162 (1929) (decided under former Civil Code 1910, § 5833).

Ancient Writings

Ancient writings, generally. — An instrument may be properly admitted as having been sufficiently proved irrespectively of whether or not there was a sufficient compliance with the rule admitting ancient writings without proof. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937) (decided under former Code 1933, § 38-707).

Writing more than 30 years old. — When a receipt or other written instrument is more than 30 years old, the receipt's execution need not be proved to admit the receipt in evidence, although the subscribing witness may be living. Settle v. Alison, 8 Ga. 201, 52 Am. Dec. 393 (1850) (decided under former law).

Subscribing witness alive and available. — An ancient writing is admissible in evidence though an attesting witness is still alive and accessible, and is not examined. Settle v. Alison, 8 Ga. 201, 52 Am. Dec. 393 (1850) (decided under former law); Gardner v. Granniss, 57 Ga. 539 (1876) (decided under former Code 1873, § 3837).

Subscribing Witnesses Not Available

Any competent evidence admissible. — While it is incumbent upon a party offering in evidence a paper the execution of which the party is required to prove, and which purports to have been attested by a subscribing witness, to introduce or account for such witness, if the latter upon examination does not remember or denies that the witness attested the instrument, the execution thereof may then be proved by any other competent evidence. Buchanan v. Simpson Grocery Co., 105 Ga. 393, 31 S.E. 105 (1898) (decided under former Civil Code 1895, § 5245).

Circumstantial evidence. — Existence and genuineness of a deed may be proved by circumstantial evidence. Campbell v. Sims, 161 Ga. 517, 131 S.E. 483 (1926) (decided under former Civil Code 1910, § 5834).

Proof of handwriting. — When the alleged maker of an unrecorded deed, who signed by the maker's mark, and the two subscribing witnesses to the instrument are dead, proof that the signature of the two latter upon the instrument are in their genuine handwriting is evidence of the fact of execution; and the charge of the court, which in effect instructed the jury that such proof was prima facie evidence of the fact of the execution of the deed, was not contrary to law. Edenfield v. Brinson, 149 Ga. 377, 100 S.E. 373 (1919) (decided

under former Civil Code 1910, § 5834).

Names of witnesses unknown. — In view of the former statute when a deed had been lost, and the subscribing witnesses were unknown, proof of the deed's existence and due execution may be made by any witness who knew the facts. Turner v. Cates, 90 Ga. 731, 16 S.E. 971 (1893) (decided under former Code 1882, § 3837). See also Felton v. Pitman, 14 Ga. 530 (1854).

Witnesses to last writing unknown. — When the witnesses, if any, are unknown, it is not necessary to prove that the alleged lost original writing was executed with any particular formality in order to admit secondary evidence of the writing's contents. Sharp v. Autry, 185 Ga. 160, 194 S.E. 194 (1937) (decided under former Code 1933, § 38-707).

Witness not in county. — Fact that a witness is not in the county will not (without more) lay the foundation for receiving other evidence. Baker & Swain v. Massengale, 83 Ga. 137, 10 S.E. 347 (1889) (decided under former Code 1882, § 3837).

Witness attending school in another state. — When it appeared that the subscribing witness to a written instrument was attending school in another state at the time of the trial, the witness's absence was sufficiently accounted for, and the execution of the instrument could be proved otherwise than by the witness's testimony. Terry v. Broadhurst, 127 Ga. 212, 56 S.E. 282 (1906) (decided under former Civil Code 1895, § 5244).

Death of subscribing witnesses. — When an affidavit of forgery was filed to a recorded deed, after having shown death of the two attesting witnesses, the plaintiff should introduce proof of actual signing by the alleged maker or of the genuinenesses of the maker's signature fixed thereto, or that such evidence was not attainable. Strickland v. Babcock Lumber Co., 142 Ga. 120, 82 S.E. 531 (1914) (decided under former Civil Code 1910, § 5834).

Writing Only Collaterally Material

Bond for title. — When a bond for title admitted over objection is only collaterally material, the bond falls within this exception. Chance v. Chance, 163 Ga. 267, 135 S.E. 923 (1926) (decided under former Civil Code 1910, § 5833).

Contract on action on check. — Since this was an action on the check itself, the contract between the purchaser and the seller was only incidentally or collaterally involved, and proof of the proper execution of the check was neither necessary nor material to the case. Dealers Disct. & Inv. Co. v. Mitchell Motors, Inc., 101 Ga. App. 900, 115 S.E.2d 420 (1960) (decided under former Code 1933, § 38-706).

Contract of sale. — Contract of sale, whereby the sole stockholder of the old corporation transferred part of the stockholder's interest therein, established no rights between the parties to a pending suit by a new corporation, to recover the unpaid purchase-money on a contract of sale entered into between the corporation and the defendant, and is therefore only incidentally and collaterally material to the suit. Permitting proof of the execution of a contract otherwise than by the testimony of the subscribing witnesses thereto was not error. Johnson-Battle Lumber Co. v. Emanuel Lumber Co., 33 Ga. App. 517, 126 S.E. 861 (1925) (decided under former Civil Code 1910, § 5833).

Landlord's lien. — When the existence of a landlord's lien for supplies was directly in issue, a writing attested by a subscribing witness and purporting to create such a lien was not admissible in evidence without proof by such witness of the writing's execution or duly accounting for nonproduction in view of the former statute. Baker & Swain v. Massengale, 83 Ga. 137, 10 S.E. 347 (1889) (decided under former Code 1882, § 3837).

Transfer of mortgage. — When the transfer of a mortgage, if material at all, is simply incidentally or collaterally relevant to the real issues in the case, as a mere circumstance which may tend to throw some light upon a question of fact involved in the case it is not necessary to produce a subscribing witness, in view of the law. Prescott v. Fletcher, 133 Ga. 404, 65 S.E. 877 (1909) (decided under former Civil Code 1895, § 5244).

Testimony by Party Executing Writing

Accounting for absence of party executing. — On trial of a suit by a beneficiary in a life-insurance policy, it was error to receive in evidence secondary evidence respecting the execution of the application to reinstate without preliminary proof accounting for the subscribing witness thereto. Lamb v. Empire Life Ins. Co., 143 Ga. 180, 84 S.E. 439 (1915) (decided under former Civil Code 1910, § 5833).

Deed not recorded. — Deed need not be recorded to be admissible if proper foundation is laid; such foundation can be laid if party executing deed testifies to the deed's execution in accordance with the law or witnesses to deed are examined as to the deed's execution. Smith v. Forrester, 156 Ga. App. 79, 274 S.E.2d 101 (1980) (decided under former Code 1933, § 38-706).

Time of execution. — When the subscribing witnesses to a deed were called to prove the deed's execution, but because of failure of memory were unable to locate the time of the deed's execution, the deed was, even before the passage of this provision, competent for the alleged maker to testify that the deed was in fact made at the time the deed purported on the deed's face to have been executed. Kelly v. William Sharp Saddlery Co., 99 Ga. 393, 27 S.E. 741 (1896) (decided under former Civil Code 1895, § 5244).

Signature to blank paper. — When the maker of an instrument testified that the maker's signature thereto was genuine, the court properly admitted the instrument in evidence, notwithstanding the fact that in the same breath the maker testified that when the maker put the maker's signature on this paper it was a blank piece of paper, that the maker did not make the statements contained in this paper, and knew nothing of the contents thereof. Campbell v. State, 157 Ga. 233, 121 S.E. 306 (1924) (decided under former Civil Code 1910, § 5833).

Transfer of note by corporation. — Execution of a written transfer of a promissory note by a corporation as the payee, denied on oath, is proved by the undisputed evidence of the president of the corporation that as president and duly authorized agent of the corporation the written transfer of the note was executed, for and in the name of the corporation. Christie v. Shingler, 10 Ga. App. 529, 73 S.E. 751 (1912) (decided under former Civil Code 1910, § 5833).

Bill of sale not acknowledged. — It was not error to admit in evidence a paper purporting to be a bill of sale, over objection that the paper appeared to have been recorded but not to have been acknowledged before a notary public; there being testimony that the maker signed the paper, and the maker as a witness admitting so signing. James v. Bettis, 21 Ga. App. 170, 94 S.E. 85 (1917) (decided under former Civil Code 1910, § 5833).

Deed. — Between the parties, the testimony of the maker is sufficient proof of execution of a deed. Vizard v. Moody, 119 Ga. 918, 47 S.E. 348 (1904) (decided under former Civil Code 1895, § 5244).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 1051, 1190, 1203 et seq., 1229.

C.J.S. — 32 C.J.S., Evidence, §§ 986, 989, 990, 1125.

ALR. — Authorship or authenticity of written or printed matter as inferable without extrinsic proof from name used therein or from its contents or subject matter, 131 ALR 301.

Introduction of decedent's books of account by his personal representative as waiver of "dead man's statute," 26 ALR2d 1009.

24-9-904. Definitions.

As used in this article, the term:

(1) "Public office" shall have the same meaning as set forth in Code Section 24-8-801.

(2) "Public officer" means any person appointed or elected to be the head of any entity included in paragraph (1) of Code Section 24-9-902.

(3) "Telephone service provider" shall have the same meaning as "voice service provider" as set forth in Code Section 46-5-231. (Code 1981, § 24-9-904, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Analysis

"Public Officer" Defined

"Public Officer" Defined

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1890-91, p. 109, § 1, former Civil Code 1895, § 5216, former Civil Code 1910, § 5803, and former Code 1933, § 38-606, are included in the annotations for this Code section. The reader is also advised to consult the annotations under O.C.G.A. § 24-9-920 for annotations regarding the authentication of Georgia state and county records, and O.C.G.A. § 24-9-922, for annotations regarding foreign state laws and records.

In general. — The former statute came from an Act of Legislature (Ga. L. 1890-91, p. 109). Former Code 1882, § 3816 applied exclusively to public officers of this state and the several counties thereof and therefore could have no reference to certificates signed by municipal officers. In fact, exemplification of the records of municipal corporations were not admissible at all until made so by former Ga. L. 1890-91, p. 109, and the former merely provided that the records shall be admitted in evidence when certified under seal. Metropolitan St. R.R. v. Johnson, 90 Ga. 500, 16 S.E. 49 (1892) (decided under Ga. L. 1890-91, p. 109, § 1); Western & Atl. R.R. v. Hix, 104 Ga. 11, 30 S.E. 424 (1898) (decided under former Civil Code 1895, § 5216); Farrar Lumber Co. v. City of Dalton, 20 Ga. App. 138, 92 S.E. 946 (1917) (decided under former Civil Code 1910, § 5803); Harrison v. Central of Ga. Ry., 44 Ga. App. 167, 160 S.E. 694 (1931) (decided under former Civil Code 1910, § 5803); R.O.H. Properties, Inc. v. Westside Elec. Co., 151 Ga. App. 857, 261 S.E.2d 767 (1979) (decided under former Code 1933, § 38-606).

ARTICLE 2

SPECIFIC TYPES OF RECORDS AND EVIDENCE

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-9-920. Authentication of Georgia state and county records.

The certificate or attestation of any public officer either of this state or any county thereof or any clerk or keeper of county, consolidated government, or municipal records in this state shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper or file, or other matter or thing in such public officer's

respective office, or pertaining thereto, to admit the same in evidence. (Code 1981, § 24-9-920, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Proof of lack of public record by evidence showing that record cannot be found, § 9-11-44. Records, documents, and papers of public officers generally, T. 50, C. 18.

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Laws 1830, Cobb's 1851 Digest, p. 273, Ga. L. 1855-56, p. 143, § 1, former Code 1863, § 3739, former Code 1868, § 3763, former Code 1873, § 3816, former Code 1882, § 3816, former Civil Code 1895, § 5211, former Penal Code 1895, § 1015, former Civil Code 1910, § 5798, former Penal Code 1910, § 1041, former Code 1933, § 38-601, and former O.C.G.A. § 24-7-20 are included in the annotations for this Code section. The reader is also advised to consult the annotations under O.C.G.A. §§ 24-9-901 and 24-9-902, for annotations discussing authentication requirements in general.

Public Officers

Commission not required. — "Public officer," whose certification authenticated copies of records, was not expressly required to be commissioned by the Governor. Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311 (1973) (decided under former Code 1933, § 38-601); Waddill v. Waddill, 143 Ga. App. 806, 240 S.E.2d 129 (1977) (decided under former Code 1933, § 38-601).

Deputies authorized to certify. — Certificate need not be by a public officer personally, rather than by a deputy officer who certified that the deputy was the custodian of the records. Musgrove v. State, 230 Ga. 46, 195 S.E.2d 407 (1973) (decided under former Code 1933, § 38-601); Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311 (1973) (decided under former Code 1933, § 38-601); Waddill v. Waddill, 143 Ga. App. 806, 240 S.E.2d 129 (1977) (decided under former Code 1933, § 38-601); Blackmon v. State, 153 Ga. App. 359, 265 S.E.2d 320 (1980) (decided prior to 1980 amendment to former Code 1933, § 68B-215 (see § 40-5-2) and under Code 1933, § 38-601).

Court reporters were not authorized to certify. Hardeman v. English, 79 Ga. 387, 5 S.E. 70 (1888) (decided under former Code 1882, § 3816).

Clerk of court authorized to certify. — Any witness who read the records in the clerk's office could testify as to what was found or not found but only the certificate of the clerk was sufficient to authenticate any record existing in the clerk's office. Hines v. Johnston, 95 Ga. 644, 23 S.E. 970 (1895) (decided under former Code 1882, § 3816).

Federal officers and employees were not authorized to certify. O'Connor v. United States, 11 Ga. App. 246, 75 S.E. 110 (1912) (decided under former Penal Code 1910, § 1041);

Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24 (1946) (decided under former Code 1933, § 38-601); Pressley v. State, 207 Ga. 274, 61 S.E.2d 113 (1950) (decided under former Code 1933, § 38-601); Mach v. State, 109 Ga. App. 154, 135 S.E.2d 467 (1964) (decided under former Code 1933, § 38-601); Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311 (1973) (decided under former Code 1933, § 38-601).

Certificate and Seal

Form of certificate. — Certificate in the following form: "The above and foregoing is a true copy," etc., was a sufficient authentication of a record. Harden v. Webster, Parmelee & Co., 29 Ga. 427 (1859) (decided under Ga. L. 1855-56, p. 143, § 1).

Sufficiency of certificate. — To make a certificate from the Executive Department admissible in evidence, it was not necessary that the certificate give a copy of that to which it relates. It was sufficient that it gave, substantially, the contents, or a part of the contents, of the thing to which it related. Henderson v. Hackney, 16 Ga. 521 (1854) (decided under Laws 1830, Cobb's 1851 Digest, p. 273).

Validity of record certified. — In action for alimony when plaintiff introduced a certified copy of marriage certificate, no issue as to validity of marriage was made in the absence of a direct attack on the record by the defendant. Guess v. Guess, 202 Ga. 364, 43 S.E.2d 326 (1947) (decided under former Code 1933, § 38-601).

Nothing in former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902) required that certified copies be photostatic copies of original documents. Cook v. State, 255 Ga. 565, 340 S.E.2d 843, cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986) (decided under former O.C.G.A. § 24-7-20).

Elements of authentication. — Establishment of three elements was commonly spoken of as authentication: the authority of the officer issuing the document, the incumbency of the officer, and the genuineness of the officer's signature or seal. Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24 (1946) (decided under former Code 1933, § 38-627).

Municipality without corporate seal. — When a municipality had no seal, it was not error to admit in evidence an original ordinance if it was admitted to be such. Greenberg v. Rothberg, 72 Ga. App. 882, 35 S.E.2d 485 (1945) (decided under former Code 1933, § 38-606).

Attestation

Contents of record. — Former statute merely required a certificate or attestation, without specifying any detail as to the location and length of the record, by reference to the number of pages, minute book, case number, and similar details. McIntyre v. Balkcom, 229 Ga. 81, 189 S.E.2d 445 (1972) (decided under former Code 1933, § 38-601).

Treatment of Specific Records

Acknowledgment of service. — There was no error in admitting in evidence the certified copy of an acknowledgment of service. James v. Edward Thompson Co., 17 Ga. App. 578, 87 S.E. 842 (1916) (decided under former Civil Code 1910, § 5798).

Administrative records. — Properly authenticated administrative records are admissible. Niehaus v. State, 149 Ga. App. 575, 254 S.E.2d 895 (1979) (decided under former Code 1933, § 38-601).

Conditional sales contract. — Conditional sales contract duly recorded and on its face properly executed and attested was admissible in evidence. Central Bank & Trust Co. v. Creede, 103 Ga. App. 203, 118 S.E.2d 844 (1961) (decided under former Code 1933, § 38-601).

County bonds. — It was the duty of the clerk of the superior court to sign a validation certificate and attach the seal of the clerk's office to all county bonds regularly validated. Touchton v. Echols County, 211 Ga. 85, 84 S.E.2d 81 (1954) (decided under former Code 1933, § 38-601).

Distribution of estate. — When a division in kind was made between heirs and distributees of a decedent, a certified copy of the return of the commissioners, and of the order of the court approving the return, were admissible in evidence in an action involving title to the land covered

Treatment of Specific Records (Cont'd)

by the award. Bell v. Cone, 208 Ga. 467, 67 S.E.2d 558 (1951) (decided under former Code 1933, § 38-601).

Driver's license. — Because a defendant's driver's license was a properly certified public record, the trial court was permitted to infer the reliability of any hearsay contained therein and to conclude that no confrontation clause violation had been shown pursuant to former O.C.G.A. §§ 24-3-17 and 24-7-20 (see now O.C.G.A. §§ 24-9-902 and 24-9-924). Douglas v. State, 312 Ga. App. 585, 718 S.E.2d 908 (2011), cert. denied, No. S12C0470, 2012 Ga. LEXIS 606 (Ga. 2012) (decided under former O.C.G.A. § 24-7-20).

Fertilizer analysis record. — A certified copy of an analysis of fertilizers to be used in an action for false or incorrect branding should not contain a statement as to the penalty or damage for which the manufacturer or dealer might be deemed to be liable; only the mathematical result of the chemical analysis should be stated. Georgia Fertilizer Co. v. Walker, 45 Ga. App. 68, 163 S.E. 277 (1932) (decided under former Civil Code 1910, § 5798).

Map of county. — Properly certified copy of a map of a county, in the office of the Secretary of State, was admissible in evidence without proof of the correctness or existence of the original. Berry v. Clark, 117 Ga. 964, 44 S.E. 824 (1903) (decided under former Civil Code 1895, § 5211).

Marriage record. — Public record of a ceremonial marriage was conclusive evidence of such marriage, in the absence of a timely direct attack on such record, which attack must be supported by proper proof. Guess v. Guess, 202 Ga. 364, 43 S.E.2d 326 (1947) (decided under former Code 1933, § 38-601).

Intoxilyzer report. — Defendant's conviction for driving under the influence to the extent that defendant's blood-alcohol content exceeded the legal limit was reversed as the trial court erroneously admitted a copy of the Intoxilyzer report over a best evidence objection; the state was unable to explain the absence of the original, the state presented no evidence that the state made any effort to locate the original, and former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902) did not apply. Lumley v. State, 280 Ga. App. 82, 633 S.E.2d 413 (2006) (decided under former O.C.G.A. § 24-7-20).

Book-in photographs. — Although the appellate court found that book-in photographs which the state offered to prove that defendant was the same person who was convicted of a prior felony, albeit under a different name, could have been admitted under former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902), and the appellate court recommended that practice, the appellate court held that the trial court did not abuse the court's discretion during the sentencing phase of defendant's trial when the court admitted the photographs and used them to determine that defendant was subject to a sentence of life in prison without parole, pursuant to O.C.G.A. § 17-10-7(c), because defendant had prior felony convictions. Farmer v. State, 268 Ga. App. 831, 603 S.E.2d 16 (2004) (decided under former O.C.G.A. § 24-7-20).

Search warrants. — Rule that a public record could be proved only by a duly certified copy thereof, in the absence of admission in open court that the document was an original public record, did not apply to search warrants. DePalma v. State, 228 Ga. 272, 185 S.E.2d 53 (1971) (decided under former Code 1933, § 38-601).

Secretary of State's office records. — A certified copy of a record in the office of the Secretary of State was held admissible on the question as to who was the grantee of land from the state. Ferrell v. Hurst, 68 Ga. 132 (1881) (decided under former Code 1873, § 3816).

Computer printout from state website. — Former homeowner was required to give notice to a defendant under O.C.G.A. § 10-1-399 even though the defendant was incorporated and had its principal place of business in a different state. There was no evidence that the defendant did not maintain a place of business in Georgia or keep some assets in Georgia, and the homeowner's contention was predicated on uncertified computer printouts from the Secretary of State's website, which were inadmissible under

former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-907). Steed v. Fed. Nat'l Mortg. Corp., 301 Ga. App. 801, 689 S.E.2d 843 (2009) (decided under former O.C.G.A. § 24-7-20).

Transcript of tax records. — Upon the trial of a tax collector for embezzlement, transcripts from the books of the Comptroller General and former Treasurer of the State, certified under the former statute, were admissible in evidence to show a failure on the part of such defendant to pay over the taxes collected by the defendant tax collector. Shivers v. State, 53 Ga. 149 (1874) (decided under former Code 1873, § 3816).

Tax returns. — It was not error to allow material portions of certified copies of tax returns of the defendant in ejectment, as to the number of acres of land given in by the defendant and the value thereof for certain years, to be received in evidence over the objection that the copies were certified to by the tax receiver, and not by the tax collector; that the original returns themselves, and not certified copies of the returns, should be produced in evidence. Jett v. Hart, 152 Ga. 266, 109 S.E. 654 (1921) (decided under former Civil Code 1910, § 5798).

Tax return records of state. — Books of tax returns in the office of the Comptroller General were of equal rank as evidence with those in the proper offices of the respective counties, and the certificate of the Comptroller General touching the contents of such books was no less admissible than the certificates of the proper county officer were. Clark v. Empire Lumber Co., 87 Ga. 742, 13 S.E. 826 (1891) (decided under former Code 1882, § 3816).

Execution for unpaid taxes. — After an execution for unpaid taxes was issued by the Comptroller General against a certain tract of unreturned wild land, and a sale of the land was made thereunder, and the execution was returned to the Comptroller's office with the official entries thereon, it became an office paper, and a certified copy of such execution and entries was admissible in evidence in lieu of the original. Cannon v. Gorham, 136 Ga. 167, 71 S.E. 142, 1912C Ann. Cas. 39 (1911) (decided under former Civil Code 1910, § 5798).

Uncertified copies of computer printouts. — Uncertified copies of computer printouts apparently obtained from the Secretary of State's website could not be used as evidence to show a relationship between corporations because the printouts did not contain a certificate or attestation of a public officer and thus were not properly authenticated. Matson v. Noble Inv. Group, LLC, 288 Ga. App. 650, 655 S.E.2d 275 (2007) (decided under former O.C.G.A. § 24-7-20).

Name search records from Secretary of State in form of computer printouts. — Trial court erred in considering name search documents from the Ohio Secretary of State's office because the documents were not properly authenticated under former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902). Uncertified copies of computer printouts from a Secretary of State's website were not admissible as evidence unless authenticated. Std. Bldg. Co. v. Wallen Concept Glazing, Inc., 298 Ga. App. 443, 680 S.E.2d 527 (2009) (decided under former O.C.G.A. § 24-7-20).

Talley sheets of election. — Exemplifications of "records and minutes" of municipal corporations did not include talley sheets of former municipal elections. Sewell v. City of Tallapoosa, 145 Ga. 19, 88 S.E. 577 (1916) (decided under former Civil Code 1910, § 5803).

Not Applicable to Federal Records

Elements of authentication, the authority, the incumbency, and the genuineness of the signature of the certifying custodian, were applicable to records of the federal, not the state, government. O'Connor v. United States, 11 Ga. App. 246, 75 S.E. 110 (1912) (decided under former Civil Code 1910, § 5798); Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24 (1946) (decided under former Code 1933, § 38-601); Pressley v. State, 207 Ga. 274, 61 S.E.2d 113 (1950) (decided under former Code 1933, § 38-601); Mach v. State, 109 Ga. App. 154, 135 S.E.2d 467 (1964) (decided under former Code 1933, § 38-601); Cowan v. State, 130 Ga. App. 320, 203 S.E.2d 311 (1973) (decided under former Code 1933, § 38-601).

Court Records

In general. — Clerk of court may certify a copy or transcript of the court record, but the clerk's certificate of the nonexistence on the records of certain facts was not admissible. Miller v. Reinhart, 18 Ga. 239 (1855) (decided under Laws 1830, Cobb's 1851 Digest, p. 273); Dillon v. Mattox, 21 Ga. 113 (1857) (decided under Ga. L. 1855-56, p. 143, § 1); Martin v. Anderson, 21 Ga. 301 (1857) (decided under Ga. L. 1855-56, p. 143, § 1); Walker v. Logan, 75 Ga. 759 (1885) (decided under former Code 1882, § 3816); Lamar v. Pearre, 90 Ga. 377, 17 S.E. 92 (1892) (decided under former Code 1882, § 3816); Hines v. Johnston, 95 Ga. 644, 23 S.E. 470 (1895) (decided under former Civil Code 1895, § 5211); Greer v. Fergerson, 104 Ga. 552, 30 S.E. 943 (1898) (decided under former Civil Code 1895, § 5211); but see for contra implication, Thompson v. Cheatham, 244 Ga. 120, 259 S.E.2d 62 (1979) (decided under former Code 1933, § 38-601).

Court proceedings. — The only legal way to prove proceedings of the superior court was by an extract from the minutes of that court duly certified by the court's clerk. Bowden v. Taylor, 81 Ga. 199, 6 S.E. 277 (1888) (decided under former Code 1882, § 3816); Weaver v. Tuten, 138 Ga. 101, 74 S.E. 835 (1912) (decided under former Civil Code 1910, § 5798).

Criminal proceedings. — Exemplification of the record of an illegality case, under the hand and seal of the clerk, exhibiting among other things, the assignment by the plaintiff of the writ of fi. fa., was admissible in evidence to prove the transfer. Napier v. Neal, 3 Ga. 298 (1847) (decided under Laws 1830, Cobb's 1851 Digest, p. 273).

Guilty plea. — Trial court properly used a prior guilty plea to sentence the defendant as a recidivist when the state had presented a certified copy of the plea that was signed and initialed by defense counsel along with a plea hearing transcript; even if the plea hearing transcript was uncertified and unauthenticated, the certified copy of the plea was admissible under former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902), and the defendant did not produce evidence of invalidity once the fact of conviction was proved and the state showed that the defendant was represented by counsel. Moorer v. State, 286 Ga. App. 395, 649 S.E.2d 537 (2007), cert. denied, No. S07C1910, 2007 Ga. LEXIS 806 (Ga. 2007) (decided under former O.C.G.A. § 24-7-20).

Proceedings in same court. — Original papers of proceedings in the court were admissible in another case in the same court where otherwise relevant. Sellers v. Page, 127 Ga. 633, 56 S.E. 1011 (1907) (decided under former Civil Code 1895, § 5211); Woods v. Travelers Ins. Co., 53 Ga. App. 429, 186 S.E. 467 (1936) (decided under former Code 1933, § 38-601); Clarkum v. State, 55 Ga. App. 44, 189 S.E. 397 (1936) (decided under former Code 1933, § 38-601); Williford v. State, 55 Ga. App. 40, 192 S.E. 93 (1937) (decided under former Code 1933, § 38-601); Brantley v. State, 121 Ga. App. 79, 172 S.E.2d 852 (1970) (decided under former Code 1933, § 38-601); Thompson v. Cheatham, 244 Ga. 120, 259 S.E.2d 62 (1979) (decided under former Code 1933, § 38-601).

Proceedings in other courts. — Former statute made provision for exemplification by certificate of any public officer of authenticity of any copy or transcript of any record, but had no relation to the court record in another case or cases pending in the same court in which the records were offered in evidence. Brantley v. State, 121 Ga. App. 79, 172 S.E.2d 852 (1970) (decided under former Code 1933, § 38-601).

Certification of nonconforming record. — Certification by the clerk of court must speak the truth, and the clerk must not be required by a mandamus, or otherwise, to certify an instrument that did not conform to the records in the clerk's office. Touchton v. Echols County, 211 Ga. 85, 84 S.E.2d 81 (1954) (decided under former Code 1933, § 38-601).

Judgment. — Introduction of a certified copy of a judgment against a party was sufficient evidence to prove the existence of that judgment. Gowdey v. Rem Assocs., 176 Ga. App. 83, 335 S.E.2d 309 (1985) (decided under former O.C.G.A. § 24-7-20).

Trial court did not abuse the court's

discretion when the court excluded a document purported to be the codefendant's felony conviction, as the document was not a properly certified copy and was unauthenticated. McClendon v. State, 276 Ga. App. 543, 623 S.E.2d 738 (2005) (decided under former O.C.G.A. § 24-7-20).

Record of conviction. — Certification and seal on record of conviction furnished by an officer of the Department of Offender Rehabilitation (now Corrections) who was required by law to keep the records on file was sufficient to qualify the record for admission into evidence to establish the fact of lawfulness of incarceration even though the certification was not by the Superior Court of Whitfield County, the source of the original document. Ward v. State, 165 Ga. App. 163, 300 S.E.2d 528 (1983) (decided under former O.C.G.A. § 24-7-20).

Authentication does not automatically establish admissibility. — Former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902) did not address hearsay concerns; the former statute did not require the admission of hearsay merely because the hearsay had been recorded in a court of record. McGaha v. State, 221 Ga. App. 440, 471 S.E.2d 533 (1996) (decided under former O.C.G.A. § 24-7-20).

Clerical error in a certified copy of the sentence of one convicted of a crime did not render the paper inadmissible in evidence if it clearly appeared from the context what the true purport of the document was. Daniel v. State, 114 Ga. 533, 40 S.E. 805 (1902) (decided under former Penal Code 1895, § 1015).

Objection to admission of record. — It was too late to object to a record for want of proper authentication after the record had been admitted and read to the jury without objection. Williams v. Rawlins, 33 Ga. 117 (1861) (decided under Ga. L. 1855-56, p. 143, § 1).

Traffic citation indicating guilty plea admissible. — In a suit for damages sustained in an automobile collision, alleging that the defendant negligently failed to yield the right-of-way at a stop sign, the trial court did not err by admitting evidence of a traffic citation issued against the defendant in conjunction with the accident. The citation noted entry of a guilty plea, but also indicated the defendant was found guilty by the municipal court. Though ambiguous and subject to conflicting interpretations, the citation was relevant if interpreted by the jury as a plea of guilty. Hunter v. Hardnett, 199 Ga. App. 443, 405 S.E.2d 286, cert. denied, 199 Ga. App. 906, 405 S.E.2d 286 (1991) (decided under former O.C.G.A. § 24-7-20).

Pleading not used as court record. — When a plea of guilty, in a prior criminal proceeding arising from the same occurrence, was admitted in evidence in the subsequent civil case for its impeaching value, the plea was not admitted as a court paper, and the former statute did not apply. Webb v. May, 91 Ga. App. 437, 85 S.E.2d 641 (1955) (decided under former Code 1933, § 38-601).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 38-601 and former O.C.G.A. § 24-7-20 have been included in the opinions for this Code section.

Former statute related only to the certification of state and county records, and did not embrace federal records. 1970 Op. Att'y Gen. No. U70-176 (decided under former Code 1933, § 38-601).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 1303, 1320, 1321.

Am. Jur. Pleading and Practice Forms. — 21A Am. Jur. Pleading and Practice Forms, Records and Recording Laws, § 3.

C.J.S. — 32 C.J.S., Evidence, §§ 841 et seq., 886, 896, 897. 32A C.J.S., Evidence, § 1037.

ALR. — Admissibility, in personal injury or death action arising out of airplane accident, of documents and reports pertaining to investigations, 23 ALR2d 1360.

Presumption and prima facie case as to ownership of vehicle causing highway accident, 27 ALR2d 167.

Admissibility of report of police or other public officer or employee, or portions of reports, as to cause of or responsibility for accident, injury to person, or damage to property, 69 ALR2d 1148.

Weather reports and records as evidence, 57 ALR3d 713.

Admissibility, under public records exception to hearsay rule, of record kept by public official without express statutory direction or authorization, 80 ALR3d 414.

Authentication of electronically stored evidence, including text messages and e-mail, 45 ALR4th 602.

24-9-921. Identification of medical bills; expert witness unnecessary.

(a) Upon the trial of any civil proceeding involving injury or disease, the patient or the member of his or her family or other person responsible for the care of the patient shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such a witness that the expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial and that the bills were received from:

(1) A hospital;

(2) An ambulance service;

(3) A pharmacy, drugstore, or supplier of therapeutic or orthopedic devices; or

(4) A licensed practicing physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist.

(b) Such items of evidence need not be identified by the one who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary. However, nothing in this Code section shall be construed to limit the right of a thorough and sifting cross-examination as to such items of evidence. (Code 1981, § 24-9-921, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-706.1 and former O.C.G.A. § 24-7-9 are in-

cluded in the annotations for this Code section.

Purpose. — Law creates a stream-lined procedure permitting laymen to introduce bills incurred for treatment of injuries resulting from the subject of litigation without requiring an expert witness to testify that such charges were reasonable and necessary. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860 (1972) (decided under former Code 1933, § 38-706.1); Piggly-Wiggly S., Inc. v. Tucker, 139 Ga. App. 873, 229 S.E.2d 804 (1976) (decided under former Code 1933, § 38-706.1).

Former O.C.G.A. § 24-7-9 was only a statutory rule of evidence regarding the admission of medical bills. It does not purport to obviate a plaintiff's further satisfaction of the evidentiary obligation to demonstrate the liability of the defendant for the damages being sought. Eberhart v. Morris Brown College, 181 Ga. App. 516, 352 S.E.2d 832 (1987) (decided under former O.C.G.A. § 24-7-9).

Scope. — Law accomplishes three goals: (1) it eliminates the necessity of having the person submitting the bill to testify; (2) it makes it unnecessary to produce an expert witness to prove such charges were reasonable and necessary; and (3) it makes laymen competent witnesses to identify such bills. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860 (1972) (decided under former Code 1933, § 38-706.1).

Statute not exclusive. — Law was not intended as the sole means of proving medical damages in personal injury suits. Piggly-Wiggly S., Inc. v. Tucker, 139 Ga. App. 873, 229 S.E.2d 804 (1976) (decided under former Code 1933, § 38-706.1).

Rules of evidence apply. — Ga. L. 1970, p. 225, § 1 and Ga. L. 1971, p. 441, §§ 1 and 2 (see now O.C.G.A. § 24-9-902) deal with the method of authenticating records which were otherwise admissible and were not new rules of admissibility eliminating the hearsay rule. Dennis v. Adcock, 138 Ga. App. 425, 226 S.E.2d 292 (1976) (decided under former Code 1933, § 38-706.1); Moody v. State, 244 Ga. 247, 260 S.E.2d 11 (1979) (decided under former Code 1933, § 38-706.1).

Right to cross-examine not limited. — Law allows a thorough and sifting cross-examination for the purpose of undermining the credibility of the lay witness, but the fact that the witness's accuracy is impugned does not affect the admissibility of the exhibits. Atlanta Transit Sys. v. Smith, 141 Ga. App. 87, 232 S.E.2d 580 (1977) (decided under former Code 1933, § 38-706.1).

Law does not require the showing that a hospital is licensed as a prerequisite to admission of hospital and medical bills from that institution. Kamman v. Seabolt, 149 Ga. App. 167, 253 S.E.2d 842 (1979) (decided under former Code 1933, § 38-706.1).

Irrelevant items in records. — When a submitted bill includes without differentiation items having no relevance to the automobile collision, the proffered evidence not only fails to meet the statutory requisites but may be properly rejected under the rule that testimony offered as a whole without separating the relevant from that which is irrelevant and inadmissible is to be repelled in its entirety. Maloy v. Dixon, 127 Ga. App. 151, 193 S.E.2d 19 (1972) (decided under former Code 1933, § 38-706.1); Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860 (1972) (decided under former Code 1933, § 38-706.1); Jordan v. Hagewood, 133 Ga. App. 958, 213 S.E.2d 85 (1975) (decided under former Code 1933, § 38-706.1).

Expenses from hospital and nursing home. — Trial court properly admitted a deceased patient's medical bills in support of the patient's claims against a nursing home under O.C.G.A. § 24-7-9, because the patient's expert subtracted from the total hospital bills the amount that would have been incurred had the patient remained in the nursing home receiving treatment for previous problems. Tucker Nursing Ctr., Inc. v. Mosby, 303 Ga. App. 80, 692 S.E.2d 727 (2010) (decided under former O.C.G.A. § 24-7-9).

Physician's action for services. — Physician in an action to recover for professional services rendered has the burden of proving the value as represented by the ordinary and reasonable fee for the services, despite this statute whereby in certain cases it shall not be necessary for an expert to testify that the medical

charges were reasonable and necessary. Bouldin v. Baum, 134 Ga. App. 484, 214 S.E.2d 734 (1975) (decided under former Code 1933, § 38-706.1).

Authentication of canceled checks. — Former statute did not mention authentication of canceled checks and, as a result, canceled checks could be authenticated in the traditional manner. Piggly-Wiggly S., Inc. v. Tucker, 139 Ga. App. 873, 229 S.E.2d 804 (1976) (decided under former Code 1933, § 38-706.1).

Canceled checks as evidence. — Since neither the spirit nor the literal application of the former statute placed a limitation upon the admission of canceled checks in evidence, the checks' admission would be assessed by the jury in light of testimony showing the checks had been drawn for payment of treatment of injuries which plaintiff received due to defendant's negligence. Piggly-Wiggly S., Inc. v. Tucker, 139 Ga. App. 873, 229 S.E.2d 804 (1976) (decided under former Code 1933, § 38-706.1).

Testimony on reasonableness of charges. — When testimony of plaintiff describes the plaintiff's injuries arising out of an auto collision and number of visits to a named doctor for treatment and the spouse identifies the doctor's bill and states the spouse's payment thereof, it is not necessary to have the physician testify that the charges were reasonable and necessary. Rutledge v. Glass, 125 Ga. App. 549, 188 S.E.2d 261 (1972) (decided under former Code 1933, § 38-706.1).

Testimonial foundation was sufficient for the admission of evidence. — See Harper v. Samples, 164 Ga. App. 511, 298 S.E.2d 29 (1982) (decided under former O.C.G.A. § 24-7-9); Zack's Properties, Inc. v. Gafford, 241 Ga. App. 43, 526 S.E.2d 80 (1999) (decided under former O.C.G.A. § 24-7-9).

Testimonial foundation was insufficient for admission of evidence. — Plaintiff in a personal injury action failed to lay the proper foundation for admission of a summary of plaintiff's medical expenses, where the plaintiff introduced a summary sheet that listed only the medical providers by name, a range of dates, the total amount per provider, and the final total of services from multiple sources, but the plaintiff admitted that the plaintiff did not and could not compile the totals, and the plaintiff did not provide specific testimony substantiating the various subtotals. Hossain v. Nelson, 234 Ga. App. 792, 507 S.E.2d 243 (1998) (decided under former O.C.G.A. § 24-7-9).

Error in admission of bills held harmless. — See Binns v. Metropolitan Atlanta Rapid Transit Auth., 168 Ga. App. 261, 308 S.E.2d 674 (1983), aff'd, 252 Ga. 289, 313 S.E.2d 104 (1984) (decided under former O.C.G.A. § 24-7-9).

Medical bills not speculative evidence. — In a personal injury suit brought by a married couple, evidence of the cost of medical treatment that the injured spouse received from all of the various medical providers was not speculative and was properly considered by the jury when the injured spouse testified as to the medical treatment received and introduced the medical bills into evidence. Hart v. Shergold, 295 Ga. App. 94, 670 S.E.2d 895 (2008), cert. denied, No. S09C0582, 2009 Ga. LEXIS 230 (Ga. 2009) (decided under former O.C.G.A. § 24-7-9).

Expert medical testimony not required to withstand defendant's motion for directed verdict. — Causal connection, requiring expert medical testimony, must be established when the "potential continuance of a disease" is at issue. However, if there is no significant lapse of time between the injury sustained and the onset of the physical condition for which the injured party seeks compensation, and the injury sustained is a matter which jurors must be credited with knowing by reason of common knowledge, expert medical testimony is not required in order for a plaintiff to establish a personal injury case sufficient to withstand a defendant's motion for directed verdict. Jordan v. Smoot, 191 Ga. App. 74, 380 S.E.2d 714 (1989) (decided under former O.C.G.A. § 24-7-9).

Clarification of opposing counsel's semantics argument did not impact testimony on medical bills. — In a premises liability case, the trial court did not prevent an invitee from identifying the invitee's medical bills through the invitee's own testimony. This contention

was clearly belied by the record which demonstrated that the trial court simply clarified opposing counsel's semantics argument but allowed the invitee to testify regarding the invitee's medical bills and the total dollar amount incurred. Fuller v. Flash Foods, Inc., 298 Ga. App. 217, 679 S.E.2d 775 (2009) (decided under former O.C.G.A. § 24-7-9).

RESEARCH REFERENCES

ALR. — Admissibility in personal injury action of hospital or other medical bill which includes expenses for treatment of condition unrelated to injury, 89 ALR3d 1012.

24-9-922. Proof of laws, records, nonjudicial records, or books of other states, territories, or possessions; full faith and credit.

The acts of the legislature of any other state, territory, or possession of the United States, the records and judicial proceedings of any court of any such state, territory, or possession, and the nonjudicial records or books kept in the public offices in any such state, territory, or possession, if properly authenticated, shall have the same full faith and credit in every court within this state as they have by law or usage in the courts of such state, territory, or possession from which they are taken. (Code 1981, § 24-9-922, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-7-24, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived in part from 28 U.S.C. § 1738.

Law reviews. — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1890-91, p. 109, § 1, former Civil Code 1895, §§ 5216, 5237, former Civil Code 1910, §§ 5803, 5824, former Code 1933, §§ 38-606, 38-627, 38-630, and former O.C.G.A. §§ 24-7-24 and 24-7-25 are included in the annotations for this Code section.

In general. — It was usually considered that a substantial compliance with the terms of the former statute was sufficient. Drake v. Drake, 187 Ga. 423, 1 S.E.2d 573 (1939) (decided under former Code 1933, § 38-627).

Provisions not exclusive. — Former

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statute was not exclusive but cumulative of the method authorized by statute. Sloan v. Wolfsfeld, 110 Ga. 70, 35 S.E. 344 (1900) (decided under former Civil Code 1895, § 5237); Seaboard Air-Line Ry. v. Phillips, 117 Ga. 98, 43 S.E. 494 (1903) (decided under former Civil Code 1895, § 5237); Missouri State Life Ins. Co. v. Lovelace, 1 Ga. App. 446, 58 S.E. 93 (1907) (decided under former Civil Code 1895, § 5237).

Choice of Law

Georgia law applies in absence of proof of foreign law. — Although an insurance policy provided that the policy should be construed pursuant to another state's law, upon the failure to prove that state's law as required by former O.C.G.A. § 24-7-24 (see now O.C.G.A. § 24-9-902), the law of Georgia was applied. General Am. Life Ins. Co. v. Samples, 167 Ga. App. 622, 307 S.E.2d 51 (1983) (decided under former O.C.G.A. § 24-7-24).

In an action to domesticate a New York default judgment, the trial court properly applied Georgia law because the judgment debtor did not give written notice of intent to rely on foreign law pursuant to O.C.G.A. § 9-11-43(c), nor did the debtor prove New York law as required by former O.C.G.A. § 24-7-24 (see now O.C.G.A. § 24-9-902). Giarratano v. Glickman, 232 Ga. App. 75, 501 S.E.2d 266 (1998) (decided under former O.C.G.A. § 24-7-24).

Georgia law applied in an action arising out of a Louisiana divorce decree because neither party met the requirements in O.C.G.A. § 9-11-43(c) and former O.C.G.A. § 24-7-24 (see now O.C.G.A. § 24-9-902) that the parties give notice and thereafter prove the law of another state. Davis v. Davis, 310 Ga. App. 512, 713 S.E.2d 694 (2011) (decided under former O.C.G.A. § 24-7-24).

Child support orders. — Courts of this state are required to give full faith and credit to child support orders from other states that satisfy the jurisdictional due process standards of the federal Full Faith and Credit for Child Support Orders Act (28 U.S.C. § 1738B). Georgia Dep't of Human Resources v. Pinter, 241 Ga. App. 10, 525 S.E.2d 715 (1999) (decided under former O.C.G.A. § 24-7-24).

Adoption proceedings. — Relatives of the mother of a child born with Fetal Alcohol Syndrome were not required to comply with the requirements of O.C.G.A. § 19-8-7, as the father's relinquishment of his rights was valid because it was knowingly and voluntarily made in accordance with New Mexico law pursuant to former O.C.G.A. § 24-7-24 (see now O.C.G.A. § 24-9-902). Rokowski v. Gilbert, 275 Ga. App. 305, 620 S.E.2d 509 (2005) (decided under former O.C.G.A. § 24-7-24).

Responsibility on party wishing to raise foreign law issue. — Notice of intent was required to raise an issue of foreign law, to establish such law by compliance with statutory means (O.C.G.A. § 9-11-43(c) and former O.C.G.A. §§ 24-1-4 and 24-7-24 (see now O.C.G.A. § 24-9-902)), or cause a duty to be imposed on a court to judicially recognize any relevant, existing foreign law. Samay v. Som, 213 Ga. App. 812, 446 S.E.2d 230 (1994) (decided under former O.C.G.A. §§ 24-1-4 and 24-7-24).

Authentication not exclusive means of proving law. — Authentication of foreign law pursuant to former O.C.G.A. § 24-7-24 (see now O.C.G.A. § 24-9-902) rendered that evidence of foreign law admissible, and perhaps constituted the most certain method of proving foreign law, but it was not the exclusive means of introducing foreign law in a case. Meeker v. Eufaula Bank & Trust, 208 Ga. App. 702, 431 S.E.2d 475 (1993) (decided under former O.C.G.A. § 24-7-24).

Judicial cognizance taken of substantive Alabama law. — Presenting copies of relevant portions of the Code of Alabama and copies of two decisions of the Alabama Supreme Court published in the Southern Reporter, and requesting that the trial court take judicial notice of the Alabama law, permitted judicial cognizance of the substantive Alabama law. Meeker v. Eufaula Bank & Trust, 208 Ga. App. 702, 431 S.E.2d 475 (1993) (decided under former O.C.G.A. § 24-7-24).

Foreign Judgments

Lack of jurisdiction not appearing on face of judgment. — Judgment cred-

itor's evidence showed a prima facie case for domestication where judgment creditor produced an authenticated copy of its Louisiana judgment and the lack of jurisdiction did not appear on the face of the judgment nor did any fact regarding judgment debtor's possible nonresidency. Toledo Center Floor Covering, Inc. v. Richfield Carpet Mills, Inc., 176 Ga. App. 400, 336 S.E.2d 320 (1985) (decided under former O.C.G.A. § 24-7-24).

Giving effect to judgment granted in sister state. — Full faith and credit clause of the United States Constitution required the courts of this state to give effect to a judgment granted in a sister state when the same is properly proved in a proceeding in which it may be relevant. Melnick v. Bank of Highwood, 151 Ga. App. 261, 259 S.E.2d 667 (1979) (decided under former Code 1933, § 38-627).

Case action summary. — Certified copy of Alabama court's case action summary was admissible as proof of defendant's status as a convicted felon in a prosecution for possession of a firearm by a convicted felon. Taylor v. State, 249 Ga. App. 5389, 548 S.E.2d 662 (2001) (decided under former O.C.G.A. § 24-7-24).

Prima facie case was made by alleging and proving a properly authenticated copy of the judgment itself. Melnick v. Bank of Highwood, 151 Ga. App. 261, 259 S.E.2d 667 (1979) (decided under former Code 1933, § 38-627).

Judgment rendered by competent court of another state was conclusive on merits when made basis of action or defense in the courts of Georgia, and the merits could not be reinvestigated. Melnick v. Bank of Highwood, 151 Ga. App. 261, 259 S.E.2d 667 (1979) (decided under former Code 1933, § 38-627).

Foreign judgment was conclusive as to all matters which were decided or could have been heard at the time of the obtaining of the foreign judgment. Melnick v. Bank of Highwood, 151 Ga. App. 261, 259 S.E.2d 667 (1979) (decided under former Code 1933, § 38-627).

Responsibility of state. — State could not by merely failing or refusing to amend the state's code place greater restrictions upon a party seeking to rely on a foreign judgment than were imposed by the procedure enacted by Congress pursuant to the provisions of the full faith and credit clause of the United States Constitution. Peeples v. Peeples, 103 Ga. App. 462, 119 S.E.2d 710 (1961) (decided under former Code 1933, § 38-627).

Collateral attack. — An authenticated foreign judgment did not preclude the defendant from pleading any special matter in avoidance of the judgment, such as fraud in the judgment's rendition. Potter v. Potter, 40 Ga. App. 324, 149 S.E. 579 (1929) (decided under former Civil Code 1910, § 5824).

Collateral attack upon a petition to domesticate a foreign judgment that was based on lack of personal jurisdiction was precluded in this state only if the defendant had appeared in the foreign court and had thus had an opportunity to litigate the issue. Maxwell v. Columbia Realty Venture, 155 Ga. App. 289, 270 S.E.2d 704 (1980) (decided under former Code 1933, § 38-627).

When defense to foreign judgment is made, the responsibility of raising the issue concerning the law of the sister state is upon the plaintiff. Ramseur v. American Mgt. Ass'n, 155 Ga. App. 340, 270 S.E.2d 880 (1980) (decided under former Code 1933, § 38-627).

When clerk of court in Ohio certified the records of three prior felony convictions of a person with the same name of appellant, the trial court properly admitted the records into evidence because the appellant admitted having lived in Ohio at the time of the convictions and the appellant's name was unusual; moreover, this gave the jury a sufficient basis to find that the appellant actually was a convicted felon for impeachment purposes. Wyley v. State, 169 Ga. App. 106, 311 S.E.2d 530 (1983) (decided under former O.C.G.A. § 24-7-24).

Certified copies of a defendant's out-of-state judgment of conviction, associated complaint, and plea hearing transcript were properly admitted into evidence to show that the defendant was a convicted felon for purposes of O.C.G.A. § 16-11-131, which prohibits possession of a firearm by a convicted felon. Warren v. State, 289 Ga. App. 481, 657 S.E.2d 533 (2008), cert. denied, No. S08C0978, 2008

Foreign Judgments (Cont'd)

Ga. LEXIS 508 (Ga. 2008) (decided under former O.C.G.A. § 24-7-24).

In suit to domesticate default judgment rendered against defendant in another state, summary judgment was not authorized, it appearing that the copy of the foreign state's return of service which was filed of record in the Georgia case was not properly certified, in that it was not accompanied by the certificate of a judge to the effect that the attestation of the clerk was in proper form, nor was the seal of the foreign court affixed to the clerk's attestation. Moore v. Sanford, Adams, McCullough & Beard, 171 Ga. App. 549, 320 S.E.2d 394 (1984) (decided under former O.C.G.A. § 24-7-24).

Foreign order was found improperly certified in accordance with Georgia law. Southeastern Metal Prods., Inc. v. Horger, 166 Ga. App. 205, 303 S.E.2d 536 (1983) (decided under former O.C.G.A. § 24-7-24).

Without an original signature or court seal, a foreign divorce decree did not meet the statutory requirements for proper domestication. Henderson v. Justice, 223 Ga. App. 591, 478 S.E.2d 434 (1996) (decided under former O.C.G.A. § 24-7-24).

Full Faith and Credit Granted

Properly exemplified acts, records, and judicial proceedings or copies thereof shall have the same full faith and credit in every court within this state as those documents have by law or usage in the courts of the state from which those documents are taken. Van Buskirk v. Great Am. Bank, 175 Ga. App. 101, 332 S.E.2d 394 (1985) (decided under former O.C.G.A. § 24-7-24).

Bankruptcy proceedings. — See Venable v. Venable, 153 Ga. 689, 112 S.E. 891 (1922) (decided under former Civil Code 1910, § 5824).

Divorce decrees. — See Beggs v. Beggs, 208 Ga. 415, 67 S.E.2d 135 (1951) (decided under former Code 1933, § 38-627); Parker v. Parker, 233 Ga. 434, 211 S.E.2d 729 (1975) (decided under former Code 1933, § 38-627).

Letters of administration. — See Stewart v. Fisher, 18 Ga. App. 519, 89 S.E. 1052 (1916) (decided under former Civil Code 1910, § 5824).

Prior criminal conviction. — See Strong v. State, 232 Ga. 294, 206 S.E.2d 461 (1974) (decided under former Code 1933, § 38-627).

Wills. — See White v. First Nat'l Bank, 174 Ga. 281, 162 S.E. 701 (1932) (decided under former Civil Code 1910, § 5824); Blackwell v. Grant, 46 Ga. App. 241, 167 S.E. 333 (1933) (decided under former Code 1933, § 38-627); Tripp v. Hutchings, 214 Ga. 330, 104 S.E.2d 423 (1958) (decided under former Code 1933, § 38-627).

When the clerk's certificate was incomplete, the docket of mayor's court was not given full faith and credit. Mason v. Nashville, C. & St. L. Ry., 135 Ga. 741, 70 S.E. 225, 33 L.R.A. (n.s.) 280 (1911) (decided under former Civil Code 1910, § 5824).

State records. — Full faith and credit statute applied only to state records and proceedings. Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24 (1946) (decided under former Code 1933, § 38-630).

Judicial records and proceedings. — See Jackson v. Johnson, 67 Ga. 167 (1881) (decided under former law); Tharpe v. Pearce, 89 Ga. 194, 15 S.E. 46 (1892) (decided under former law); McFarland v. Fricks, 99 Ga. 104, 24 S.E. 868 (1896) (decided under former Civil Code 1895, § 5237); Sloan v. Wolfsfeld, 110 Ga. 70, 35 S.E. 344 (1900) (decided under former Civil Code 1895, § 5237); Hope v. First Nat'l Bank, 142 Ga. 310, 82 S.E. 929 (1914) (decided under former Civil Code 1910, § 5824); Parker v. Cramton, 143 Ga. 421, 85 S.E. 338 (1915) (decided under former Civil Code 1910, § 5824); Clein v. Diamond, 17 Ga. App. 652, 87 S.E. 1101 (1916) (decided under former Civil Code 1910, § 5824); Sullivan v. Douglas Gibbons, Inc., 58 Ga. App. 708, 199 S.E. 554 (1938), aff'd, 187 Ga. 764, 2 S.E.2d 89 (1939) (decided under former Code 1933, § 38-627); Brown v. Beckner, 60 Ga. App. 827, 5 S.E.2d 409 (1939) (decided under former Code 1933, § 38-627); Roadway Express, Inc. v. McBroom, 61 Ga. App. 223, 6 S.E.2d 460 (1939) (decided under former Code 1933, § 38-627); Minor v. Lillie Rubin, Inc., 84 Ga. App. 112, 65

S.E.2d 691 (1951) (decided under former Code 1933, § 38-627); Albert v. Albert, 86 Ga. App. 560, 71 S.E.2d 904 (1952) (decided under former Code 1933, § 38-627); Soman v. Yeager, 209 Ga. 444, 73 S.E.2d 198 (1952) (decided under former Code 1933, § 38-627); Peeples v. Peeples, 103 Ga. App. 462, 119 S.E.2d 710 (1961) (decided under former Code 1933, § 38-627); Kelly v. Kelly, 115 Ga. App. 700, 155 S.E.2d 732 (1967) (decided under former Code 1933, § 38-627); Ramseur v. American Mgt. Ass'n, 155 Ga. App. 340, 270 S.E.2d 880 (1980) (decided under former Code 1933, § 38-627); Southeastern Metal Prods., Inc. v. Horger, 175 Ga. App. 143, 332 S.E.2d 662 (1985) (decided under former O.C.G.A. § 24-7-24); Smith v. Airtouch Cellular of Ga., Inc., 244 Ga. App. 71, 534 S.E.2d 832 (2000) (decided under former O.C.G.A. § 24-7-24).

Full Faith and Credit Denied

Judicial record or proceedings. — See James v. Kerby, 29 Ga. 684 (1859) (decided under former law). See also Tharpe v. Pearce, 89 Ga. 194, 15 S.E. 46 (1892) (decided under former Civil Code 1895, § 5237); Sloan v. Wolfsfeld, 110 Ga. 70, 35 S.E. 344 (1900) (decided under former Civil Code 1895, § 5237); Mason v. Nashville, C. & St. L. Ry., 135 Ga. 741, 70 S.E. 225, 33 L.R.A. (n.s.) 280 (1911) (decided under former Civil Code 1910, § 5824); Atkinson v. Atkinson, 160 Ga. 480, 128 S.E. 765 (1925) (decided under former Civil Code 1910, § 5824); King v. King, 203 Ga. 811, 48 S.E.2d 465 (1948) (decided under former Code 1933, § 38-627).

Divorce proceedings. — See Elliott v. Elliott, 181 Ga. 545, 182 S.E. 845 (1935) (decided under former Code 1933, § 38-627).

Wills. — See Youmans v. Ferguson, 122 Ga. 331, 50 S.E. 141 (1905) (decided under former Civil Code 1895, § 5237).

Court Records

Applicability. — Georgia resident's argument that the supplemental affidavit attached to the motion under the Uniform Act to Secure the Attendance of Witnesses from Without the State was inadmissible because it did not comply with former O.C.G.A. § 24-7-27 (see now O.C.G.A. § 24-9-902) failed because former § 24-7-27 provided the method for authenticating out-of-state court records and the affidavit was not a court record. Wollesen v. State, 242 Ga. App. 317, 529 S.E.2d 630 (2000) (decided under former O.C.G.A. § 24-7-24).

Council Records

Action of city council. — Until the contrary appeared, the action of a city council was supposed to be in writing; and its book of minutes, properly proved as such, or an exemplification of the record, certified by the clerk or keeper of such records, under seal, was the proper mode of placing the evidence before the court. Farrar Lumber Co. v. City of Dalton, 20 Ga. App. 138, 92 S.E. 946 (1917) (decided under former Civil Code 1910, § 5803); Mullis v. State, 197 Ga. 550, 30 S.E.2d 99 (1944) (decided under former Code 1933, § 38-606).

Original book of minutes. — Official minutes of the city council may be proved by the production of the original book of minutes identified as such by the clerk of the corporation, and shown to have come from the clerk's custody. Mullis v. State, 197 Ga. 550, 30 S.E.2d 99 (1944) (decided under former Code 1933, § 38-606).

RESEARCH REFERENCES

ALR. — Determination of question relating to foreign law as one of law or of fact, 34 ALR 1447.

Conclusiveness of decision of sister state on a contested hearing as to its own jurisdiction, 52 ALR 740.

Foreign judgment based upon, or which fails to give effect to, a judgment previously rendered at the forum, or in a third jurisdiction, 53 ALR 1146.

Construction and effect of foreign statutes or judicial decisions as question for court or for jury, 68 ALR 809.

Judgment or order upholding prior judgment in the same state against direct attack upon ground of lack of jurisdiction,

as conclusive in another state under the full faith and credit provision or doctrine of res judicata, 104 ALR 1187.

Full faith and credit provision as affecting insurance contracts, 119 ALR 483; 173 ALR 1138.

Right to maintain action or proceeding in one state or country to collect or enforce tax due to another state or country or political subdivision thereof, 165 ALR 796.

24-9-923. Authentication of photographs, motion pictures, video recordings, and audio recordings when witness unavailable.

(a) As used in this Code section, the term "unavailability of a witness" includes situations in which the authenticating witness:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the authentication;

(2) Persists in refusing to testify concerning the subject matter of the authentication despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the authentication;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the authentication has been unable to procure the attendance of the authenticating witness by process or other reasonable means.

An authenticating witness shall not be deemed unavailable as a witness if his or her exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of an authentication for the purpose of preventing the witness from attending or testifying.

(b) Subject to any other valid objection, photographs, motion pictures, video recordings, and audio recordings shall be admissible in evidence when necessitated by the unavailability of a witness who can provide personal authentication and when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered.

(c) Subject to any other valid objection, photographs, motion pictures, video recordings, and audio recordings produced at a time when the device producing the items was not being operated by an individual person or was not under the personal control or in the presence of an individual operator shall be admissible in evidence when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered, provided that, prior to the admission of such evidence, the date

and time of such photograph, motion picture, or video recording shall be contained on such evidence, and such date and time shall be shown to have been made contemporaneously with the events depicted in such photograph, motion picture, or video recording.

(d) This Code section shall not be the exclusive method of introduction into evidence of photographs, motion pictures, video recordings, and audio recordings but shall be supplementary to any other law and lawful methods existing in this state. (Code 1981, § 24-9-923, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, "Understanding and Challenging Photographic Evidence: What the Camera Never Saw," see 10 Ga. St. B.J. 20 (2004).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-4-48 are included in the annotations for this Code section.

Brief nonresponsive reference to polygraph test did not open the door to the cross-examination of a witness about the witness's polygraph test; additionally, the polygraph reference did not prejudice a defendant because the reference indicated nothing about the results of the polygraph. Franks v. State, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784 (2005) (decided under former O.C.G.A. § 24-4-48).

Internet chat session transcript admissible. — Transcript of an internet chat session was admissible because the operator of the machine which produced the transcript, or one who personally witnessed the events recorded, testified that the videotape accurately portrayed what the witness saw take place at the time the events occurred. Ford v. State, 274 Ga. App. 695, 617 S.E.2d 262 (2005) (decided under former O.C.G.A. § 24-4-48).

Transcript of an Internet chat room conversation between defendant and a police officer, posing as a 14-year-old girl, was properly admitted as similar transaction evidence in defendant's trial for pimping, contributing to the delinquency of a minor, and sexual exploitation of a minor; the officer was present to testify, personally witnessed the real-time chat recorded in the transcript as it was taking place, and testified that the transcript accurately represented the on-line conversation; the officer's testimony was tantamount to that of a witness to an event and was sufficient to authenticate the transcript. Ford v. State, 274 Ga. App. 695, 617 S.E.2d 262 (2005) (decided under former O.C.G.A. § 24-4-48).

Audiotapes

9-1-1 call admissible. — An audiotape of a witness's 9-1-1 emergency telephone call that was admitted into evidence without meeting foundation requirements was properly authenticated by testimony of the witness that the witness had reviewed the tape and that the tape accurately portrayed the conversation the witness had with the 9-1-1 operator, with no deletions, additions, or alterations. Hudson v. State, 273 Ga. 124, 538 S.E.2d 751 (2000) (decided under former O.C.G.A. § 24-4-48).

Audiotapes (Cont'd)

Audiotape of two 9-1-1 calls was properly admitted into evidence since the records custodian of the county 9-1-1 communications bureau presented detailed testimony as to the process used in producing both the original audiotapes and the copy admitted into evidence, the records custodian explained that calls are automatically recorded without the intervention of the 9-1-1 operator, and the records custodian further testified that the copy was a true and correct copy of the original recording. Shaw v. State, 247 Ga. App. 867, 545 S.E.2d 399 (2001) (decided under former O.C.G.A. § 24-4-48).

Audiotape of deceased victim admissible. — With regard to a defendant's convictions for malice murder and kidnapping with bodily injury as a result of the defendant killing a former girlfriend who was also the mother of the defendant's two children, the trial court did not err by admitting an audiotape of a telephone conversation between the victim and the defendant since the state laid a proper foundation for the admission of the audiotape by adequately demonstrating that the victim was the person who made the tape, the victim was a party to the conversation, and the tape was not inadmissible under O.C.G.A. § 16-11-62. Griffin v. State, 282 Ga. 215, 647 S.E.2d 36 (2007), overruled on other grounds, Garza v. State, 284 Ga. 696, 670 S.E.2d 73 (2008) (decided under former O.C.G.A. § 24-4-48).

Proper foundation for admission of audiotape. — Deed grantee laid a proper foundation pursuant to former O.C.G.A. § 24-4-48(c) (see now O.C.G.A. § 25-9-923) for purposes of admission of an audiotape in a deed grantor's action to set aside the deed since the grantee testified that the tape was of a voice mail left on a cell phone that went unanswered, and that the voice on the tape was that of the grantor. Dae v. Patterson, 295 Ga. App. 818, 673 S.E.2d 306 (2009) (decided under former O.C.G.A. § 24-4-48).

Improper foundation for admission of audiotape in controlled drug buy. — Trial court erred in admitting an audiotape recording of a controlled drug sale by a confidential informant (CI) with defendant as neither party to the sale testified as to the authenticity and accuracy of the recording, and former O.C.G.A. § 24-4-48 could not be the vehicle by which the tape was admitted because the essential criterion, the unavailability of an authenticating witness, could not be met; another audiotape of a second controlled buy was properly admitted as a police officer who listened to the transaction via a bug that had been attached to the CI testified that the tape recording was a fair and accurate portrayal of the conversation. Brown v. State, 274 Ga. App. 302, 617 S.E.2d 227 (2005) (decided under former O.C.G.A. § 24-4-48).

Claim of error in admission of tape rejected. — Defendant's claim that an audiotape was improperly admitted into evidence was rejected as defendant did not include the tape in the record and defendant failed to specify the harm that resulted from any error in admitting the tape. Dupree v. State, 267 Ga. App. 561, 600 S.E.2d 654 (2004) (decided under former O.C.G.A. § 24-4-48).

Transcript of audiotape and photographs. — Since a proper foundation for a transcript of defendant's statements to the police was laid by the trial court properly informing the jury that the transcript was not to be considered independent evidence, and that the jury had to return the transcript after listening to an audiotape thereof, admission of the transcript was proper; in addition, the photographs of the victim, which were not unduly gruesome or prejudicial, were admissible. Palmer v. State, 277 Ga. 124, 587 S.E.2d 1 (2003) (decided under former O.C.G.A. § 24-4-48).

Photos

Proper foundation for admission of photo. — Since the defendant failed to establish the photo's origins or source, and also failed to connect the photo to the threatening letters defendant claimed defendant received while in jail, under former O.C.G.A. § 24-4-48(b), the trial court did not abuse the court's discretion in finding that a proper foundation was not laid for the photo's admission. Sweet v. State, 276 Ga. 545, 580 S.E.2d 231 (2003)

(decided under former O.C.G.A. § 24-4-48).

Defendant's motion for a mistrial based on the admission of a photograph of the victim's head was not an abuse of discretion as: (1) if pre-autopsy photographs were relevant and material to any issue in the case, they were admissible even if they were duplicative and might inflame the jury; (2) photographs showing the extent and nature of the victim's wounds were material and relevant, even if the cause of death was not in dispute; (3) the state had the burden to prove beyond a reasonable doubt that the defendant caused the death of the victim with malice aforethought; and (4) the photograph was relevant to the state's claim that the defendant had done so by shooting a single shot into the victim's head with a .38 revolver. Bradley v. State, 281 Ga. 173, 637 S.E.2d 19 (2006) (decided under former O.C.G.A. § 24-4-48).

It was within the broad discretion of the trial court to allow photographs to be introduced to show the locations of two docks during the time frames testified to by a landowner because notwithstanding that the witness who obtained the photographs did not have the exact same aerial view as the tendered photographs, the witness explained the basis for the testimony as to the date of the photographs and testified that the photographs accurately depicted those locations as of those time periods. Dillon v. Reid, 312 Ga. App. 34, 717 S.E.2d 542 (2011) (decided under former O.C.G.A. § 24-4-48).

Child victim provided proper foundation. — Photos that were introduced not to show that they accurately represented the sexual events depicted, but rather to show that the defendant possessed sexually explicit photographs, were admissible after the photos were identified by the child victim as being photographs shown to the victim by the defendant and by other witnesses as the photos shown to the child victim on the defendant's computer. Abernathy v. State, 278 Ga. App. 574, 630 S.E.2d 421 (2006) (decided under former O.C.G.A. § 24-4-48).

Trial court did not abuse the court's discretion in admitting numerous sexually explicit photographs and several video recordings into evidence as they were authenticated by showing the photographs to either minor victim during their testimony and having them identify themselves as being fairly depicted therein; in addition, both victims also testified that they viewed the digital video recordings prior to the admission of that evidence and were able to recognize themselves as being fairly depicted in those recordings. Walthall v. State, 281 Ga. App. 434, 636 S.E.2d 126 (2006) (decided under former O.C.G.A. § 24-4-48).

No foundation for admission of photo. — Trial court properly refused to admit photos of a subdivision, tendered by a utility to rebut testimony by the condemnees' appraiser that property around power lines was usually the last piece of residential property to be developed, and was usually relegated to low income housing because the utility (1) failed to authenticate the pictures by showing the identity or address of the subdivision; (2) failed to present any evidence as to the value of the property in the pictures; and (3) failed to demonstrate whether the subdivision was built before or after the power lines were installed. Ga. Power Co. v. Jones, 277 Ga. App. 332, 626 S.E.2d 554 (2006) (decided under former O.C.G.A. § 24-4-48).

Trial court erred in allowing an officer to identify the defendant in two surveillance photographs, based on the officer's familiarity with the defendant's appearance and absent a change in the defendant's appearance, because the testimony was offered to establish a fact which the jurors could decide for themselves; hence, the evidence was erroneously admitted as invading the jury's province to decide the issue. Mitchell v. State, 283 Ga. App. 456, 641 S.E.2d 674 (2007) (decided under former O.C.G.A. § 24-4-48).

Photos of a deceased body. — Photographs of a victim's body after the body had been taken to the crime lab were material, relevant, and admissible as the photographs showed the location, nature, and extent of the victim's multiple gunshot wounds. Thomason v. State, 281 Ga. 429, 637 S.E.2d 639 (2006) (decided under former O.C.G.A. § 24-4-48).

Trial court did not err in admitting two

Photos (Cont'd)

post-incision autopsy photographs of the victim, despite the fact that the depicted injuries might not have been the direct cause of the victim's death, as the internal injuries could not have been shown by photographs of the outside of the body and were material in corroborating the details of the assault on the victim, which ultimately resulted in death. Lyons v. State, 282 Ga. 588, 652 S.E.2d 525 (2007), overruled on other grounds, Garza v. State, 2008 Ga. LEXIS 865 (Ga. 2008) (decided under former O.C.G.A. § 24-4-48).

In a defendant's prosecution for, inter alia, felony murder, a photograph of the victim's body just prior to the beginning of the autopsy did not violate the rule pertaining to post-autopsy incision photographs as the incision marks shown related to an organ harvest after attempts to keep the victim alive failed; photographs that displayed the body's exposed rib cage and the calcification of ribs broken weeks before the victim's death were also properly admitted as those injuries formed the basis of charges against the defendant of cruelty to a child and aggravated assault, separate from the acts that immediately caused the victim's death. Berryhill v. State, 285 Ga. 198, 674 S.E.2d 920 (2009) (decided under former O.C.G.A. § 24-4-48).

Photographs properly admitted. — In a boundary line dispute, the fact that the surveyor who prepared an exhibit depicting the area at issue did not testify, and that the exhibit did not contain a surveyor's stamp or signature, was not certified or authenticated, was not incorporated into a deed, and was labeled "not to scale," did not preclude the exhibit's admission. It was an aerial photo that a defendant used to explain the defendant's testimony about the defendant's understanding of the location of the boundary line and, thus, was properly admitted. Griggs v. Fletcher, 294 Ga. App. 60, 668 S.E.2d 521 (2008) (decided under former O.C.G.A. § 24-4-48).

Videotapes

Videotape without authentication insufficient. — Introduction into evidence of videotapes, depicting a male and female engaged in sexual activity, without authentication by the operator of the machine which produced the videotapes, or by one who personally witnessed the events recorded, was error and required reversal of convictions for aggravated child molestation and sexual exploitation of a child. Phagan v. State, 268 Ga. 272, 486 S.E.2d 876 (1997), cert. denied, 522 U.S. 1128, 118 S. Ct. 1079, 140 L. Ed. 2d 136 (1998) (decided under former O.C.G.A. § 24-4-48).

First and third portions of a videotape were not properly authenticated under former O.C.G.A. § 24-4-48, as the subject child molestation victims were not sleeping in these segments of the videotape, and the victims, both of whom testified at trial, were available to authenticate these portions of the videotape; neither child was asked during testimony to confirm that the videotape accurately portrayed the events the children had witnessed. Smith v. State, 285 Ga. App. 658, 647 S.E.2d 346 (2007) (decided under former O.C.G.A. § 24-4-48).

Evidence sufficient to authenticate videotape. — To establish that tape was taken from a surveillance camera at the scene of the crime, testimony of the store supervisor, the agent who found the tape, the forensic photographer who repaired the tape, and the investigator who created the state's exhibit was sufficient authentication. Tolver v. State, 269 Ga. 530, 500 S.E.2d 563 (1998) (decided under former O.C.G.A. § 24-4-48).

Surveillance tape of a convenience store robbery was admissible into evidence because, even though the tape showed the wrong date because a store employee did not know how to properly set the videorecorder, the tape was properly authenticated by the store clerk and customers that were in the store during the robbery. Wallace v. State, 267 Ga. App. 801, 600 S.E.2d 808 (2004) (decided under former O.C.G.A. § 24-4-48).

Since the victim was semiconscious at the time of acts of alleged child molestation due to drug and alcohol use, the victim was an unavailable witness under former O.C.G.A. § 24-4-48 for purposes of authenticating a videotape found at the

scene; however, the trial court did not err in admitting the videotape because, in a pretrial statement to police, the defendant acknowledged that the victim had performed oral sex on the defendant on the evening in question and did not dispute the accuracy of the tape's depiction of it, the victim identified herself on the tape, another victim was identified on the videotape by the victim's mother, and another attendee at the party identified herself on the videotape. Wilson v. State, 279 Ga. App. 459, 631 S.E.2d 391 (2006), cert. denied, No. S06C1689, 2006 Ga. LEXIS 1036 (Ga. 2006) (decided under former O.C.G.A. § 24-4-48).

Trial court was authorized to find that a segment of a videotape reliably showed the facts for which the videotape was offered and was admissible under former O.C.G.A. § 24-4-48(b); that a child molestation victim appeared on the tape and that the defendant made the tape was shown by the testimony of the investigating officer, who identified the victim and who recognized the defendant's voice on the segment of the tape showing the victim to be asleep. Smith v. State, 285 Ga. App. 658, 647 S.E.2d 346 (2007) (decided under former O.C.G.A. § 24-4-48).

Fast food restaurant video surveillance tape was properly admitted under former O.C.G.A. § 24-4-48(d), although the tape lacked date and time stamps, because other evidence authenticated the tape, including identification of the tape by a police officer who saw the tape, date and time stamps on still photographs from the tape, and the tape's corroboration of an employee's description of events. Dixon v. State, 300 Ga. App. 183, 684 S.E.2d 679 (2009) (decided under former O.C.G.A. § 24-4-48).

Date and time stamp on videotape. — Defendant argued only that a proper foundation was not laid under former O.C.G.A. § 24-4-48(c) because no competent witness testified as to the date and time of the tape; however, since the videotape was not admitted under that portion of the former statute which required a date and time on such evidence, that enumeration of error presented nothing for review. Rogers v. State, 294 Ga. App. 195, 670 S.E.2d 106 (2008) (decided under former O.C.G.A. § 24-4-48).

Admitted to authenticate videotape. — Trial court did not abuse the court's discretion when the court found that the state exercised due diligence in attempting to locate a robbery victim who had moved or by allowing a police officer to testify about out-of-court statements the victim made after a robbery to authenticate a videotape showing the robbery. Fernandez v. State, 263 Ga. App. 750, 589 S.E.2d 309 (2003) (decided under former O.C.G.A. § 24-4-48).

Defendant unavailable as authenticating witness due to right against self-incrimination. — Child pornography defendant was deemed unavailable as an authenticating witness of seized photographic and videotape evidence against the defendant because defendant could not be compelled to testify due to the constitutional right against self-incrimination; but even though defendant was unavailable, the evidence was admissible through the testimony of the seizing officers. Craft v. State, 252 Ga. App. 834, 558 S.E.2d 18 (2001), cert. denied, 537 U.S. 1025, 123 S. Ct. 537, 154 L. Ed. 2d 437 (2002) (decided under former O.C.G.A. § 24-4-48).

Videotaped statement of testifying witness properly admitted. — Defendant's right of confrontation was not violated by the admission of a videotaped statement of a witness, who did not remain silent at the trial, and who completely denied making any statement to the police regarding the murder. Wilson v. State, 277 Ga. 114, 587 S.E.2d 9 (2003) (decided under former O.C.G.A. § 24-4-48).

Surveillance videotape was properly admitted, and the trial court's reliability finding was upheld on appeal, based on the surrounding testimony, despite the fact that the state was unable to present testimony from a witness who actually observed the events transpire contemporaneously with the recording of the tape; moreover, the tape was not rendered inadmissible merely because the tape did not contain the date and time on which it was recorded, as such went to the weight of the evidence, and not the admissibility. Holloway v. State, 287 Ga. App.

Videotapes (Cont'd)

655, 653 S.E.2d 95 (2007) (decided under former O.C.G.A. § 24-4-48).

Hotel surveillance tape was properly admitted under former O.C.G.A. § 24-4-48. Testimony that security personnel in the dispatch office were not trained to operate machinery in the dispatch room and did nothing more than replace spent tapes with fresh ones established that the devices producing the images were not operated by a person or under the personal control or in the presence of an individual operator; the fact that the date-time stamp was 104 minutes "off" went to the weight of the evidence, not to the evidence's admissibility; and the purported poor quality of the recording did not preclude the tape's admissibility. Dawson v. State, 283 Ga. 315, 658 S.E.2d 755 (2008), cert. denied, 129 S. Ct. 169, 172 L.Ed.2d 122 (2008) (decided under former O.C.G.A. § 24-4-48).

Trial court did not abuse the court's discretion in admitting a videotape of the footage from surveillance cameras depicting the defendant's theft of the victim's property because the victim testified that the victim recognized oneself on the tape, and police officers testified that the officers viewed the tape at the U. S. Attorney's Office shortly after the theft. Sheppard v. State, 300 Ga. App. 631, 686 S.E.2d 295 (2009) (decided under former O.C.G.A. § 24-4-48).

Voicemail message properly authenticated. — With regard to a defendant's murder conviction, the trial court did not err by admitting the tape of the voicemail message the defendant left on the victim's sibling's voicemail service shortly before the shooting based on the defendant's contention that the voicemail itself, as opposed to the tape of the voicemail, was not properly authenticated because competent evidence sufficient to establish the reliability of the voicemail message for purposes of authentication was admitted at trial via the testimony of the sibling as to retrieval of the message and the state presenting evidence of the phone records. Henley v. State, 285 Ga. 500, 678 S.E.2d 884, cert. denied, 130 S. Ct. 800, 175 L. Ed. 2d 559, 2009 U.S. LEXIS 8805 (2009) (decided under former O.C.G.A. § 24-4-48).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 11.

Am. Jur. Proof of Facts. — Foundation for Contemporaneous Videotape Evidence, 16 POF3d 493.

Am. Jur. Trials. — Preparing and Using Photographs in Civil Cases, 3 Am. Jur. Trials 1.

Preparing and Using Photographs in Criminal Cases, 3 Am. Jur. Trials 335.

Uses, Techniques, and Reliability of Polygraph Testing, 42 Am. Jur. Trials 313.

Audio Recordings: Evidence, Experts and Technology, 48 Am. Jur. Trials 1.

Video Technology, 58 Am. Jur. Trials 481.

The Daubert Challenge to the Admissibility of Scientific Evidence, 60 Am. Jur. Trials 1.

ALR. — Admissibility in evidence of aerial photographs, 85 ALR5th 671.

Construction and application of silent witness theory, 116 ALR5th 373.

Admissibility in state criminal case of results of polygraph (lie detector) test-Post *Daubert* cases, 10 ALR6th 463.

24-9-924. Admissibility of records of Department of Driver Services; admissibility of computer transmitted records.

(a) Any court may receive and use as evidence in any proceeding information otherwise admissible from the records of the Department of Public Safety or the Department of Driver Services obtained from any

terminal lawfully connected to the Georgia Crime Information Center without the need for additional certification of such records.

(b) Any court may receive and use as evidence for the purpose of imposing a sentence in any criminal proceeding information otherwise admissible from the records of the Department of Driver Services obtained from a request made in accordance with a contract with the Georgia Technology Authority for immediate on-line electronic furnishing of information. (Code 1981, § 24-9-924, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-3-17 are included in the annotations for this Code section.

Records obtained from Georgia Crime Information Center. — Former O.C.G.A. § 24-3-17 provided for self-authentication when the document sought to be admitted was obtained from a computer terminal lawfully connected to the Georgia Crime Information Center. Thomas v. State, 196 Ga. App. 88, 395 S.E.2d 615 (1990) (decided under former O.C.G.A. § 24-3-17).

There was an inadequate foundation for the introduction of an uncertified driver's record since the prosecutor merely represented in argument that the record was from a computer connected to the Georgia Crime Information Center, but no witness testified that it was so obtained. Waters v. State, 210 Ga. App. 305, 436 S.E.2d 44 (1993) (decided under former O.C.G.A. § 24-3-17); Tipton v. State, 213 Ga. App. 764, 445 S.E.2d 860 (1994) (decided under former O.C.G.A. § 24-3-17).

An uncertified copy of defendant's driving record was properly introduced in evidence since the state adduced a sworn witness to identify the printout as a report from the Georgia Crime Information Center. Jackson v. State, 228 Ga. App. 877, 492 S.E.2d 897 (1997) (decided under former O.C.G.A. § 24-3-17).

In a prosecution for possession of vehicles with an altered vehicle identification number (VIN), the trial court properly permitted the introduction into evidence of four computer printouts that listed the make, model, VIN, and owner of four of the cars that allegedly had altered VINs where the printouts came from the Georgia Crime Information Center (GCIC) computer and the state laid a proper foundation when a certified GCIC operator testified that the computer printouts were obtained from a GCIC terminal. Brennan v. State, 247 Ga. App. 515, 544 S.E.2d 210 (2001) (decided under former O.C.G.A. § 24-3-17).

In a case where defendant, who had been convicted of driving with a suspended license, claimed that the state had not laid a proper legal foundation for the admission of the defendant's driving record, there was no error in the driving record's admission as there was at least circumstantial evidence that the driving record was connected to the Georgia crime information computer. Worthy v. State, 252 Ga. App. 852, 557 S.E.2d 448 (2001) (decided under former O.C.G.A. § 24-3-17).

Defendant's challenge to the admission of a Georgia Crime Information Center (GCIC) report was rejected as the state complied with the requirements of former O.C.G.A. § 24-3-17 and the caselaw; the evidence was sufficient to show identity for purposes of the admission of the GCIC report as the GCIC record bore defendant's name, and defendant did not deny that it was defendant's. Evans v. State, 267 Ga. App. 706, 600 S.E.2d 671 (2004) (decided under former O.C.G.A. § 24-3-17).

Record from Georgia Department of Public Safety. — Driving with a suspended license conviction was affirmed

after the state proved that defendant received notice of defendant's license suspension by introducing defendant's driving record; an officer testified that the officer was certified to run driving histories and that the officer obtained a printout of defendant's driving history from an approved computer terminal at the Georgia Department of Public Safety. Fannin v. State, 267 Ga. App. 413, 599 S.E.2d 355 (2004) (decided under former O.C.G.A. § 24-3-17).

Certified copy of driver's license. — Because a defendant's driver's license was a properly certified public record, the trial court was permitted to infer the reliability of any hearsay contained therein and to conclude that no confrontation clause violation had been shown pursuant to former O.C.G.A. §§ 24-3-17 and 24-7-20 (see now O.C.G.A. §§ 24-9-902 and 24-9-924). Douglas v. State, 312 Ga. App. 585, 718 S.E.2d 908 (2011), cert. denied, No. S12C0470, 2012 Ga. LEXIS 606 (Ga. 2012) (decided under former O.C.G.A. § 24-3-17).

National Crime Information Center printout of defendant's criminal record was competent, admissible evidence that defendant had three prior shoplifting convictions, one in Georgia and two in Arizona. State v. Sterling, 244 Ga. App. 328, 535 S.E.2d 329 (2000) (decided under former O.C.G.A. § 24-3-17).

Printout establishing date of license suspension properly admitted. — When the defendant was charged with driving with a suspended license, a certified copy of the defendant's notice of suspension prepared in connection with an earlier driving-under-the-influence conviction and a computer printout establishing the date of the suspension were properly admitted under former O.C.G.A. § 24-3-17. Before the printout was submitted to the jury, the trial court required that the prejudicial information on the printout be redacted. Hann v. State, 292 Ga. App. 719, 665 S.E.2d 731 (2008) (decided under former O.C.G.A. § 24-3-17).

Insufficient foundation for admission of evidence. — Testimony of an employee of the county solicitor's (now district attorney) office that the employee had obtained a copy of defendant's driving record from the state patrol office was not sufficient foundation for admission of the record. Tolbert v. State, 227 Ga. App. 647, 490 S.E.2d 183 (1997) (decided under former O.C.G.A. § 24-3-17).

CHAPTER 10

BEST EVIDENCE RULE

Sec.
24-10-1001. Definitions.
24-10-1002. Requirement of original.
24-10-1003. Admissibility of duplicates.
24-10-1004. Admissibility of other evidence of contents of a writing, recording, or photograph.
24-10-1005. Public records.
24-10-1006. Summaries.
24-10-1007. Testimony or written admission of party.
24-10-1008. Functions of court and jury.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 enactment of this chapter, see 28 Ga. St. U.L. Rev. 1 (2011).

24-10-1001. Definitions.

As used in this chapter, the term:

(1) "Writing" or "recording" means letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, magnetic impulse, or mechanical or electronic recording or other form of data compilation.

(2) "Photograph" includes still photographs, X-ray films, video recordings, and motion pictures.

(3) "Original" means the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

(4) "Duplicate" means a counterpart produced by the same impression as the original or from the same matrix or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, chemical reproduction, or other equivalent techniques which accurately reproduce the original.

(5) "Public record" shall have the same meaning as set forth in Code Section 24-8-801. (Code 1981, § 24-10-1001, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Definitions that apply to article, Fed. R. Evid. 1001.

Law reviews. — For note discussing the possible uses of video tape and its admissibility as evidence, see 5 Ga. St. B.J. 393 (1969).

For comment on Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337 (1958), see 21 Ga. B.J. 553 (1959).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3761, former Civil Code 1910, § 5750, former Code 1933, § 38-204, and former O.C.G.A. § 24-5-1 are included in the annotations for this Code section.

Duplicate original signed by both parties at the same time as the original constituted primary instead of secondary evidence and was admissible without the necessity of first serving a notice to produce the "original." Beard v. Westmoreland, 90 Ga. App. 632, 84 S.E.2d 93 (1954) (decided under former Code 1933, § 38-204); Raulerson v. Jones, 122 Ga. App. 440, 177 S.E.2d 181 (1970) (decided under former Code 1933, § 38-204).

Written bill of sale is the best evidence, and parol evidence is inadmissible to show the title to personalty. Epping v. Mockler, 55 Ga. 376 (1875) (decided under former Code 1873, § 3761).

Evidence of title. — If there be written evidence of title that evidence should be produced. Morgan v. Jones, 24 Ga. 155 (1858) (decided under former law).

Familiarity with basis for record. — As a general rule, the testimony of a person who has knowledge of the facts from which books of account are made up is primary evidence as to those facts, and is admissible whether or not the books themselves are put in evidence. Mayor of Buford v. Medley, 58 Ga. App. 48, 197 S.E. 494 (1938) (decided under former Code 1933, § 38-204).

Oral testimony by a police officer that the officer was certified to operate particular model of intoximeter at the time the officer tested defendant was not barred by the best evidence rule. Clarke v. State, 170 Ga. App. 852, 319 S.E.2d 16 (1984) (decided under former O.C.G.A. § 24-5-1).

Claim under best evidence rule waived. — Driver waived the driver's claim that the trial court erred in denying the driver's pretrial motion seeking to exclude an injured party from cross-examining the driver about a traffic citation without producing a certified copy of the guilty plea under the former best evidence rule when the driver testified on direct that the driver received a traffic citation in connection with the automobile accident with the injured party and that the driver paid a fine on the citation, and the driver did not object when the injured party asked the driver about the citation without introducing a certified copy. Daniel v. Smith, 266 Ga. App. 637, 597 S.E.2d 432 (2004) (decided under former O.C.G.A. § 24-5-1).

Exact carbon copy. — When it is proved that a genuine original was executed, proof that a document is an exact carbon copy of that original is sufficient to admit the copy into evidence without proving the loss of the original. Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337 (1958), for comment, see 21 Ga. B.J. 553 (1959) (decided under former Code 1933, § 38-204).

Production of photocopy of search warrant was sufficient to evidence valid search when issuing magistrate testified that the magistrate searched the magistrate's files and had not found the original warrant, and the police officer who executed the warrant similarly found only the photocopy in the officer's file. Early v. State, 170 Ga. App. 158, 316 S.E.2d 527 (1984) (decided under former O.C.G.A. § 24-5-1).

Unsigned copy of the existing original contract was properly excluded from evidence. Brenard Mfg. Co. v. Winn-Wilkes Drug Co., 31 Ga. App. 200, 120 S.E. 446 (1923) (decided under former Civil Code 1910, § 5750).

Altered copy of contract properly excluded. — When an unaltered original of a contract was available to the plaintiff from the defendant according to the assertion of plaintiff's president at trial but plaintiff's president did not attempt to subpoena the document, the trial court

properly exercised the court's discretion in excluding an altered copy of the contract since the plaintiff failed to exercise diligence to obtain the original. Jeff Goolsby Homes Corp. v. Thomas, 181 Ga. App. 308, 352 S.E.2d 172 (1986) (decided under former O.C.G.A. § 24-5-1).

A press letter book is not original but secondary evidence of the contents of the letters. Watkins v. Paine, 57 Ga. 50 (1876) (decided under former Code 1873, § 3761).

Witness's notes. — Best evidence of the expert witness's opinion was the witness's own testimony not the worksheet which the witness had prepared in order to assist the witness in presenting the testimony. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860 (1972) (decided under former Code 1933, § 38-204).

Illegal hearsay distinguished. — There is a distinction between illegal testimony and secondary evidence in that hearsay testimony (illegal testimony) has no probative force whatsoever, and its only effect is to prejudice the minds of the jury against the party against whom such hearsay evidence is introduced, while the only objection to secondary evidence is that the evidence is received without first laying the preliminary foundation; such evidence stands on a different footing, and if admitted without objection it is nevertheless competent, for by allowing such evidence without objecting at the time it is sought to be introduced the party waives the party's right to have the best evidence of such fact sought to be proved, and cannot subsequently insist that the court should withdraw such secondary evidence from the consideration of the jury. Rushin v. State, 63 Ga. App. 646, 11 S.E.2d 844 (1940) (decided under former Code 1933, § 38-204).

Preliminary proof. — Party must always make the usual preliminary proof for the admission of secondary evidence, or that kind of evidence will not be admitted. Morgan v. Jones, 24 Ga. 155 (1858) (decided under former law).

Criminal confessions. — Rules governing the admission of primary and secondary evidence to establish a contract have no application to the confession of a crime. In making a confession, all that the accused voluntarily wrote, or said, or signed, which is material to the charge, is competent against the accused because it is the accused's own admission, and against the accused's own interest. Cawthon v. State, 71 Ga. App. 497, 31 S.E.2d 64 (1944) (decided under former Code 1933, § 38-204).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 38-204 are included in the annotations for this Code section.

Photostatic copies made from microfilms are admissible. 1945-47 Op. Att'y Gen. p. 286 (decided under former Code 1933, § 38-204).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 73.

C.J.S. — 32A C.J.S., Evidence, § 1040.

ALR. — Proof, in absence of direct testimony by survivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident, 32 ALR2d 988.

Admissibility of evidence of absence of other accidents or injuries from a customary practice or method asserted to be negligent, 42 ALR2d 1055.

24-10-1002. Requirement of original.

To prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required. (Code 1981, § 24-10-1002, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Parol contracts, § 13-1-6. Statute of frauds, § 13-5-30 et seq. Parol evidence generally, Ch. 3 of this title. Requirement of the original, Fed. R. Evid. 1002.

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, §§ 3707, 3709, former Code 1873, §§ 3760, 3762, former Civil Code 1895, §§ 5162, 5166, former Civil Code 1910, §§ 5748, 5752, former Code 1933, §§ 38-203, 38-205, and former O.C.G.A. § 24-5-4 are included in the annotations for this Code section.

Rule restricted to writings and has nothing to do with evidence generally. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860 (1972) (decided under former Code 1933, §§ 38-203, 38-205); Willingham v. State, 134 Ga. App. 603, 215 S.E.2d 521 (1975) (decided under former Code 1933, §§ 38-203, 38-205); Rutledge v. State, 152 Ga. App. 755, 264 S.E.2d 244 (1979) (decided under former Code 1933, §§ 38-203, 38-205); Bostic v. State, 183 Ga. App. 430, 359 S.E.2d 201 (1987) (decided under former Code 1933, §§ 38-203, 38-205).

Contents of writing in issue. — Former statute applied only when the contents of a writing were in issue. Young v. State, 226 Ga. 553, 176 S.E.2d 52 (1970) (decided under former Code 1933, §§ 38-203, 38-205); Springer v. State, 238 Ga. 81, 230 S.E.2d 883 (1976) (decided under former Code 1933, §§ 38-203, 38-205); Pryor v. State, 238 Ga. 698, 234 S.E.2d 918, cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006); (decided under former Code 1933, §§ 38-203, 38-205); Guthrie v. State, 147 Ga. App. 351, 248 S.E.2d 714 (1978) (decided under former Code 1933, §§ 38-203, 38-205); Smith v. State, 147 Ga. App. 549, 249 S.E.2d 353 (1978) (decided under former Code 1933, §§ 38-203, 38-205); Ferrell v. State, 149 Ga. App. 405, 254 S.E.2d 404 (1979) (decided under former Code 1933, §§ 38-203, 38-205); Denson v. State, 149 Ga. App. 453, 254 S.E.2d 455 (1979) (decided under former Code 1933, §§ 38-203, 38-205).

Preference for original writing. — Former statute was really a preferential rule giving first preference to the original writing. Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860 (1972) (decided under former Code 1933, §§ 38-203, 38-205); Willingham v. State, 134 Ga. App. 603, 215 S.E.2d 521 (1975) (decided under former Code 1933, §§ 38-203, 38-205).

Former statute should be more appropriately called the "original document rule." Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 193 S.E.2d 860 (1972) (decided under former Code 1933, §§ 38-203, 38-205); Pugh v. Jones, 131 Ga. App. 600, 206 S.E.2d 650 (1974) (decided under former Code 1933, §§ 38-203, 38-205).

Accounting for absence of notes. — There was no violation of the former stat-

ute by the failure to introduce the officer's notes taken during interviews with the defendant when the absence of notes was accounted for and explained. Dowdy v. State, 215 Ga. App. 576, 451 S.E.2d 528 (1994) (decided under former O.C.G.A. § 24-5-4).

When, with regard to proof of transmittal of contraband to state crime lab by certified mail, the state could only produce a photostatic copy of the certification receipt in lieu of the original and the defendant urged that, without an adequate explanation for the absence of the original certified mail receipt as required by former O.C.G.A. § 24-5-4, the chain of custody was not sufficiently proven, but a deputy sheriff testified that the deputy would always make a copy of the certified mail receipt when the deputy mailed contraband to the state crime lab, but had been unable to locate the original receipt for this particular mailing, and identified the deputy's handwriting on the photostatic copy and noted that the certification number was identical to that on the state crime lab report, the trial court was authorized to conclude that the copy of the receipt had been made in the regular course of business so as to be admissible pursuant to former O.C.G.A. §§ 24-3-14 and 24-5-26 (see now O.C.G.A. §§ 24-8-803 and 24-10-1003). Spead v. State, 187 Ga. App. 359, 370 S.E.2d 213 (1988) (decided under former O.C.G.A. § 24-5-4).

Inadmissible testimony. — It was error to admit the testimony of witnesses as to the contents of a notebook without establishing the notebook's existence, admissibility, authentication and without accounting for the absence of the original. Clark v. State, 271 Ga. 6, 515 S.E.2d 155 (1999) (decided under former O.C.G.A. § 24-5-4).

In a civil forfeiture proceeding in connection with an action brought under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., a witness's testimony regarding newspaper and billboard advertising, telephone calls, and credit card charges violated the former best evidence rule because the state neither produced documentary evidence to support the statements, nor accounted for the absence of such evidence. Pabey v. State, 262 Ga. App. 272, 585 S.E.2d 200 (2003) (decided under former O.C.G.A. § 24-5-4).

Trial court erred in excluding the testimony of the defendant's parent concerning a missing letter written to the parent by the codefendant because testimony regarding the letter was inadmissible under the former best evidence rule; because the parent was not so familiar with the defendant's handwriting that the parent would recognize the handwriting, and there was no other evidence that the letter the parent described was written by the codefendant, the letter was not properly authenticated. Norris v. State, 289 Ga. 154, 709 S.E.2d 792 (2011) (decided under former O.C.G.A. § 24-5-4).

Inadmissible evidence. — Cover letter sought to be introduced was a photocopy of an alleged original that had never been produced, that the introducing party had never seen, and that the other party claimed did not exist; thus, without additional foundation, the photocopy was susceptible to a best evidence objection, and a trial court properly denied admission of the letter. Dixon Dairy Farms, Inc. v. Purina Mills, Inc., 267 Ga. App. 738, 601 S.E.2d 152 (2004) (decided under former O.C.G.A. § 24-5-4).

Guarantors' claims that the guarantors entered into written agreements with a bank releasing the guarantors from their guaranty agreements was not supported by any evidence; there was nothing to satisfactorily account for the absence of the written agreements, former O.C.G.A. § 24-5-4(a), and any oral assurances by bank personnel were inadmissible to vary from the terms of the guaranty agreements under O.C.G.A. § 13-2-2(1). Windham & Windham, Inc. v. Suntrust Bank, 313 Ga. App. 841, 723 S.E.2d 70 (2012) (decided under former O.C.G.A. § 24-5-4).

Suspicion of fraud as basis for rule. — Ground of the former rule was a suspicion of fraud and, if there was better evidence of the fact which was withheld, a presumption arose that the party had some secret or sinister motive in not producing the better evidence. United States v. Reyburn, 31 U.S. (6 Pet.) 352, 8 L. Ed.

General Consideration (Cont'd)

424 (1832) (decided under former law); Fitzgerald v. Adams, 9 Ga. 471 (1851) (decided under former law).

Evidence which itself indicates accessibility of other and better proof is inadmissible. Wise v. State, 52 Ga. App. 98, 182 S.E. 535 (1935) (decided under former Code 1933, §§ 38-203, 38-205); Short v. Haney, 60 Ga. App. 585, 4 S.E.2d 497 (1939) (decided under former Code 1933, §§ 38-203, 38-205).

Rule does not require introduction of chattels into evidence. Hill v. State, 221 Ga. 65, 142 S.E.2d 909 (1965), overruled on other grounds, Henderson v. State, 251 Ga. 398, 306 S.E.2d 645 (1983) (decided under former Code 1933, §§ 38-203, 38-205); Adams v. State, 142 Ga. App. 252, 235 S.E.2d 667 (1977) (decided under former Code 1933, §§ 38-203, 38-205).

Rule may be waived. Moret v. State, 246 Ga. 5, 268 S.E.2d 635 (1980) (decided under former Code 1933, §§ 38-203, 38-205).

Defendant waived this rule when, with knowledge that officer's notes taken during interviews with the defendant were accessible, the defendant did not demand that the notes be produced and allowed the introduction of typed notes. Dowdy v. State, 215 Ga. App. 576, 451 S.E.2d 528 (1994) (decided under former O.C.G.A. § 24-5-4).

Other evidence of similar import. — Party cannot complain that evidence was admitted when the party offered other evidence of similar legal import. Cain v. State, 113 Ga. App. 477, 148 S.E.2d 508 (1966) (decided under former Code 1933, §§ 38-203, 38-205).

Harmless error. — Error in failing to require production of a warrant was harmless if its only effect was to establish a state of facts the defendant admitted to be true. Cain v. State, 113 Ga. App. 477, 148 S.E.2d 508 (1966) (decided under former Code 1933, §§ 38-203, 38-205).

Effect of failure to comply with rule. — Failure to comply with the "original document rule" in attachments may cause the affidavit to be stricken. Pugh v. Jones, 131 Ga. App. 600, 206 S.E.2d 650 (1974) (decided under former Code 1933, §§ 38-203, 38-205).

Expert's opinion must be based on original record. — It is reversible error to allow an expert witness to base an opinion upon what the expert says a chart of an official Navy health record shows when the record itself is not introduced in evidence. Pressley v. State, 205 Ga. 197, 53 S.E.2d 106 (1949) (decided under former Code 1933, §§ 38-203, 38-205).

Insurance card testimony admissible. — In light of defendant's own admission at trial that the defendant did not have an insurance card because the defendant paid for insurance in installments, the trial court did not abuse the court's discretion in allowing the officer's testimony without producing the card itself. Johnson v. State, 209 Ga. App. 395, 433 S.E.2d 638 (1993) (decided under former Code 1933, §§ 38-203, 38-205).

Application

Videotapes. — Former best evidence rule applied only to writings and not to videotapes. Collins v. State, 232 Ga. App. 651, 502 S.E.2d 498 (1998) (decided under former O.C.G.A. § 24-5-4).

Former best evidence rule did not apply to videotapes. Reese v. State, 252 Ga. App. 650, 556 S.E.2d 150 (2001) (decided under former O.C.G.A. § 24-5-4).

Former best evidence rule did not apply to collateral evidence. Walls v. State, 161 Ga. App. 235, 291 S.E.2d 15 (1982) (decided under former O.C.G.A. § 24-5-4).

When essential fact to be proved was neither existence nor contents of quarterly bank statements, which were merely collateral or incidental to issue involved, it was not error to admit photocopies of such statements since plaintiff testified that the plaintiff did not have the originals. Jones v. Sudduth, 162 Ga. App. 602, 292 S.E.2d 448 (1982) (decided under former O.C.G.A. § 24-5-4).

Rule inapplicable when contents of writing not in issue. — See Jones v. Blackburn, 75 Ga. App. 791, 44 S.E.2d 555 (1947) (decided under former Code 1933, §§ 38-203, 38-205); DeKalb County v. Townsend Assocs., 243 Ga. 80, 252 S.E.2d 498 (1979) (decided under former Code

1933, §§ 38-203, 38-205); Wells v. State, 151 Ga. App. 416, 260 S.E.2d 374 (1979) (decided under former Code 1933, §§ 38-203, 38-205); Borenstein v. Blumenfeld, 151 Ga. App. 420, 260 S.E.2d 377 (1979) (decided under former Code 1933, §§ 38-203, 38-205); Brown v. State, 177 Ga. App. 284, 339 S.E.2d 332 (1985) (decided under former O.C.G.A. § 24-5-4); Johnson v. State, 177 Ga. App. 705, 340 S.E.2d 662 (1986) (decided under former O.C.G.A. § 24-5-4); Blue Cross of Georgia/ Columbus, Inc. v. Whatley, 180 Ga. App. 93, 348 S.E.2d 459 (1986) (decided under former O.C.G.A. § 24-5-4); Covington v. State, 226 Ga. App. 484, 486 S.E.2d 706 (1997) (decided under former O.C.G.A. § 24-5-4).

With regard to a defendant's convictions for aggravated sodomy and kidnapping, the trial court did not err by admitting the testimony of the defendant's relative regarding letters the defendant sent to the relative while the defendant was awaiting trial wherein the defendant asked the relative to testify at trial that the relative had seen the victim and the defendant together the day before the attack at a motel, which was an event that never occurred. Contrary to the defendant's contention that the admission of the relative's testimony violated the best evidence rule, the best evidence rule did not apply since the contents of the writings were not in issue. Smith v. State, 294 Ga. App. 692, 670 S.E.2d 191 (2008) (decided under former O.C.G.A. § 24-5-4).

When contents or existence not in issue. — Former best evidence rule was inapplicable when neither the existence nor the contents of documents was in issue. Bacon v. Decatur Fed. Sav. & Loan Ass'n, 169 Ga. App. 538, 313 S.E.2d 727 (1984) (decided under former O.C.G.A. § 24-5-4); Calloway v. State, 176 Ga. App. 674, 337 S.E.2d 397 (1985) (decided under former O.C.G.A. § 24-5-4).

Currency was not a "writing". — Photocopy of a $20 bill used as "buy money" in a drug transaction was admissible. Johnson v. State, 231 Ga. App. 114, 497 S.E.2d 666 (1998) (decided under former O.C.G.A. § 24-5-4).

Computer screen as writing. — Admission of the oral testimony of a clerk whose computer defendant used to "back out" taxes, that the clerk's computer showed evidence of backing out, did not violate the best evidence rule, even assuming that a computer screen constituted a writing; at issue was a question of fact, whether defendant used the clerk's computer to back out taxes, and not the contents or terms of a writing. Parham v. State, 275 Ga. App. 528, 621 S.E.2d 532 (2005) (decided under former O.C.G.A. § 24-5-4).

Nonexistence of fact. — When it is sought to show that certain records do not contain a certain thing, the testimony of the keeper of the records, or of any other person who has read the records, that the records do not show the thing in question, is not inadmissible. Cary v. State, 55 Ga. App. 167, 189 S.E. 625 (1937) (decided under former Code 1933, §§ 38-203, 38-205); Peters v. Adcock, 196 Ga. 118, 26 S.E.2d 342 (1943) (decided under former Code 1933, §§ 38-203, 38-205).

Existence of fact to which writing is incidental. — Oral testimony of a fact in issue may be primary evidence thereof, although there is written evidence of the same fact, where the essential fact to be proved is neither the existence nor the contents of the writing, but the existence of the independent fact itself, to which the writing is merely collateral or incidental. Peterson v. Lott, 200 Ga. 390, 37 S.E.2d 358 (1946) (decided under former Code 1933, §§ 38-203, 38-205); Burke v. State, 153 Ga. App. 769, 266 S.E.2d 549 (1980) (decided under former Code 1933, §§ 38-203, 38-205); Emmett v. Regions Bank, 238 Ga. App. 455, 518 S.E.2d 472 (1999) (decided under former O.C.G.A. § 24-5-4).

Existence of writing. — Witness may testify that a writing exists since the witness does not attempt to testify as to the contents of the writing. Jones v. Blackburn, 75 Ga. App. 791, 44 S.E.2d 555 (1947) (decided under former Code 1933, §§ 38-203, 38-205).

Existence of notes, checks, letters, and the like. — Parol evidence as to the existence of notes, checks, receipts, books, letters, and the like, or as to their location, size, length, quantity, and other factors, but not undertaking to disclose the mate-

Application (Cont'd)

rial contents thereof, is not subject to the objection that the writings themselves would be higher proof; where such writings are only collaterally in point, and are in no sense the foundation of the action or defense, even their contents may sometimes be shown by parol without accounting for the nonproduction of the papers themselves. Butts v. Maryland Cas. Co., 52 Ga. App. 838, 184 S.E. 774 (1936) (decided under former Code 1933, §§ 38-203, 38-205).

Existence of magazine pictures. — Trial court properly allowed an arresting officer to testify regarding the presence of magazine pictures of female nudes in defendant's home since the pictures were not introduced into evidence. King v. State, 209 Ga. App. 529, 433 S.E.2d 722 (1993) (decided under former O.C.G.A. § 24-5-4).

Summary of accounting book entries. — When pertinent and essential facts can be ascertained only by an examination of a large number of entries in books of account, an auditor or an expert accountant who has made an examination and analysis of the books and figures may testify as a witness and give summarized statements of what the books show as a result of the investigation, provided the books themselves are accessible to the court and the parties. Stewart v. State, 246 Ga. 70, 268 S.E.2d 906 (1980) (decided under former Code 1933, §§ 38-203, 38-205); Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8 (1981) (decided under former Code 1933, §§ 38-203, 38-205).

Showing absence of administration. — Best method of proving that no administration was ever had upon a particular estate is to introduce the evidence of one who has examined the records in the court where letters of administration should have been granted, that no such letters are shown by those records. Cowan v. Corbett, 68 Ga. 66 (1881) (decided under former Code 1873, §§ 3760, 3762); Greenfield v. McIntyre, 112 Ga. 691, 38 S.E. 44 (1901) (decided under former Civil Code 1895, §§ 5162, 5166); Compton v. Fender, 132 Ga. 483, 64 S.E. 475 (1909) (decided under former Civil Code 1895, §§ 5162, 5166).

Accounting for absence. — Hearsay testimony of a deputy about the contents of a missing letter that defendant allegedly wrote and sent to a codefendant was admissible as an incriminating statement by the defendant; the state satisfactorily accounted for the absence of the letter through the codefendant, who testified that the codefendant destroyed the letter after showing the letter to the deputy. Summerour v. State, 211 Ga. App. 65, 438 S.E.2d 176 (1993) (decided under former O.C.G.A. § 24-5-4).

Trial court's admission of a photocopy of a letter examined by a documents examiner did not violate the former best evidence rule as the original letter was lost and the copy was properly authenticated. Roberts v. State, 282 Ga. 548, 651 S.E.2d 689 (2007) (decided under former O.C.G.A. § 24-5-4).

No error in admission of copy of warranty. Croxton v. Leggett Motor Rebuilding, 168 Ga. App. 258, 308 S.E.2d 640 (1983) (decided under former O.C.G.A. § 24-5-4).

Still photographs taken from videotape were inapplicable to the former statute; the snapshots were merely positive enlargements of the frames which the jury could not have easily seen. Cleveland v. State, 204 Ga. App. 101, 418 S.E.2d 430 (1992) (decided under former O.C.G.A. § 24-5-4).

Former statute was inapplicable in the following cases. — See International Harvester Co. of Am. v. Morgan, 19 Ga. App. 716, 92 S.E. 35 (1917) (prior written agreement) (decided under former Civil Code 1910, §§ 5748, 5752); Jenkins v. Lane, 154 Ga. 454, 115 S.E. 126 (1922) (parol evidence to establish implied trust) (decided under former Civil Code 1910, §§ 5748, 5752); Maynard v. Rawlins, 45 Ga. App. 91, 163 S.E. 269 (1932) (testimony concerning note admitted by agreement of counsel) (decided under former Civil Code 1910, §§ 5748, 5752); Oliver v. Lane, 46 Ga. App. 136, 167 S.E. 116 (1932) (parol evidence concerning note) (decided under former Civil Code 1910, §§ 5748, 5752); Cooper v. State, 180 Ga. 612, 180 S.E. 103 (1935) (oral criminal confession) (decided under former Code 1933, §§ 38-203, 38-205); Garcia v. State, 52 Ga.

App. 80, 182 S.E. 526 (1935) (testimony derived from records) (decided under former Code 1933, §§ 38-203, 38-205); Wise v. State, 52 Ga. App. 98, 182 S.E. 535 (1935) (testimony concerning addresses printed on stolen property) (decided under former Code 1933, §§ 38-203, 38-205); Butts v. Maryland Cas. Co., 52 Ga. App. 838, 184 S.E. 774 (1936) (accord and satisfaction) (decided under former Code 1933, §§ 38-203, 38-205); Jones v. State, 182 Ga. 378, 185 S.E. 571 (1936) (certificate of insurance issued under group policy) (decided under former Code 1933, §§ 38-203, 38-205); Roberts v. State, 86 Ga. App. 768, 72 S.E.2d 551 (1952) (parol evidence to impeach) (decided under former Code 1933, §§ 38-203, 38-205); Robinson v. Reward Ceramic Color Mfg., Inc., 120 Ga. App. 380, 170 S.E.2d 724 (1969) (testimony concerning records) (decided under former Code 1933, §§ 38-203, 38-205); Young v. State, 226 Ga. 553, 176 S.E.2d 52 (1970) (proof to convict) (decided under former Code 1933, §§ 38-203, 38-205); Denson v. State, 149 Ga. App. 453, 254 S.E.2d 455 (1979) (testimony concerning ownership and possession of car) (decided under former Code 1933, §§ 38-203, 38-205); Jones v. Brawner, 151 Ga. App. 437, 260 S.E.2d 385 (1979) (testimony concerning existence of perpetual care reserve fund) (decided under former Code 1933, §§ 38-203, 38-205); Causey v. State, 154 Ga. App. 76, 267 S.E.2d 475 (1980) (transcript of tape recording) (decided under former Code 1933, §§ 38-203, 38-205); Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980) (copy of forged check) (decided under former Code 1933, §§ 38-203, 38-205); Knox v. State, 165 Ga. App. 26, 299 S.E.2d 105 (1983) (checks) (decided under former O.C.G.A. § 24-5-4); Fantasia v. State, 268 Ga. 512, 491 S.E.2d 318 (1997) (photocopies of original inspection certificates) (decided under former O.C.G.A. § 24-5-4).

In a breach of contract action between a business and an advertiser, the former best evidence rule required the advertiser to produce the first affidavit provided by the advertiser's senior director of business affairs, and the trial court erred in considering the affidavit without requiring the affidavit's production. But, given that the second affidavit showed that the parties entered into the contract at issue, the trial court properly considered the affidavit to that effect. Alcatraz Media, LLC v. Yahoo! Inc., 290 Ga. App. 882, 660 S.E.2d 797 (2008) (decided under former O.C.G.A. § 24-5-4).

Acceptable Evidence

Certified copy of a public record is the best evidence of the records contents. O'Connor v. United States, 11 Ga. App. 246, 75 S.E. 110 (1912) (decided under former Civil Code 1910, §§ 5748, 5752); Pressley v. State, 205 Ga. 197, 53 S.E.2d 106 (1949) (decided under former Code 1933, §§ 38-203, 38-205); Pugh v. Jones, 131 Ga. App. 600, 206 S.E.2d 650 (1974) (decided under former Code 1933, §§ 38-203, 38-205).

Deed is the best evidence of the deed's contents. Hall v. Waller, 66 Ga. 483 (1881) (decided under former Code 1873, §§ 3760, 3762); McConnell Bros. v. Slappey, 134 Ga. 95, 67 S.E. 440 (1910) (decided under former Civil Code 1895, §§ 5162, 5166); Head v. Lee, 203 Ga. 191, 45 S.E.2d 666 (1947) (decided under former Code 1933, §§ 38-203, 38-205); Ehrlich v. Mills, 203 Ga. 600, 48 S.E.2d 107 (1948) (decided under former Code 1933, §§ 38-203, 38-205); Green v. Wright, 225 Ga. 25, 165 S.E.2d 843 (1969) (decided under former Code 1933, §§ 38-203, 38-205); Hembree v. Cotton States Mut. Ins. Co., 132 Ga. App. 556, 208 S.E.2d 568 (1974) (decided under former Code 1933, §§ 38-203, 38-205).

Record of a conviction is the best evidence of conviction. Johnson v. State, 48 Ga. 116 (1873) (decided under former Code 1868, §§ 3707, 3709); Beach v. State, 138 Ga. 265, 75 S.E. 139 (1912) (decided under former Civil Code 1910, §§ 5748, 5752); Howard v. State, 144 Ga. 169, 86 S.E. 540 (1915) (decided under former Civil Code 1910, §§ 5748, 5752); Swain v. State, 151 Ga. 375, 107 S.E. 40 (1921) (decided under former Civil Code 1910, §§ 5748, 5752); Lovinger v. State, 39 Ga. App. 116, 146 S.E. 346 (1929) (decided under former Civil Code 1910, §§ 5748, 5752); Corley v. State, 64 Ga. App. 841, 14 S.E.2d 121 (1941) (decided under former Code 1933, §§ 38-203, 38-205); Carroll v.

Acceptable Evidence (Cont'd)

Crawford, 218 Ga. 635, 129 S.E.2d 865 (1963) (decided under former Code 1933, §§ 38-203, 38-205).

Patients' dental records. — When, in a dentist's suit to recover income for work performed for a dental clinic, it appeared that the patients' individual records constituted the primary documentary evidence of their visits, charges, and payments and that those records were otherwise available or accessible, the trial court did not err in refusing to admit plaintiff's own purported summary as secondary evidence of that information. White v. Dilworth, 178 Ga. App. 226, 342 S.E.2d 709 (1986) (decided under former O.C.G.A. § 24-5-4).

Reconstruction of recorded statement. — Since the tape recorder malfunctioned for a period of time during the giving of defendant's statement to police, and the interview continued after the recorder had been repaired; since the officers who conducted the interview offered their reconstruction of the interview's unrecorded portions, and testified that they were substantially the same as the recorded parts; and the recorded statement, as thus supplemented, was admitted only after a Jackson-Denno hearing, there was no error. McGee v. State, 260 Ga. 178, 391 S.E.2d 400 (1990) (decided under former O.C.G.A. § 24-5-4).

Testimony of investigator as to contents of missing affidavits. — Trial court did not err when the court denied the defendant's motion to suppress even though the unsigned, unsworn document an investigator identified as the investigator's unsigned affidavit presented at the suppression hearing did not qualify as a "duplicate original" under Georgia law since the affidavit was not made by the same pen stroke at the same time or was not a copy executed at the same time as the "original" of the document; in light of an investigator's testimony concerning the loss of the sealed packet containing the original search warrants and affidavits, the trial court did not abuse the court's discretion when the court admitted secondary evidence under former O.C.G.A. § 24-5-21 (see now O.C.G.A. §§ 24-10-1003 and 24-10-1004), i.e., the testimony of the investigator as to the contents of the missing affidavits. Baptiste v. State, 288 Ga. 653, 706 S.E.2d 442 (2011) (decided under former O.C.G.A. § 24-5-4).

Examples of best evidence are found in the following cases. — See Fitzgerald v. Adams, 9 Ga. 471 (1851) (writing as evidence of transaction) (decided under former law); Cook v. North & S.R.R., 50 Ga. 211 (1873) (written contract) (decided under former Code 1868, §§ 3707, 3709); White v. Claxton, 12 Ga. App. 141, 76 S.E. 1040 (1913) (written application for insurance) (decided under former Civil Code 1910, §§ 5748, 5752); Probasco v. Shaw, 144 Ga. 416, 87 S.E. 466 (1915) (unconditional note) (decided under former Civil Code 1910, §§ 5748, 5752); Smith v. Lawrence, 23 Ga. App. 795, 99 S.E. 536 (1919) (specific written agreement) (decided under former Civil Code 1910, §§ 5748, 5752); Bowen v. Mobley, 40 Ga. App. 833, 151 S.E. 667 (1930) (mortgage) (decided under former Civil Code 1910, §§ 5748, 5752); Southern Loan & Inv. Co. v. State, 68 Ga. App. 75, 22 S.E.2d 108 (1942) (charter and bylaws of company) (decided under former Code 1933, §§ 38-203, 38-205); Shaw v. Fehn, 196 Ga. 661, 27 S.E.2d 406 (1943), later appeal, 199 Ga. 747, 35 S.E.2d 253 (1945) (will) (decided under former Code 1933, §§ 38-203, 38-205); Sikes v. State, 76 Ga. App. 883, 47 S.E.2d 677 (1948) (record of trial) (decided under former Code 1933, §§ 38-203, 38-205); Pressley v. State, 205 Ga. 197, 53 S.E.2d 106 (1949) (verified copy) (decided under former Code 1933, §§ 38-203, 38-205); Delinski v. Dunn, 209 Ga. 402, 73 S.E.2d 171 (1952) (record of board of corrections and certified copy of sentence) (decided under former Code 1933, §§ 38-203, 38-205); Beard v. Westmoreland, 90 Ga. App. 632, 84 S.E.2d 93 (1954) (duplicate original of property settlement) (decided under former Code 1933, §§ 38-203, 38-205); Carroll v. Crawford, 218 Ga. 635, 129 S.E.2d 865 (1963) (indictment) (decided under former Code 1933, §§ 38-203, 38-205); Cain v. State, 113 Ga. App. 477, 148 S.E.2d 508 (1966) (search warrant) (decided under former Code 1933, §§ 38-203, 38-205);

Hawes v. Red Oak Hauling Co., 116 Ga. App. 302, 157 S.E.2d 38 (1967) (documents in possession of party) (decided under former Code 1933, §§ 38-203, 38-205); Consolidated Eng'g Co. v. U.I.R. Contractors, 136 Ga. App. 923, 222 S.E.2d 692 (1975) (checks and vouchers) (decided under former Code 1933, §§ 38-203, 38-205); Barrett v. State, 146 Ga. App. 207, 245 S.E.2d 890 (1978) (duplicate original) (decided under former Code 1933, §§ 38-203, 38-205); Ferrell v. State, 149 Ga. App. 405, 254 S.E.2d 404 (1979), cert. denied, 444 U.S. 1021, 100 S. Ct. 679, 62 L. Ed. 2d 653 (1980) (traffic citations) (decided under former Code 1933, §§ 38-203, 38-205).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1062 et. seq.

C.J.S. — 32A C.J.S., Evidence, §§ 1041 et seq., 1050 et seq.

ALR. — Parol evidence to prove title to real property when the title is only collaterally involved, 1 ALR 1143.

Admissibility in evidence of audit or testimony of auditor or accountant, 52 ALR 1266.

Parol-evidence rule: evidence of agreements as to manner or medium of payment of bill or note, or as to credit, setoff, or counterclaim with respect to the same, 71 ALR 548.

Admissibility and weight of testimony based on taste, sight, and smell as to unlawful content of liquor, 78 ALR 439.

Admissibility as against the beneficiary of life or accident insurance of statements or declarations by the insured outside of his application, 86 ALR 146.

Mutilations, alterations, and deletions as affecting admissibility in evidence of public record, 28 ALR2d 1443.

Proof, in absence of direct testimony by survivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident, 32 ALR2d 988.

Admissibility of testator's declarations upon issue of genuineness or due execution of purported will, 62 ALR2d 855.

Carbon copies of letters or other written instruments as evidence, 65 ALR2d 342.

Admissibility, in homicide prosecution, of deceased's clothing worn at time of killing, 68 ALR2d 903.

Admissibility in evidence of receipt of third person, 80 ALR2d 915.

Proof, in absence of direct testimony, of identity of motor vehicle involved in accident, 81 ALR2d 861.

Admissibility in evidence of sample or samples of article or substance of which the quality, condition, or the like is involved in litigation, 95 ALR2d 681.

Effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements, 7 ALR3d 1394.

Applicability of parol-evidence rule in favor of or against one not a party to contract of release, 13 ALR3d 313.

Workmen's compensation: use of medical books or treatises as independent evidence, 17 ALR3d 993.

Admissibility of newspaper article as evidence of the truth of the facts stated therein, 55 ALR3d 663.

Admissibility of nonexpert opinion testimony as to weather conditions, 56 ALR3d 575.

Admissibility in evidence of sound recording as affected by hearsay and best evidence rules, 58 ALR3d 598.

Proof of public records kept or stored on electronic computing equipment, 71 ALR3d 232.

Requirement of notice as condition for admission in evidence of summary of voluminous records, 80 ALR3d 405.

Sufficiency of evidence that will was not accessible to testator for destruction, in proceeding to establish lost will, 86 ALR3d 980.

Admissibility of photographs of stolen property, 94 ALR3d 357.

Admissibility of visual recording of event or matter other than that giving rise to litigation on prosecution, 41 ALR4th 877.

24-10-1003. Admissibility of duplicates.

A duplicate shall be admissible to the same extent as an original unless:

(1) A genuine question is raised as to the authenticity of the original; or

(2) A circumstance exists where it would be unfair to admit the duplicate in lieu of the original. (Code 1981, § 24-10-1003, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Primary evidentiary value of photostatic copies of records produced from microfilm and print-out copies of computer records, § 50-18-96. Admissibility of duplicates, Fed. R. Evid. 1003.

Law reviews. — For article, "The Admissibility of Computer-Generated Evidence in Georgia," see 18 Ga. St. B.J. 137 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1855-56, p. 138, § 2, Ga. L. 1858, p. 53, § 1, former Code 1863, §§ 3741, 3744, and 3745, former Penal Code 1895, § 996, former Civil Code 1910, §§ 5761 and 5829, former Code 1933, §§ 38-206, 38-212, 38-214, 38-702, Ga. L. 1950, p. 73, § 1, and O.C.G.A. §§ 24-5-2, 24-5-21, 24-5-25, and 24-5-26, are included in the annotations for this Code section. The reader is also advised to consult the annotations under O.C.G.A. §§ 24-9-901 through 24-9-904, for annotations discussing identity, authentication, and foundation issues related to duplicates and copies.

In general. — Existence of a genuine original was essential to the admissibility of a copy and therefore whether there was any primary evidence relating to the existence of a genuine original deed became a material question. Latham v. Fowler, 199 Ga. 648, 34 S.E.2d 870 (1945), later appeal, 201 Ga. 68, 38 S.E.2d 732 (1946) (decided under former Code 1933, § 38-214).

Former statute simply permitted photostatic, microphotographic, and photographic reproductions of original writings or records made in the regular course of business to be admitted in evidence without accounting for the original. Knudsen v. Duffee-Freeman, Inc., 95 Ga. App. 872, 99 S.E.2d 370 (1957) (decided under Ga. L. 1950, p. 73, § 1); Ricketts v. Liberty Mut. Ins. Co., 127 Ga. App. 483, 194 S.E.2d 311 (1972) (decided under Ga. L. 1950, p. 73, § 1).

Recorded instruments. — Former law applied to those deeds and instruments that were, by law, authorized and required to be recorded. Gill v. Strozier, 32 Ga. 688 (1861) (decided under Ga. L. 1858, p. 53, § 1).

Construction with other provisions. — Provisions of Ga. L. 1950, p. 73, § 1, permitting the introduction of photo-

static copies of original writings or records made in the regular course of business to be introduced as original evidence in a case did not have any bearing upon former Code 1933, § 38-709. Ga. L. 1950, p. 73 applied to situations where the contents of the document were sought to be introduced because the document itself had a bearing upon the issues sought to be proved, the test of admissibility being relevancy and materiality, while documents containing signatures introduced under the provisions of former Code 1933, § 38-709 did not necessarily have any bearing upon the issue being tried, and their sole purpose was to establish a criterion by which the genuineness or forgery of the signature on some other document relevant to the cause could be established. Mitchell v. State, 89 Ga. App. 80, 78 S.E.2d 563 (1953) (decided under Ga. L. 1950, p. 73, § 1).

Duplicate original. — When more than one copy of a document was executed at the same time, any copy thereof was a duplicate original, and it was primary evidence of the agreement instead of secondary evidence. Raulerson v. Jones, 122 Ga. App. 440, 177 S.E.2d 181 (1970) (decided under former Code 1933, § 38-206).

Standard is one of moral certainty. — Former best evidence rule required that the court be satisfied that the better evidence had not been willfully destroyed nor voluntarily withheld, but the rule did not exact that the loss or destruction of the document should be proven beyond all possibility of a mistake; the rule only demanded that a moral certainty should exist that the court has had every opportunity for examining and deciding the cause upon the best evidence within the power or ability of the litigant. Fowler v. Latham, 201 Ga. 68, 38 S.E.2d 732 (1946) (decided under former Code 1933, § 38-214).

Execution as well as existence of written contract must be proved before a copy can be used as evidence. Bigelow v. Young, 30 Ga. 121 (1860) (decided under former law); Durham v. Holeman, 30 Ga. 619 (1860) (decided under former law).

Unauthorized execution. — Evidence that a contract was executed by the treasurer of an insurance company, without proof of the treasurer's authority so to do, was insufficient to show that the original contract was the act of the company and did not satisfy the law. Brown v. Bass, 132 Ga. 41, 63 S.E. 788 (1909) (decided under former Penal Code 1895, § 996).

Formality of execution. — When the witnesses, if any, were unknown, it was not necessary to prove that the alleged lost original writing was executed with any particular formality in order to admit secondary evidence of the writing's contents. Sharp v. Autry, 185 Ga. 160, 194 S.E. 194 (1937) (decided under former Code 1933, § 38-214).

Execution may be proved by circumstances when no direct evidence of the execution of a written instrument was attainable. Sharp v. Autry, 185 Ga. 160, 194 S.E. 194 (1937) (decided under former Code 1933, § 38-214).

Duplicate originals. — Papers which are executed simultaneously with the original, by the same stroke of the pen or the typewriter, are admissible as primary evidence without accounting for the original because the papers are considered duplicate originals. Strickland v. Foundation Life Ins. Co., 129 Ga. App. 614, 200 S.E.2d 306 (1973) (decided under Ga. L. 1950, p. 73, § 1).

Copies of duplicate originals are admissible without accounting for the original. Strickland v. Foundation Life Ins. Co., 129 Ga. App. 614, 200 S.E.2d 306 (1973) (decided under Ga. L. 1950, p. 73, § 1).

Copies of duplicate originals were admissible under former O.C.G.A. § 24-5-26 (see now O.C.G.A. §§ 24-10-1003 and 24-10-1004), without accounting for the original. Ellerbee v. State, 215 Ga. App. 102, 449 S.E.2d 874 (1994) (decided under former O.C.G.A. § 24-5-25).

Duplicate original of instrument admissible into evidence without violation of the best evidence rule. Georgia Farm Bureau Mut. Ins. Co. v. Latimore, 151 Ga. App. 786, 261 S.E.2d 735 (1979) (decided under former Code 1933, § 38-702).

Copy need not be exact. — It is not necessary that a copy sought to be proved shall be identical with the original, but it may be either a literal or a substantial copy, provided other rules as to the admis-

General Consideration (Cont'd)

sion of secondary evidence are satisfied. Georgia Farm Bureau Mut. Ins. Co. v. Latimore, 151 Ga. App. 786, 261 S.E.2d 735 (1979) (decided under former Code 1933, § 38-702).

Response to notice to produce. — When a party to a cause serves on the opposite party, who is presumably in possession of a once existing material writing, a notice to produce such writing, and the party served responds that the writing is lost, or fails to produce the writing at the trial, secondary evidence as to the contents of the original writing becomes admissible. Middlebrooks v. Cabaniss, 193 Ga. 764, 20 S.E.2d 10 (1942) (decided under former Code 1933, § 38-214).

Carbon Copies

Original of exhibit inadvertently removed from attorney's office. — When a witness testified that the original of an exhibit was prepared by the witness, and that the exhibit was an exact copy of the original, and when the plaintiff's attorney stated in plaintiff's place that the original had been given to the attorney and several copies made, and also stated that through inadvertence the original went out of the attorney's office as an exhibit to the complaint and could not be located, the trial judge did not abuse judicial discretion in admitting the exhibit. Palmer v. Wilkins, 163 Ga. App. 104, 294 S.E.2d 355 (1982) (decided under former O.C.G.A. § 24-5-21).

Carbon copies of documents. — When it is proved that a genuine original was executed, proof that a document is an exact carbon copy of that original is sufficient to admit it into evidence without proving the loss of the original. Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337 (1958) for comment, see 21 Ga. B.J. 553 (1959) (decided under former Code 1933, § 38-212).

Trial court did not err in admitting certain copies of a store's receipts of defendant's fraudulent transactions rather than the originals as the store's loss prevention manager testified that although the originals had been maintained at the store, the manager had not been able to locate the receipts in time for trial and that the manager had made the copies of the original receipts, which accurately reflected the original receipts; defendant did not show that the best evidence rule had been violated. Epps v. State, 262 Ga. App. 113, 584 S.E.2d 701 (2003) (decided under former O.C.G.A. § 24-5-2).

Exact carbon copy admissible. — If it was proved that a genuine original was executed, proof that a proffered document was an exact carbon copy of that original was sufficient to admit in evidence the carbon copy without proving loss of the original. Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337 (1958) (decided under former Code 1933, § 38-702).

Carbonless copies held admissible. — In light of a landowner's testimony that the original cancelled checks and bank statements showing evidence of payment from 1986 for the land in question were unavailable, the trial court could not be said to have abused the court's discretion in allowing the landowner to introduce two "carbonless copies" of checks showing payment. Murray v. Stone, 283 Ga. 6, 655 S.E.2d 821 (2008) (decided under former O.C.G.A. § 24-5-21).

Carbon copy inadmissible. — When a carbon copy of a letter was offered in evidence without any proof of the execution, mailing, or receipt of an original and the copy contained a signature only in type, the copy was prejudicial and the court erred in admitting the copy. Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337 (1958) (decided under former Code 1933, § 38-702).

Application

1. In General

Accounting for original when photocopy was used. — Photocopy may not be admitted in evidence without accounting for the original except when there was proof that the copy was identical to the original. Lester v. Groves, 162 Ga. App. 590, 291 S.E.2d 785 (1982) (decided under former O.C.G.A. § 24-5-26).

Photocopies of claim forms identified as authentic by a witness are properly admissible under Ga. L. 1950, p. 73, § 1 without accounting for the original under

former Code 1933, § 38-212. Strickland v. Foundation Life Ins. Co., 129 Ga. App. 614, 200 S.E.2d 306 (1973) (decided under former Code 1933, § 38-212).

Photocopy of the forged check was admissible as a bank supervisor testified that the bank supervisor gave the check to the branch manager, who faxed a copy to the bank's corporate security; the state presented evidence that the original would have been stored at the branch or in the bank's loss prevention facility; and a supervisor testified that the check could not be located at either location. Thomas v. State, 319 Ga. App. 690, 738 S.E.2d 149 (2013) (decided under former O.C.G.A. § 24-5-26).

Showing that photocopy was made in regular course of business. — When the party offering photostatic reproductions as evidence made no attempt to establish that the photocopies were made in the regular course of business and failed to properly account for the absence of the original, it was not error to refuse to admit the photocopies. State v. Mincey, 167 Ga. App. 850, 308 S.E.2d 18 (1983) (decided under former O.C.G.A. § 24-5-26).

Photocopy of insurance application form. — Court did not err in refusing to admit a photocopy of an insurance application form offered as evidence by the defendant since the defendant was in possession of the original and had made no attempt to establish that the photocopy was made in the regular course of business. Nationwide Mut. Fire Ins. Co. v. Rhee, 160 Ga. App. 468, 287 S.E.2d 257 (1981) (decided under Ga. L. 1950, p. 73, § 1).

Photostatic copies of claim forms identified as authentic by a witness are properly admissible. Strickland v. Foundation Life Ins. Co., 129 Ga. App. 614, 200 S.E.2d 306 (1973) (decided under Ga. L. 1950, p. 73, § 1).

Investigator's unsigned affidavit did not qualify as duplicate original. — Trial court did not err when the court denied the defendant's motion to suppress even though the unsigned, unsworn document an investigator identified as the investigator's unsigned affidavit presented at the suppression hearing did not qualify as a "duplicate original" under Georgia law since the affidavit was not made by the same pen stroke at the same time or was not a copy executed at the same time as the "original" of the document; in light of an investigator's testimony concerning the loss of the sealed packet containing the original search warrants and affidavits, the trial court did not abuse the court's discretion when the court admitted secondary evidence under former O.C.G.A. § 24-5-21, i.e., the testimony of the investigator as to the contents of the missing affidavits. Baptiste v. State, 288 Ga. 653, 706 S.E.2d 442 (2011) (decided under former O.C.G.A. § 24-5-21).

Copies of affidavits. — Affidavits introduced in evidence that were reproductions of the original affidavits were admissible notwithstanding an objection based on the best evidence rule. Adams v. State, 217 Ga. App. 706, 459 S.E.2d 182 (1995) (decided under former O.C.G.A. § 24-5-26).

When, with regard to proof of transmittal of contraband to the state crime lab by certified mail, the state could only produce a photostatic copy of the certification receipt in lieu of the original and the defendant urged that, without an adequate explanation for the absence of the original certified mail receipt as required by former O.C.G.A. § 24-5-4 (see now O.C.G.A. § 24-10-1002), the chain of custody was not sufficiently proven, but a deputy sheriff testified that the deputy would always make a copy of the certified mail receipt when the deputy mailed contraband to the state crime lab, but had been unable to locate the original receipt for this particular mailing, and identified the deputy's handwriting on the photostatic copy and noted that the certification number was identical to that on the state crime lab report, the trial court was authorized to conclude that the copy of the receipt had been made in the regular course of business so as to be admissible pursuant to former O.C.G.A. §§ 24-3-14 and 24-5-26 (see now O.C.G.A. §§ 24-8-803 and 24-10-1003). Spead v. State, 187 Ga. App. 359, 370 S.E.2d 213 (1988) (decided under former O.C.G.A. § 24-5-26).

Reproduction admissible despite testifying witness's lack of personal

Application (Cont'd)
1. In General (Cont'd)

knowledge. — Trial court did not err in admitting a copy of the defendant's fingerprint card, pursuant to former O.C.G.A. §§ 24-3-14 and 24-5-26 (see now O.C.G.A. §§ 24-8-803 and 24-10-1003), despite the defendant's claim that the testifying witness lacked personal knowledge with regard to the circumstances or time of the creation or transmission of the card as the card itself showed that the card was created and transmitted at the time of the defendant's arrest and was handled in the gathering agency's regular and routine course of business. Tubbs v. State, 283 Ga. App. 578, 642 S.E.2d 205 (2007) (decided under former O.C.G.A. § 24-5-26).

Copy of particular magazine issue. — As copies of magazines of the same issue are usually duplicates of the original, there was no error in admitting another copy of the same issue used by an investigating officer when the officer testified the magazine was identical. Verble v. State, 172 Ga. App. 321, 323 S.E.2d 239 (1984) (decided under former O.C.G.A. § 24-5-26).

Photostatic copies of bill payments and original bills excluded. — Bills from a court reporter for depositions and from company for the company's efforts to locate indemnitee, the photostatic copies of checks issued in payment of these bills, and the photostatic copy of check issued in payment of the claim were properly excluded under the best evidence rule. Commercial Union Ins. Co. v. Smith, 179 Ga. App. 734, 347 S.E.2d 701 (1986) (decided under former O.C.G.A. § 24-5-25).

Evidence inadmissible. — In a civil forfeiture proceeding in connection with an action brought under the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., a witness's testimony regarding newspaper and billboard advertising, telephone calls, and credit card charges violated the best evidence rule because the state neither produced documentary evidence to support the statements, nor accounted for the absence of such evidence. Pabey v. State, 262 Ga. App. 272, 585 S.E.2d 200 (2003) (decided under former O.C.G.A. § 24-5-25).

State's showing insufficient. — Sentencing court improperly considered defendant's prior state court conviction because the state presented only hearsay, rather than competent evidence, showing that the state was unable to obtain a certified copy of the conviction, and there was no evidence regarding whether the state used due diligence to obtain such a copy. Brinkley v. State, 301 Ga. App. 827, 689 S.E.2d 116 (2009) (decided under former O.C.G.A. § 24-5-2).

2. Real Estate Transactions

Deed on record. — Deed should be held to be legally and properly on record by due proof of signing, sealing, and delivery until the contrary appears. Walls v. Smith, 19 Ga. 8 (1855) (decided under Ga. L. 1855-56, p. 138, § 2).

Title to land. — If there is written evidence of title to land, that evidence must be produced in order to prove its contents and before secondary evidence is competent to show its contents, it must first be shown to the court that the original once existed, that the original was properly executed and that the original is either lost or destroyed, or for some other sufficient cause is not accessible to the diligence of the party. Head v. Lee, 203 Ga. 191, 45 S.E.2d 666 (1947) (decided under former Code 1933, § 38-214).

Deed. — If a party wishes to introduce a copy of a deed in evidence, it will be a sufficient compliance with the rule to swear that the original deed in the party's belief was lost or destroyed, and the deed was not in the party's custody, power, or control. Ratteree v. Nelson, 10 Ga. 439 (1851) (decided under former law); Drew v. Drew, 146 Ga. 479, 91 S.E. 541 (1917) (decided under former Civil Code 1910, § 5829).

When in a suit for land the right of the plaintiffs is predicated upon an alleged lost and unrecorded deed, proof of the existence of a genuine original must be established before secondary evidence relating thereto is admissible. Latham v. Fowler, 199 Ga. 648, 34 S.E.2d 870 (1945), later appeal, 201 Ga. 68, 38 S.E.2d 732 (1946) (decided under former Code 1933, § 38-214).

Typewritten copy of deed. — Certified copy of a petition filed by the plaintiffs' father (holder of life estate under the alleged deed) to sell for reinvestment and attaching a typewritten copy of what purported to be the alleged unrecorded deed did not establish that in fact a genuine deed had been executed. Latham v. Fowler, 199 Ga. 648, 34 S.E.2d 870 (1945), later appeal, 201 Ga. 68, 38 S.E.2d 732 (1946) (decided under former Code 1933, § 38-214).

Proof of handwriting not required. — If an original deed remains in existence in possession of the grantee, proof of the handwriting would be prima facie evidence that the deed was sealed and delivered; but when the deed is lost, positive proof of the handwriting is not to be expected or required, and the grantee must depend on other proof. Fowler v. Latham, 201 Ga. 68, 38 S.E.2d 732 (1946) (decided under former Code 1933, § 38-214).

Attesting witnesses to deed not necessary. — When a deed has been recorded and lost and the record has been destroyed, a copy of the original may be proved by the person who made the deed, and the attesting witnesses need not be called for that purpose. Fletcher v. Horne, 75 Ga. 134 (1885) (decided under former Code 1863, §§ 3741, 3744, and 3745).

Indefinite statement concerning deed. — Evidence of a statement by a defendant that the defendant knew such a deed as alleged by the plaintiffs was in existence in which the father and his children were grantees was not sufficient to establish the deed because such an admission was too indefinite to properly identify and establish the existence of any particular deed. Latham v. Fowler, 199 Ga. 648, 34 S.E.2d 870 (1945), later appeal, 201 Ga. 68, 38 S.E.2d 732 (1946) (decided under former Code 1933, § 38-214).

3. Banking

Photostatic copy of bank account signature card. — When the original of the bank account signature card was on file in the bank and the custodian of the bank's records brought with the custodian a photostatic copy, which was a copy routinely made in the normal course of business, the photostatic copy was admissible. Hawkins v. State, 167 Ga. App. 143, 305 S.E.2d 797 (1983) (decided under former O.C.G.A. § 24-5-26).

Photostatic copy of check drawn on a New York bank and returned for insufficient funds was properly identified as a bank record since the original was accounted for as having been returned to the defendant. Hamilton v. State, 118 Ga. App. 842, 165 S.E.2d 884 (1968) (decided under Ga. L. 1950, p. 73, § 1).

Testimony concerning record books. — Testimony of a claimant that the claimant had recently examined the books of a bank in another state was insufficient to show the authenticity of such books as a foundation for the admission of secondary evidence of their contents, it not appearing that the books were found in the custody of any trustee or officer of court in charge of such insolvent bank, or in the possession of any person whose duty it was to keep and preserve the books. McDonald v. Redding Lumber Co., 43 Ga. App. 656, 159 S.E. 888 (1931) (decided under former Civil Code 1910, § 5761).

When the original, cancelled checks were returned by the payor bank to the bank's home office in another state, the photostatic copies of the issued checks were admissible under former O.C.G.A. § 24-5-26 (see now O.C.G.A. §§ 24-10-1003 and 24-10-1004). Commercial Union Ins. Co. v. Smith, 179 Ga. App. 734, 347 S.E.2d 701 (1986) (decided under former O.C.G.A. § 24-5-26).

Copy of currency. — Since the police department routinely made copies of currency used in drug buys, the photocopy of a $20 bill used as "buy money" in a drug transaction was admissible under either former O.C.G.A. § 24-5-26 (see now O.C.G.A. §§ 24-10-1003 and 24-10-1004) or former O.C.G.A. § 24-5-4 (see now O.C.G.A. § 24-10-1002). Johnson v. State, 231 Ga. App. 114, 497 S.E.2d 666 (1998) (decided under former O.C.G.A. § 24-5-26).

Harmless error in failing to account for original check. — In an identity fraud case, the transcript showed that the state never accounted for the original check when defense counsel objected on

Application (Cont'd)
3. Banking (Cont'd)

the ground that the admission of the original was the best evidence; therefore, it was error for the trial court to admit the photostatic copy pursuant to former O.C.G.A. § 24-5-2 (see now O.C.G.A. §§ 24-10-1003 and 24-10-1004), but the error was harmless because the state's witnesses provided direct testimony regarding details about the check, and specifically testified regarding defendant's use of the identity fraud victim's driver's license; thus, the check itself was of little or no significance in determining defendant's guilt or innocence of identity fraud, and any error in admitting a photostatic copy of the check into evidence would not have influenced the jury's verdict in any way. Wilson v. State, 276 Ga. App. 39, 622 S.E.2d 411 (2005) (decided under former O.C.G.A. § 24-5-2).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Ga. L. 1950, p. 73, § 1, are included in the annotations for this Code section.

Photostatic copies made from microfilms are admissible as primary evidence. 1945-47 Op. Att'y Gen. p. 286 (decided under former law).

Microfilms of records would probably be admissible into evidence. 1973 Op. Att'y Gen. No. 73-91 (decided under Ga. L. 1950, p. 73, § 1).

Microfilm copies of scholarship agreements and notes would be admissible in evidence. 1972 Op. Att'y Gen. No. 72-142 (decided under Ga. L. 1950, p. 73, § 1).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Admissibility of Computerized Business Records, 14 POF2d 173.

Foundation for Offering Business Records in Evidence, 34 POF2d 509.

Routine Business Practice, 35 POF2d 589.

Recovery and Reconstruction of Electronic Mail as Evidence, 41 POF3d 1.

Establishing A Foundation to Admit Computer-Generated Evidence as Demonstrative or Substantive Evidence, 57 POF3d 455.

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 1066 et seq., 1250.

C.J.S. — 23 C.J.S., Criminal Law, § 1131 et seq. 32 C.J.S., Evidence, §§ 924, 939, 940, 949, 954 et seq. 32A C.J.S., Evidence, §§ 1049, 1050, 1089 et seq., 1093 et seq., 1100 et seq.

U.L.A. — Uniform Photographic Copies of Business and Public Records as Evidence Act (U.L.A.) § 1.

ALR. — Release or assignment of interest by witness as removing disqualification to testify in action by or against estate of decedent, 28 ALR 6.

Admissibility in evidence of audit or testimony of auditor or accountant, 52 ALR 1266.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.

Presumption or circumstantial evidence to establish missing link in chain of title, 67 ALR 1333.

Use as evidence against officers, employees, or stockholders of corporation of illegally seized documents or other articles belonging to corporation, 78 ALR 343.

Use of photograph, plan, map, cast, model, etc., as evidence as affected by marking or legends thereon, 108 ALR 1415.

Photographic representation of writing as primary or secondary evidence, 142 ALR 1270; 76 ALR2d 1356.

Degree or quantum of evidence necessary to establish a lost instrument and its contents, 148 ALR 400.

Verification and authentication of slips, tickets, bills, invoices, etc., made in regular course of business, under the Uniform Business Records as Evidence Act, or under similar "Model Acts," 21 ALR2d 773.

Form, particularity, and manner of designation required in subpoena duces

tecum for production of corporate books, records, and documents, 23 ALR2d 862.

Sufficiency of certificate of acknowledgment, 25 ALR2d 1124.

Admissibility of opinion of medical expert as affected by his having heard the person in question give the history of his case, 51 ALR2d 1051.

Carbon copies of letters or other written instruments as evidence, 65 ALR2d 342.

Necessity, in order to enter judgment by confession on instrument containing warrant of attorney, that original note or other instrument and original warrant be produced or filed, 68 ALR2d 1156.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 ALR2d 308.

Photographic representation or photostat of writing as primary or secondary evidence within best evidence rule, 76 ALR2d 1356.

Proof, in absence of direct testimony, of identity of motor vehicle involved in accident, 81 ALR2d 861.

Preliminary proof, verification, or authentication of X-rays requisite to their introduction in evidence in civil cases, 5 ALR3d 303.

Admissibility of newspaper article as evidence of the truth of the facts stated therein, 55 ALR3d 663.

Applicability of attorney-client privilege to matters relating to drafting of nonexistent or unavailable nontestamentary documents, 55 ALR3d 1322.

Admissibility of video tape film in evidence in criminal trial, 60 ALR3d 333; 41 ALR4th 812; 41 ALR4th 877.

Proof of public records kept or stored on electronic computing equipment, 71 ALR3d 232.

Admissibility of computerized private business records, 7 ALR4th 8.

24-10-1004. Admissibility of other evidence of contents of a writing, recording, or photograph.

The original shall not be required and other evidence of the contents of a writing, recording, or photograph shall be admissible if:

(1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) No original can be obtained by any available judicial process or procedure;

(3) At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) The writing, recording, or photograph is not closely related to a controlling issue. (Code 1981, § 24-10-1004, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Recording lost or destroyed deeds, see § 44-2-12. Admissibility of other evidence of content, Fed. R. Evid. 1004.

Law reviews. — For comment on Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337 (1958), see 21 Ga. B.J. 553 (1959).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1858, p. 53, § 1, Ga. L. 1855, p. 138, § 2, former Code 1863, § 3691, former Code 1868, § 3714, former Code 1873, §§ 3767, 3818, 3821, 3822, former Code 1882, § 3767, former Civil Code 1895, §§ 5172, 5173, former Civil Code 1910, §§ 5759, 5829, former Code 1933, §§ 38-211, 38-212, 38-702, and former O.C.G.A. §§ 24-5-2, 24-5-3, 24-5-5, 24-5-21 through 24-5-24, and 24-5-26 are included in the annotations for this Code section. In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-10-1003, which may also be applicable to this Code section.

Rule as to the degree of secondary evidence. was that when there was no ground for the presumption that better secondary evidence existed, any proof was received which was admissible by the other rules of law, unless the objecting party can show that better evidence was previously known to the other party, and might have been produced. Doe v. Biggers, 6 Ga. 188 (1849) (decided under former law).

Requirements for admission of secondary evidence — To admit secondary evidence as by law provided, it was necessary to prove that there had been an original and that the original was lost. Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337 (1958) (decided under former Code 1933, § 38-702).

While the former statute left the question of diligence to the sound discretion of the court, before secondary evidence could be admitted, the party would be required to show that the party had, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery, which the nature of the case suggested and which were accessible to the party. Pendley v. Murphy, 112 Ga. App. 33, 143 S.E.2d 674 (1965) (decided under former Code 1933, § 38-702).

Foundation for secondary evidence. — Affidavit by a party that an original paper, of which one desired to make proof by secondary evidence, was lost or mislaid, and after diligent search that one cannot find it, was a substantial compliance. Smith v. Atwood, 14 Ga. 402 (1854) (decided under former law).

Recorded instruments. — Law applied to those deeds and instruments that were, by law, authorized and required to be recorded. Gill v. Strozier, 32 Ga. 688 (1861) (decided under Ga. L. 1858, p. 53, § 1).

Accessibility and diligence. — In order to introduce secondary evidence of the contents of a lost paper, it was only necessary to establish a reasonable presumption of the paper's loss; and this presumption was held to be established when the party showed that in a reasonable degree, the party had exhausted all the sources of information and means of discovery, which the nature of the cases suggests and which were accessible to the party. Ellis v. Doe, 10 Ga. 253 (1851) (decided under former law); Harper v. Scott, 12 Ga. 125 (1852) (decided under former law); Molyneaux v. Collier, 13 Ga. 406 (1853) (decided under former law); Bryan v. Walton, 14 Ga. 185 (1853) (decided under former law).

Function of trial court was not to determine the worthiness or credibility of secondary evidence, but is only to determine whether what is offered as evidence

is the best form accessible to the court. Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816 (1980) (decided under former Code 1933, §§ 38-212, 38-702).

Discretion of trial judge. — Question of inaccessibility of primary evidence and diligence of the party is a determination within the discretion of the trial judge and the judge's decision will not be overturned unless that discretion is abused. Hawes v. Paul, 41 Ga. 609 (1871) (decided under former Code 1868, § 3714); Florida Coca Cola Bottling Co. v. Ricker, 136 Ga. 411, 71 S.E. 734 (1911) (decided under former Civil Code 1910, § 5759); Orr v. Dunn, 145 Ga. 137, 88 S.E. 669 (1916) (decided under former Civil Code 1910, § 5759); Brookman v. Rennolds, 148 Ga. 721, 98 S.E. 543 (1919) (decided under former Civil Code 1910, § 5759); Bedgood v. State, 100 Ga. App. 736, 112 S.E.2d 430 (1959) (decided under former Code 1933, § 38-212); Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816 (1980) (decided under former Code 1933, § 38-212).

Discretion of court. — Exercise of such discretion mentioned in former statute would not be controlled, unless the discretion was abused. Cowart v. Fender, 137 Ga. 586, 73 S.E. 822, 1913A Ann. Cas. 932 (1912) (decided under former Civil Code 1910, § 5829); Metropolitan Life Ins. Co. v. Vickery, 49 Ga. App. 727, 176 S.E. 815 (1934) (decided under former Code 1933, § 38-702); Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816 (1980) (decided under former Code 1933, § 38-702).

It was an abuse of discretion to exclude testimony which should have qualified as secondary evidence and which comprised the defendant's most critical defense to the only direct evidence against the defendant. Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816 (1980) (decided under former Code 1933, § 38-702).

Secondary evidence admitted without objection. — Court has a right to charge, and the jury to find, upon secondary evidence, provided the evidence has been introduced without objection. Goodwyn v. Goodwyn, 20 Ga. 600 (1856) (decided under former law).

Party as witness. — Proof that a paper was lost or destroyed lays a proper foundation for the admission of secondary evidence, and a party was a competent witness to this point. Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816 (1980) (decided under former Code 1933, § 38-212).

If witnesses are unknown, it is not necessary to prove that the alleged lost original writing was executed with any particular formality in order to admit secondary evidence of the writing's contents. Sharp v. Autry, 185 Ga. 160, 194 S.E. 194 (1937) (decided under former Code 1933, § 38-212).

Former O.C.G.A. § 24-5-21 applied both to secondary documentary evidence and to parol testimony. Croxton v. Leggett Motor Rebuilding, 168 Ga. App. 258, 308 S.E.2d 640 (1983) (decided under former O.C.G.A. § 24-5-21).

Parol evidence. — Contents of a lost writing may be established by parol. Segars v. City of Cornelia, 60 Ga. App. 457, 4 S.E.2d 60 (1939) (decided under former Code 1933, § 38-212); Cummings v. State, 84 Ga. App. 698, 67 S.E.2d 156 (1951) (decided under former Code 1933, § 38-212).

Contents of lost writing may be established by parol. Segars v. City of Cornelia, 60 Ga. App. 457, 4 S.E.2d 60 (1939) (decided under former Code 1933, §§ 38-607, 38-610, and 38-611).

Original photographic line-up lost. — Admission of a photocopy of an original photographic lineup did not violate the best evidence rule since the original photographic copy was missing from the state's file and the photocopies were clear enough to be easily recognizable. Pinson v. State, 266 Ga. App. 254, 596 S.E.2d 734 (2004) (decided under former O.C.G.A. § 24-5-23).

Copy as evidence. — When an approved copy is in evidence, parol testimony as to its contents is inadmissible. Shedden v. Heard, 110 Ga. 461, 35 S.E. 707 (1900) (decided under former Civil Code 1895, § 5173); See also Williams v. Waters, 36 Ga. 454 (1867) (decided under former Code 1863, § 3691).

Secondary evidence was found admissible in the following cases. — See Hawes v. Paul, 41 Ga. 609 (1871) (material evidence) (decided under former Code 1868, § 3714); Sims v. Scheussler, 2 Ga.

General Consideration (Cont'd)

App. 466, 58 S.E. 693 (1907) (certified copy of deed) (decided under former Civil Code 1895, § 5172); Sharp v. Autry, 185 Ga. 160, 194 S.E. 194 (1937) (circumstantial evidence) (decided under former Code 1933, § 38-212); Everitt v. Harris, 67 Ga. App. 64, 19 S.E.2d 545 (1942) (carbon copies) (decided under former Code 1933, § 38-212); Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947) (circumstantial evidence) (decided under former Code 1933, § 38-212); Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816 (1980) (critical evidence) (decided under former Code 1933, § 38-212).

Inaccessibility

Inaccessibility was found in the following cases. — See Jackson v. Johnson, 67 Ga. 167 (1881) (administrator's bond in foreign state) (decided under former Code 1873, § 3767); Sims v. Scheussler, 2 Ga. App. 466, 58 S.E. 693 (1907) (mortgage) (decided under former Civil Code 1895, § 5172); Davis v. State, 25 Ga. App. 532, 103 S.E. 819 cert. denied, 25 Ga. App. 840 (1920) (telegraph messages) (decided under former Civil Code 1910, § 5759); Beall v. Francis, 163 Ga. 894, 137 S.E. 251 (1927) (certified copy of marriage contract) (decided under former Civil Code 1910, § 5759); Carpenter v. State, 140 Ga. App. 368, 231 S.E.2d 97 (1976) (golf membership card) (decided under former Code 1933, § 38-212); Knox v. State, 165 Ga. App. 26, 299 S.E.2d 105 (1983) (laboratory) (decided under former O.C.G.A. § 24-5-2); General Ins. Servs., Inc. v. Marcola, 231 Ga. App. 144, 497 S.E.2d 679 (1998) (contract) (decided under former O.C.G.A. § 24-5-2).

Diligence

Proof of diligence. — While upon proof that a paper was lost, secondary evidence as to the paper's contents was admissible, the mere statement of a party that a paper "is lost" was nothing but a conclusion of the witness, and, in the absence of testimony as to any search for the missing paper, or other facts to support the witness's conclusion, such secondary evidence, on timely objection, should be rejected. Underdonk & Pitts v. Jester, 17 Ga. App. 419, 87 S.E. 680 (1916) (decided under former Civil Code 1910, § 5829).

Since, during the giving of defendant's statement to police the tape recorder malfunctioned for a period of time, and the interview continued after the recorder had been repaired; since the officers who conducted the interview offered their reconstruction of the interview's unrecorded portions, and testified that the statements were substantially the same as the recorded parts, and the recorded statement, as thus supplemented, was admitted only after a Jackson-Denno hearing, there was no error. McGee v. State, 260 Ga. 178, 391 S.E.2d 400 (1990) (decided under former O.C.G.A. § 24-5-21).

Diligence was found. — When absence of letter in court was explained by the receiver of the letter, as was the receiver's diligence in searching for the letter, and in no other way could this letter be accounted for but that it was "lost," this was good and reasonable cause for inaccessibility. Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816 (1980) (decided under former Code 1933, § 38-212).

Diligence was not found. — Copy of a deed taken from the register is not admissible evidence against the grantee, without notice to the grantee to produce the original. Solomon & Son v. Creech, 82 Ga. 445, 9 S.E. 165 (1889) (decided under former Code 1882, § 3767).

Admission in evidence of testimony as to the contents of a lost document was error since there was not sufficient evidence of the diligence of the defendants to show its nonavailability. Pendley v. Murphy, 112 Ga. App. 33, 143 S.E.2d 674 (1965) (decided under former Code 1933, § 38-702).

Application

1. In General

Copy of contract admissible. — Since the original copy of a contract was admittedly destroyed by the defendant, and testimony was introduced that the plaintiff and the third party to the contract formally executed the original,

though there was no evidence that the defendant ever signed the contract, and there was evidence to the effect that the defendant followed the provisions of the contract until the parties had a falling out, evidence was sufficient to infer that defendant had received the benefits of such contract and to admit the copy into evidence over the defendant's objection. Silvey v. Wynn, 102 Ga. App. 283, 115 S.E.2d 774 (1960) (decided under former Code 1933, § 38-702).

Record. — Mere failure of the record, as appeared in the writ book, to show the existence of a portion of the record of a lost paper was not conclusive of the nonexistence of the paper, but the existence and the contents of such lost portion of a record could be established by parol. Benton v. Maddox, 52 Ga. App. 813, 184 S.E. 788 (1936) (decided under former Code 1933, § 38-702).

Letters. — When letters which would be admissible in evidence were lost or destroyed, the letters' contents are provable by parol after proof of loss or destruction. Marietta Sav. Bank v. Janes, 66 Ga. 286 (1881) (decided under former Code 1873, § 3832); Knox v. Harrell, 26 Ga. App. 772, 107 S.E. 594, cert. denied, 26 Ga. App. 801 (1921) (decided under former Civil Code 1910, § 5829).

Trial court's admission of a photocopy of a letter examined by a documents examiner did not violate the best evidence rule as the original letter was lost and the copy was properly authenticated. Roberts v. State, 282 Ga. 548, 651 S.E.2d 689 (2007) (decided under former O.C.G.A. § 24-5-21).

Last person who had custody of letter must make a complete and proper showing with respect to the alleged nonexistence or inaccessibility or loss of the letter; merely asserting the loss, without showing diligence in attempting to provide the item, will not do. Mulkey v. State, 155 Ga. App. 304, 270 S.E.2d 816 (1980) (decided under former Code 1933, § 38-702).

Memorandum of terms of settlement. — When a memorandum of the terms of a settlement was reduced to writing, and handed to defendant's agent, parol evidence as to the memorandum's contents was admissible when such agent testified that the agent never had such memorandum, or if the agent ever had the memorandum in the agent's possession, the memorandum was lost or mislaid even though no notice to produce was served either on the defendant or the agent. Carr v. Smith, 58 Ga. 361 (1877) (decided under former Code 1873, § 3832).

Original document, not disclosed during discovery, excluded. — When the defendant introduced evidence to show that a contract had been altered, and when the plaintiff then tendered the original of the contract, which contained blank spaces, the original was properly excluded by the trial court on the basis that the plaintiff had not disclosed the original's existence during discovery. White v. Lance H. Herndon, Inc., 203 Ga. App. 580, 417 S.E.2d 383, cert. denied, 203 Ga. App. 908, 417 S.E.2d 383 (1992) (decided under former O.C.G.A. § 24-5-21).

Contents of a journal. — Trial court did not err in ruling that the best evidence rule precluded defendant's wife from testifying about the contents of the victim's journal because the victim testified that the victim threw the journal away; there was no harm in the trial court's refusal to allow further testimony about the contents of the journal as the victim testified that the victim did not include the sexual assaults in the journal, and the wife's testimony about the journal's contents was consistent with the victim's testimony. Eley v. State, 266 Ga. App. 45, 596 S.E.2d 660 (2004) (decided under former O.C.G.A. § 24-5-21).

Failure to account for warranty. — In a consumer's suit against a car dealer for breach of a written warranty, regarding the sale of a used car which the dealer's salesperson falsely represented had not been in a wreck, it was not error for the trial court to grant a directed verdict to the dealer because, while the consumer testified that the dealer sold the consumer a written warranty for the vehicle, the consumer did not produce the warranty or account for the warranty's absence, rendering the testimony inadmissible under the best evidence rule. Mitchell v. Backus Cadillac-Pontiac, Inc.,

Application (Cont'd)
1. In General (Cont'd)

274 Ga. App. 330, 618 S.E.2d 87 (2005) (decided under former O.C.G.A. § 24-5-21).

Exemplified copy of will. — Exemplified copy of a will from the ordinary's office was presumptive proof that the will was properly probated, otherwise the will could not have been recorded. Thursby v. Myers, 57 Ga. 155 (1876) (decided under former Code 1873, §§ 3818, 3821, 3822).

Presumption in favor of proper probate was raised when the records were burnt. Oliver v. Persons, 30 Ga. 391, 76 Am. Dec. 657 (1860) (decided under Ga. L. 1858, p. 53, § 1).

Transcript of tape recording. — Best evidence rule did not apply to a tape recorded statement and, therefore, a transcript of a tape recorded statement was admissible when the court determined that a reasonable necessity existed for the reading of the transcript rather than experiencing a delay caused by the additional effort of playing the tape before the court. In re F.L.P., 184 Ga. App. 164, 361 S.E.2d 43 (1987) (decided under former O.C.G.A. § 24-5-3).

Oral testimony. — Trial court did not err in allowing a witness to testify that the defendant signed personal guaranties of defendant's company's prior indebtednesses to the plaintiff since the failure to produce the original of such personal guaranties was explained and oral testimony was shown to be the "best" secondary evidence of the guaranties' existence. Dedousis v. First Nat'l Bank, 181 Ga. App. 425, 352 S.E.2d 577 (1986) (decided under former O.C.G.A. § 24-5-5).

Patients' dental records. — When, in a dentist's suit to recover income for work performed for a dental clinic, it appeared that the patients' individual records constituted the primary documentary evidence of their visits, charges, and payments and that those records were otherwise available or accessible, the trial court did not err in refusing to admit plaintiff's own purported summary as secondary evidence of that information. White v. Dilworth, 178 Ga. App. 226, 342 S.E.2d 709 (1986) (decided under former O.C.G.A. § 24-5-2).

Records destroyed. — Trial court erred in directing a verdict as to damages after a landlord satisfied the requirement for submitting secondary evidence by establishing that the primary evidence, the purchase invoices, had been destroyed and that higher secondary evidence from the company was unavailable; the oral evidence as to the wholesale fair market value and as to the dealer's discount, based upon the actual damaged parts, was sufficient secondary evidence to go to a jury. Hodges v. Vara, 268 Ga. App. 815, 603 S.E.2d 327 (2004) (decided under former O.C.G.A. §§ 24-5-2 and 24-5-3).

Admission of W-2 and spouse's memory to prove income of deceased. — In a spouse's wrongful death suit against the Georgia Department of Transportation, the trial court did not err by allowing the surviving spouse to testify as to that spouse's memory of the deceased spouse's income as the question at issue concerned the prior earnings of the deceased spouse, not the actual contents of prior paychecks. Although W-2 forms and other documentary evidence certainly contained evidence of the past earnings, those documents did not preclude the admission of other evidence to prove the actual fact at issue, namely, the amount of the deceased spouse's income. DOT v. Baldwin, 292 Ga. App. 816, 665 S.E.2d 898 (2008) (decided under former O.C.G.A. § 24-5-2).

No application to videotapes. — Former O.C.G.A. § 24-5-21 applied to writings, not videotapes. Bowen v. State, 237 Ga. App. 597, 516 S.E.2d 311 (1999) (decided under former O.C.G.A. § 24-5-21).

Original of exhibit inadvertently removed from attorney's office. — When a witness testified that the original of an exhibit was prepared by the witness, and that the exhibit was an exact copy of the original, and when the plaintiff's attorney stated in plaintiff's place that the original had been given to the attorney and several copies made, and also stated that through inadvertence the original went out of the attorney's office as an exhibit to the complaint and could not be located, the trial judge did not abuse judicial discretion in admitting the exhibit. Palmer v. Wilkins, 163 Ga. App. 104, 294

S.E.2d 355 (1982) (decided under former O.C.G.A. § 24-5-21).

Certifications from manufacturer as to accuracy of radar device were admissible under business records rule although the officer testifying did not have personal knowledge of the correctness of the record and did not make entries personally, and the person who made entries did not testify. Wiggins v. State, 249 Ga. 302, 290 S.E.2d 427 (1982) (decided under former O.C.G.A. § 24-5-26).

2. Real Estate Transactions

Evidence of title to land. — If there is written evidence of title to land, it must be produced in order to prove its contents; and before secondary evidence was competent to show its contents, it must first be shown to the court that the original one existed, that it was properly executed and that it was either lost or destroyed, or for some other sufficient cause was not accessible to the diligence of the party. Head v. Lee, 203 Ga. 191, 45 S.E.2d 666 (1947) (decided under former Code 1933, § 38-212).

Deed. — If a party wishes to introduce a copy of a deed in evidence, it will be a sufficient compliance with the rule to swear that the original deed in the party's belief was lost or destroyed, and the deed was not in the party's custody, power, or control. Ratteree v. Nelson, 10 Ga. 439 (1851) (decided under former law); Drew v. Drew, 146 Ga. 479, 91 S.E. 541 (1917) (decided under former Civil Code 1910, § 5829).

Deed on record. — Deed should be held to be legally and properly on record by due proof of signing, sealing, and delivery until the contrary appears. Walls v. Smith, 19 Ga. 8 (1855) (decided under Ga. L. 1855, p. 138, § 2).

Deed in hands of nonresident grantee. — Parol evidence of the contents of a deed to land in this state is not admissible under the theory that the original deed is in the hands of nonresident grantees who are not parties to the suit, and therefore beyond the power of the court, without making preliminary proof that the deed was not duly recorded. McConnell Bros. v. Slappey, 134 Ga. 95, 67 S.E. 440 (1910) (decided under former Civil Code 1895, § 5173).

Purchaser of land. — Equity will grant no relief in favor of one who buys land, when one fails to exercise any diligence for one's protection, and asserts that one blindly relied on the representations of the seller as to matters of which one could have informed oneself. Browning v. Richardson, 181 Ga. 413, 182 S.E. 516 (1935) (decided under former Code 1933, § 38-211).

Attesting witnesses to deed not necessary. — When a deed has been recorded and lost and the record has been destroyed, a copy of the original may be proved by the person who made the deed, and the attesting witnesses need not be called for that purpose. Fletcher v. Horne, 75 Ga. 134 (1885) (decided under former Code 1863, §§ 3741, 3744, 3745).

3. Criminal Matters

Certified copy of conviction is not secondary evidence. — To impeach a witness by a prior conviction, the conviction must be proved by the record of the conviction itself. The certified copy of a conviction was primary evidence, as opposed to secondary evidence, and was the best proof. Howard v. State, 204 Ga. App. 743, 420 S.E.2d 594 (1992) (decided under former O.C.G.A. § 24-5-2).

Accounting for absence of best evidence by deputy. — Hearsay testimony of a deputy about the contents of a missing letter that the defendant allegedly wrote and sent to the codefendant was admissible as an incriminating statement by the defendant; the state satisfactorily accounted for the absence of the letter through the codefendant, who testified that the codefendant destroyed the letter after showing the letter to the deputy. Summerour v. State, 211 Ga. App. 65, 438 S.E.2d 176 (1993) (decided under former O.C.G.A. § 24-5-21).

Perjury proven through witness testimony. — Since an original record of the trial during which the perjury with which the defendant was charged occurred was unavailable and could not be produced despite the exercise of the state's due diligence, the state was authorized to prove the defendant's perjured testimony through witness testimony. Walker v.

Application (Cont'd)
3. Criminal Matters (Cont'd)

State, 314 Ga. App. 714, 725 S.E.2d 771 (2012) (decided under former O.C.G.A. § 24-5-2).

Copies of affidavit and search warrant at motion to suppress hearing. — While the trial court errs in considering copies of an affidavit and search warrant at a motion to suppress hearing, without requiring the originals to be accounted for, the subsequent inclusion of the originals in the record obviates any technical error which may result. Williams v. State, 168 Ga. App. 614, 309 S.E.2d 856 (1983) (decided under former O.C.G.A. § 24-5-2).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 38-620 and 38-621, are included in the annotations for this Code section.

Correction of records. — Clerk may not correct a misnomer in a marriage record but, when the record was incorrectly made, the clerk may rerecord the certificate just as the certificate was, with the additional recording of the affidavits attached to the certificate, and cross-index the original record and the new one. 1945-47 Op. Att'y Gen. p. 86 (decided under former Code 1933, §§ 38-620 and 38-621).

Indictment. — Clerk's certification that the indictment was lost was not sufficient replacement for a certified copy of the actual indictment. 1970 Op. Att'y Gen. No. 70-61 (decided under former Code 1933, §§ 38-620 and 38-621).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 453.

29A Am. Jur. 2d, Evidence, § 1066.

C.J.S. — 32A C.J.S., Evidence, §§ 1040, 1049 et seq., 1089 et seq., 1098 et seq.

ALR. — Meaning of "duplicate," 24 ALR 1209.

Admissibility in evidence of audit or testimony of auditor or accountant, 52 ALR 1266.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.

Carbon copies of letters or other written instruments as evidence, 65 ALR2d 342.

Photographic representation or photostat of writing as primary or secondary evidence within best evidence rule, 76 ALR2d 1356.

Modern status of rules as to use of motion in limine or similar preliminary motion to secure exclusion of prejudicial evidence or reference to prejudicial matters, 63 ALR3d 311.

24-10-1005. Public records.

The contents of a public record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by duplicate, certified as correct in accordance with Code Section 24-9-902 or Code Section 24-9-920 or testified to be correct by a witness who has compared it with the original. If a duplicate which complies with this Code section cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. (Code 1981, § 24-10-1005, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Records, documents, and papers of public officers generally, Ch. 18, T. 50. Evidentiary value of certified copies of wills proved and recorded in probate court, § 53-3-5. Use of photostatic copies of wills in lieu of original in judicial proceedings, §§ 53-3-20, 53-3-21. Copies of public records to prove content, Fed. R. Evid. 1005.

Editor's notes. — This Code section and Code Section 24-9-902 being so closely allied, and so often construed together by the courts, the notes to one will be found helpful in construing the other.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, § 3817, former Civil Code 1895, §§ 5167, 5212, former Civil Code 1910, §§ 5753, 5799, former Code 1933, §§ 38-206, 38-602, 38-608, 38-609, Ga. L. 1965, p. 250, § 1, and former O.C.G.A. §§ 24-5-20 and 24-5-31 are included in the annotations for this Code section. The reader is also advised to consult the annotations under O.C.G.A. §§ 24-9-920 and 24-9-922, for annotations regarding other issues relating to admissibility of public records, including authentication.

In general. — Best evidence rule did not prevent the introduction of certified copies of exhibits, deeds on file in the clerk of court's office, and notes when the contents of the writing were not in issue. DeKalb County v. Townsend Assocs., 243 Ga. 80, 252 S.E.2d 498 (1979) (decided under Ga. L. 1965, p. 250, § 1).

Original records as evidence. — While the use of original records as evidence was disapproved, yet when an original record had been brought into court and admitted to be such, it was admissible in evidence; and hence the original order of the commissioners calling a road bond election, as well as extracts from the original minute book of the commissioners, being admittedly originals, were not inadmissible, in the instant case, although the better method of proof would have been by properly exemplified copies. Moody v. Board of Comm'rs, 29 Ga. App. 21, 113 S.E. 103 (1922) (decided under former Civil Code 1910, § 5799).

Original records admissible. — While the use of the record as evidence was disapproved, yet when an original record was brought into court and admitted to be such, that record was admissible in evidence. A certified copy would not be higher or better evidence than the original. Moody v. Board of Comm'rs, 29 Ga. App. 21, 113 S.E. 103 (1922) (decided under former Civil Code 1910, § 5753); Mason v. State, 197 Ga. App. 534, 398 S.E.2d 822 (1990) (decided under former O.C.G.A. § 24-5-31).

Notwithstanding the statutory rules as to the proof of official and court records by certified or exemplified copies, and as to such exemplifications being primary evidence, it was also the rule that, when the record of a court in which a case was being tried was material evidence in a case it may be proved by the production of the record itself, and a certified copy was not necessary. Woods v. Travelers Ins. Co., 53 Ga. App. 429, 186 S.E. 467 (1936) (decided under former Code 1933, § 38-602); Harrison v. State, 120 Ga. App. 812, 172 S.E.2d 328 (1969) (decided under former Code 1933, § 38-602).

Original records inadmissible. — Original minutes of a superior court were not admissible in the trial of an action in a city court, over the objection that such minutes were not primary evidence. Traylor v. Epps, 11 Ga. App. 497, 75 S.E. 828 (1912) (decided under former Civil Code 1910, § 5753).

City court did not err in excluding from evidence the original papers of foreclosure proceedings in a justice's court. Original records of one court ordinarily were not admissible in evidence in a different court, but certified copies of such papers constitute primary evidence. Hall v. Treadaway, 12 Ga. App. 492, 77 S.E. 878 (1913) (decided under former Civil Code 1910, § 5799).

Unsigned order of court. — Exemplification of an unsigned order of a court for the sale of lands was admissible. Smith & Co. v. Ross, 108 Ga. 198, 33 S.E. 953 (1899) (decided under former Civil Code 1895, § 5167).

Prior court order not given judicial notice. — While the trial court erred in giving a prior court order "judicial notice" and binding effect, it was clear that the court could consider a prior court order as evidence. Genins v. Boyd, 166 Ga. App. 843, 305 S.E.2d 391 (1983) (decided under former O.C.G.A. § 24-5-31).

Certified copies. — When a division in kind was made between heirs and distributees of a decedent, a certified copy of the return of the commissioners, and of the order of the court approving the return, were admissible in evidence in an action involving title to the land covered by the award. Bell v. Cone, 208 Ga. 467, 67 S.E.2d 558 (1951) (decided under former Code 1933, § 38-206).

In a deprivation proceeding, the trial court properly admitted documents from a parent's criminal case under former O.C.G.A. § 24-5-31. The court found that the documents were attached to a negotiated plea and had been certified. In the Interest of A. R., 296 Ga. App. 62, 673 S.E.2d 586 (2009) (decided under former O.C.G.A. § 24-5-31).

Juvenile court proceedings. — Plans for family reunification prepared by the county Department of Family and Children Services as copies of records of judicial proceedings were admissible as primary evidence in a proceeding to terminate parental rights. In re C.W.D., 232 Ga. App. 200, 501 S.E.2d 232 (1998) (decided under former O.C.G.A. § 24-5-31).

Exemplified copy of will from the judge's office was presumptive proof that the will was properly probated as otherwise the will could not have been recorded. Davis v. Tyson, 60 Ga. App. 714, 4 S.E.2d 704 (1939) (decided under former Code 1933, § 38-206).

Indictment and record of trial. — Highest and best evidence of a writing or of a judicial proceeding, including an indictment and the trial thereupon, were the indictment and the record of the trial. Sikes v. State, 76 Ga. App. 883, 47 S.E.2d 677 (1948) (decided under former Code 1933, § 38-206).

Lost records. — While the contents of lost papers in a case on file in the clerk's office of the court may be established by copies of the papers as they appear of record in the writ book required to be kept by the clerk of the court, this method of proof was cumulative only; parol evidence was also admissible to establish the contents of the lost papers. Benton v. Maddox, 52 Ga. App. 813, 184 S.E. 788 (1936) (decided under former Code 1933, §§ 38-608 and 38-609).

Other records in writ book. — On the trial of an issue to establish lost papers in a case on file in the office of the clerk of the court when it appears from parol evidence introduced to establish copies of the lost papers that there was a return of service by the officer, but when from the evidence, which consists of the copies of the proceedings as contained in the writ book on file in the office of the clerk of the court, there appeared no return of service upon the papers, evidence consisting of the records in other cases recorded in the same writ book immediately before and immediately after the record in the present case, in which there appears no record of a return of service, and evidence of the original papers in such cases which contain a return of service, were admissible. Benton v. Maddox, 52 Ga. App. 813, 184 S.E. 788 (1936) (decided under former Code 1933, §§ 38-608 and 38-609).

Admission of hearsay. — Like former O.C.G.A. § 24-7-20 (see now O.C.G.A. § 24-9-902), former O.C.G.A. § 24-5-20 did not address hearsay concerns. Consequently, that Code section did not require the admission of hearsay merely because the hearsay had been recorded in a court record certified by facsimile. McKinley v. State, 303 Ga. App. 203, 692 S.E.2d 787 (2010) (decided under former O.C.G.A. § 24-5-20).

Bonds. — Bond being an office paper of the court, a certified copy or an exemplification of the bond, was primary evidence. Blount v. Bowne, 82 Ga. 346, 9 S.E. 164 (1889) (decided under former Code 1882, § 3817); Richardson v. Whitworth, 103 Ga. 741, 30 S.E. 573 (1898) (decided under former Civil Code 1895, § 5212).

Books of minutes of municipality. — Book of minutes of a municipal corporation may be proved to be such by any witness who knows the fact, there being no objection that a certified copy would be

the primary evidence. Robinson v. State, 82 Ga. 535, 9 S.E. 528 (1889) (decided under former Code 1882, § 3817).

Original minute book of county commissioners was not primary evidence. Daniel v. State, 114 Ga. 533, 40 S.E. 805 (1902) (decided under former Civil Code 1895, § 5212).

Homestead papers. — Exemplification, or certified copy of the plat of homestead and schedule of personalty, certified by the clerk of the superior court of the county when those papers were recorded, was only secondary evidence under former Code 1933, §§ 38-601 and 38-602. Brown v. Driggers, 60 Ga. 114 (1878) (decided under former Code 1873, § 3817).

Original papers were the primary evidence. Pritchett v. Davis, 101 Ga. 236, 28 S.E. 666, 65 Am. St. R. 398 (1897) (decided under former Civil Code 1895, § 5212).

Railroad lease. — Lease of a certain railroad being a paper which was required to be kept on file in the proper office of the executive department, a certified copy of the lease was primary evidence. Branan v. Nashville, C. & S. L. Ry., 119 Ga. 738, 46 S.E. 882 (1904) (decided under former Civil Code 1895, § 5212).

Search warrants. — Former law did not apply to search warrants. DePalma v. State, 228 Ga. 272, 185 S.E.2d 53 (1971) (decided under former Code 1933, § 38-602).

Schedule of creditors. — Original triplicate of the schedule of creditors and the creditors' claims, required to be filed by a bankrupt in the court of bankruptcy under the Bankruptcy Act, was an office paper, and a certified copy thereof was primary evidence. Harvard v. Davis, 145 Ga. 580, 89 S.E. 740 (1916) (decided under former Civil Code 1910, § 5799).

Traffic citation indicating guilty plea admissible. — In a suit for damages sustained in an automobile collision, alleging that the defendant negligently failed to yield the right-of-way at a stop sign, the trial court did not err by admitting evidence of a traffic citation issued against the defendant in conjunction with the accident. The citation noted entry of a guilty plea, but also indicated the defendant was found guilty by the municipal court. Though ambiguous and subject to conflicting interpretations, the citation was relevant if interpreted by the jury as a plea of guilty. Hunter v. Hardnett, 199 Ga. App. 443, 405 S.E.2d 286, cert. denied, 199 Ga. App. 906, 405 S.E.2d 286 (1991) (decided under former O.C.G.A. § 24-5-20).

Traffic citations stamped "FTA" were inadmissible hearsay. — Trial court erred in admitting the state's exhibits, which were copies of two traffic citations stamped "FTA," pursuant to former O.C.G.A. § 24-5-20 without any determination that the exhibits fell within an exception to the rule prohibiting the use of hearsay because the state introduced the exhibits to prove the truth of the statement of the unidentified person who stamped "FTA" on the citations that the defendant failed to appear for the defendant's court date, and despite defendant's objection to the documents as hearsay, the state argued only the issue of authentication and never identified any exception to the rule prohibiting hearsay that would authorize admitting the documents; the state failed to lay the required foundation for the application of the business records exception, former O.C.G.A. § 24-3-14(b) (see O.C.G.A. § 24-8-803), because the state did not call any witness to provide the required foundation. McKinley v. State, 303 Ga. App. 203, 692 S.E.2d 787 (2010) (decided under former O.C.G.A. § 24-5-20).

Evidence held admissible. — Since an original record of the trial during which the perjury with which the defendant was charged occurred was unavailable and could not be produced despite the exercise of the state's due diligence, as required by former O.C.G.A. § 24-5-31, the state was authorized to prove the defendant's perjured testimony through witness testimony pursuant to former O.C.G.A. § 24-5-2 (see now O.C.G.A. §§ 24-10-1003 and 24-10-1004). Walker v. State, 314 Ga. App. 714, 725 S.E.2d 771 (2012) (decided under former O.C.G.A. § 24-5-31).

Evidence held inadmissible. — Since the defendant did not tender the copies of the convictions which the defendant desired to have introduced to im-

peach witnesses, but only made a proffer of the testimony of the clerk's representative, the state's objection based on the failure to produce the best evidence was properly sustained. The testimony of the deputy clerk as to the content of the records was not only not the best evidence, it was also hearsay. Lipscomb v. State, 194 Ga. App. 657, 391 S.E.2d 773 (1990) (decided under former O.C.G.A. § 24-5-31).

Sentencing court improperly considered the defendant's prior state court conviction based on an uncertified copy of the indictment, a document titled "State's Version of the Offense," and a computer print-out showing that a guilty plea had been entered because the state presented only hearsay, rather than competent evidence, showing that the state was unable to obtain a certified copy of the conviction, and there was no evidence regarding whether the state used due diligence to obtain such a copy. Brinkley v. State, 301 Ga. App. 827, 689 S.E.2d 116 (2009) (decided under former O.C.G.A. § 24-5-31).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 38-608 and 38-609 are included in the annotations for this Code section.

Indictment. — Clerk's certification that the indictment was lost wais not sufficient replacement for a certified copy of the actual indictment. 1970 Op. Att'y Gen. No. 70-61 (decided under former Code 1933, §§ 38-608 and 38-609).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, §§ 1203, 1229. 42 Am. Jur. 2d, Inspection Laws, § 11.

C.J.S. — 32 C.J.S., Evidence, § 883 et seq. 32A C.J.S., Evidence, §§ 773, 993, 1028, 1037.

ALR. — Photostatic or other method of recording instrument, 57 ALR 159.

Necessity and manner of authenticating paper purporting to be act of private corporation, 65 ALR 329.

Sheriff's deed as making a prima facie case for one seeking to recover land thereunder, 108 ALR 667.

Judgment or order in connection with appointment of executor or administrator as res judicata, as law of the case, or as evidence, on questions other than the validity of the appointment, 119 ALR 594.

Admissibility of evidence on question of testamentary capacity or undue influence in a will contest as affected by remoteness, relative to the time when the will was executed, of the facts of events to which the evidence relates, 124 ALR 433.

Photographic representation of writing as primary or secondary evidence, 142 ALR 1270; 76 ALR2d 1356.

Carbon copies of letters or other written instruments as evidence, 65 ALR2d 342.

Admissibility and effect of evidence or comment on party's military service or lack thereof, 9 ALR2d 606.

Admissibility in evidence of enlarged photographs or photostatic copies, 72 ALR2d 308.

Admissibility, on issue of testamentary capacity, of previously executed wills, 89 ALR2d 177.

Sufficiency of evidence that will was not accessible to testator for destruction, in proceeding to establish lost will, 86 ALR3d 980.

24-10-1006. Summaries.

The contents of otherwise admissible voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or

copying, or both, by other parties at a reasonable time and place. The court may order that the contents of such writings, recordings, or photographs be produced in court. (Code 1981, § 24-10-1006, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Summaries to prove content, Fed. R. Evid. 1006.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 38-203, 38-205, and former O.C.G.A. § 24-5-29 are included in the annotations for this Code section.

Summary of accounting book entries. — When pertinent and essential facts can be ascertained only by an examination of a large number of entries in books of account, an auditor or an expert accountant who has made an examination and analysis of the books and figures may testify as a witness and give summarized statements of what the books show as a result of the investigation, provided the books themselves are accessible to the court and the parties. Stewart v. State, 246 Ga. 70, 268 S.E.2d 906 (1980) (decided under former Code 1933, §§ 38-203, 38-205); Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8 (1981) (decided under former Code 1933, §§ 38-203, 38-205).

For a discussion of the admissibility of summaries of business records, see Tyner v. Sheriff, 164 Ga. App. 360, 297 S.E.2d 114 (1982) (decided under former O.C.G.A. § 24-5-29).

RESEARCH REFERENCES

ALR. — Requirement of notice as condition for admission in evidence of summary of voluminous records, 80 ALR3d 405.

24-10-1007. Testimony or written admission of party.

The contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original. (Code 1981, § 24-10-1007, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Testimony or a statement of a party to prove content, Fed. R. Evid. 1007.

Law reviews. — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration
Specific Writings Produced Under Notice

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3836, former Code 1882, § 3836, former Civil Code 1910, § 5832, and former Code 1933, § 38-705 are included in the annotations for this Code section.

Writing with subscribing witnesses. — When a writing was offered in evidence, to which there was a subscribing witness, the latter must be produced in all cases, except in the five instances specified in former Civil Code 1910, § 5833 (see now O.C.G.A. § 24-9-903), and those named in former Civil Code 1910, § 5832. Lamb v. Empire Life Ins. Co., 143 Ga. 180, 84 S.E. 439 (1915) (decided under former Civil Code 1910, § 5832).

Reliance on writing creates presumption of validity. — Reason of the former statute was founded in the fact that when a paper was drawn out from the possession of a party claiming title or other benefit under the paper, that the presumption of the law was that one relied upon its genuineness and validity, and, therefore, the producing dispenses with the proof. Campbell v. Roberts, 66 Ga. 733 (1881) (decided under former Code 1873, § 3836).

Failure to prove execution. — There was no error in admitting in evidence a document sued on, over the objection that the document's execution had not been sufficiently shown at the time, notwithstanding the general rule that "where the execution of a note is denied by a plea of non est factum, the note will not be received until some extrinsic evidence of its execution has been submitted." Mendel v. Converse & Co., 30 Ga. App. 549, 118 S.E. 586 (1923) (decided under former Civil Code 1910, § 5832).

Claim of benefit. — To hold a paper as a receipt or voucher is a sufficient claim of benefit under it to meet the requirements of law. Louisville & N.R.R. v. Yudelson, 135 Ga. 731, 70 S.E. 576 (1911) (decided under former Civil Code 1910, § 5832).

Specific Writings Produced Under Notice

Irrelevant paper. — Production of a paper, upon notice that is not relevant to the issue, but which recites another paper that is pertinent and material, will not overcome the necessity of proof of execution of the latter paper that is material. Doe v. Guthry, 32 Ga. 307 (1861) (decided under former law).

RESEARCH REFERENCES

ALR. — Production, in response to call therefor by adverse party, of document otherwise inadmissible in evidence, as making it admissible, 151 ALR 1006.

24-10-1008. Functions of court and jury.

When the admissibility of other evidence of the contents of writings, recordings, or photographs under the rules of evidence depends upon the fulfillment of a condition of fact, the question of whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Code Section 24-1-104; provided, however, that when an issue is raised as to:

(1) Whether the asserted writing, recording, or photograph ever existed;

(2) Whether another writing, recording, or photograph produced at the trial is the original; or

(3) Whether other evidence of the contents correctly reflects the contents,

the issue is for the trier of fact to determine as in the case of other issues of fact. (Code 1981, § 24-10-1008, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Provision that purchaser of instrument takes with notice of claim or defense if instrument bears visible evidence of forgery or alteration, § 11-3-304. Functions of the court and jury, Fed. R. Evid. 1008.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5242, former Civil Code 1910, § 5831, and former Code 1933, § 38-704, are included in the annotations for this Code section.

Materiality of an alteration is a question of law for the court. Winkles v. Guenther & Co., 98 Ga. 472, 25 S.E. 527 (1896) (decided under former Civil Code 1895, § 5242).

Explanation is question for jury. — When the genuineness of the instrument is denied under oath, the time when, and the intention with which, a change was made in the instrument, are questions for a jury. Reinhart v. Miller, 22 Ga. 402, 68 Am. Dec. 506 (1857) (decided under former law); Winkles v. Guenther & Co., 98 Ga. 472, 25 S.E. 527 (1896) (decided under former Civil Code 1895, § 5242).

RESEARCH REFERENCES

ALR. — Admissibility of books of account as affected by mutilation, erasures, or alterations, 142 ALR 1406.

Mutilations, alterations, and deletions as affecting admissibility in evidence of public record, 28 ALR2d 1443.

Presumptions and burden of proof as to time of alteration of deed, 30 ALR3d 571.

CHAPTER 11

ESTABLISHMENT OF LOST RECORDS

Article 1

Public Records

Sec.

24-11-1. Definitions.
24-11-2. Establishment of lost records.
24-11-3. Appointment of auditor; hearing; establishment of duplicates.

Article 2

Private Papers

24-11-20. Establishment of lost office papers.
24-11-21. Summary establishment of lost or destroyed evidence of indebtedness in probate court — Petition; service of notice; hearing and decision; recordation; appeal to superior court.
24-11-22. Summary establishment of lost or destroyed evidence of indebtedness in probate court — Service of nonresidents; effect.
24-11-23. Establishment of lost or destroyed paper in superior court — Petition and affidavit; issuance and service of rule nisi.
24-11-24. Establishment of lost or destroyed paper in superior court — When continuance granted.
24-11-25. Establishment of lost or destroyed paper.
24-11-26. Establishment of lost or destroyed paper — Furnishing of certified endorsement of copy.
24-11-27. Procedure as to action on lost or destroyed note, bill, bond, or other instrument.
24-11-28. Joinder of additional party defendants in proceedings to establish lost or destroyed papers.
24-11-29. Applicability of article.

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011).

ARTICLE 1

PUBLIC RECORDS

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-11-1. Definitions.

As used in this chapter, the term:

(1) "Custodian" means the person charged with the duty of maintaining public records.

(2) "Duplicate" means a counterpart which accurately reproduces the original.

(3) "Public record" shall have the same meaning as set forth in Code Section 24-8-801. (Code 1981, § 24-11-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-11-2. Establishment of lost records.

(a) Where any original public records have been lost, mutilated, stolen, or destroyed, the custodian may establish duplicates in accordance with the provisions of this article. When such public records are established by duplicates, they shall have all of the effect in evidence as the original records would have had.

(b) The custodian of the lost, mutilated, stolen, or destroyed public records shall bring a petition to establish such records in the superior court of the county in which the public records were located.

(c) The petition shall set forth the fact that some portion of the public records has been lost, mutilated, stolen, or destroyed, specifying as nearly as may be possible the books or parts of the books in which those records existed, and shall pray for the establishment of such records. (Code 1981, § 24-11-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5810, and former O.C.G.A. §§ 24-8-1, 24-8-2, and 24-8-3 are included in the annotations for this Code section.

Jurisdiction of Supreme Court. — Proceeding which was for the purpose of establishing a copy of a lost record of a will previously probated and admitted to record, and not to probate a copy of a lost or destroyed will, did not fall within the cases of which the Supreme Court had jurisdiction on writ of error. Bond v. Reid, 152 Ga. 481, 110 S.E. 281 (1922) (decided under former Civil Code 1910, § 5810).

Separation of powers not violated by establishing version of law. — Application of former O.C.G.A. § 24-8-1 in a county's action to establish a copy of a zoning ordinance that had been lost did not violate the constitutional doctrine of separation of powers because the trial court's decree did not have the effect of either adopting or amending any zoning ordinance when the legislative process was complete, and the ordinance from which the alleged illegality arose was, in fact, a law; the supreme court's authority to reestablish a previously adopted ordinance, like its authority to construe statutes, neither violated the constitutional separation of powers nor constituted an unconstitutional delegation of legislative authority. East Georgia Land & Dev. Co. v. Baker, 286 Ga. 551, 690 S.E.2d 145 (2010) (decided under former O.C.G.A. § 24-8-1).

No violation of zoning procedure law. — Application of former O.C.G.A. § 24-8-1 in a county's action to establish a copy of a zoning ordinance that had been lost did not violate the Zoning Procedures Law (ZPL), O.C.G.A. § 36-66-1 et seq., because the trial court's decree did not have the effect of either adopting or amending any zoning ordinance; because it did not constitute final legislative action by a local government resulting in such adoption or amendment, the decree was not a "zoning decision" to which the ZPL applied. East Georgia Land & Dev. Co. v. Baker, 286 Ga. 551, 690 S.E.2d 145 (2010) (decided under former O.C.G.A. § 24-8-1).

Copy of zoning ordinance. — Superior court did not err in denying a land and development company's motion for

involuntary dismissal pursuant to O.C.G.A. § 9-11-41(b) in a county's action under former O.C.G.A. § 24-8-1 to establish a copy of a zoning ordinance that had been lost because the superior court thoroughly reviewed the evidence upon which the court relied, including the testimony of the company's forensic expert and several witnesses who were county officials when the ordinance was enacted and their successors in office, as well as the dovetailing of subsequent amendments to the sections and subsections of the proffered copy; that evidence was sufficient to support the superior court's finding that the copy was a true and correct duplicate of the original ordinance adopted at the meeting of the county board of commissioners. East Georgia Land & Dev. Co. v. Baker, 286 Ga. 551, 690 S.E.2d 145 (2010) (decided under former O.C.G.A. § 24-8-1).

Transcription prevailing over copy of will. — In a proceeding to establish a copy of a lost or destroyed record of a will theretofore duly probated and admitted to record, a copy which a witness who was neither contradicted nor impeached sware positively was correctly transcribed by the witness from the record of wills in the judge's office, before the will's destruction, must prevail over a copy testified by other witnesses to be a correct copy merely of a will (not of the record thereof), which "will" was not shown to have been probated or recorded. Bond v. Reid, 29 Ga. App. 558, 116 S.E. 318 (1923) (decided under former Civil Code 1910, § 5810).

Application to any public records. — Superior court did not err in finding that a zoning ordinance was a public record under former O.C.G.A. § 24-8-1 and in establishing a copy as an original because the plain language of former § 24-8-1 showed that it applied to "any public records" and did not include any limitation to court records, and the fact that county ordinances could not normally be proved by parol evidence did not prevent such proof in the proceeding; when a proceeding was instituted to establish a copy of a public record which has been lost for many years, circumstantial evidence must be resorted to, and any circumstance legitimately offering an inference that the record was as contended may be considered, and a lost or destroyed ordinance could be established by parol evidence. East Georgia Land & Dev. Co. v. Baker, 286 Ga. 551, 690 S.E.2d 145 (2010) (decided under former O.C.G.A. § 24-8-1).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1271.

24-11-3. Appointment of auditor; hearing; establishment of duplicates.

(a) The court shall either appoint an auditor for such petition in accordance with Chapter 7 of Title 9 or shall conduct a hearing on the petition. If an auditor is appointed, the provisions of Code Sections 9-7-1 through 9-7-16 and Code Section 9-7-21 shall apply to such proceedings. An auditor shall receive compensation for services rendered as may be allowed by the court, to be paid out of the funds of the office of the custodian whose records were lost, mutilated, stolen, or destroyed.

(b) If the court hears the petition, after receiving evidence, the court shall determine whether the purported duplicate is, in fact, the same as the original record which has been lost, mutilated, stolen, or destroyed, and it shall be discretionary with the court to order the whole or any

part of such records established. The court shall give precedence to a petition filed pursuant to this article and hear the petition as speedily as possible.

(c) The duplicates which are established pursuant to this Code section, as nearly as may be possible, shall specify and conform to the original book and pages of the same on which they originally existed. (Code 1981, § 24-11-3, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-617, and former O.C.G.A. § 24-8-4 are included in the annotations for this Code section.

Discretion of trial court. — In equity cases, the Supreme Court would not interfere with the discretion of a trial judge in overruling exceptions of fact to an auditor's report, unless it appeared that there had been a manifest abuse of such discretion. Christian v. Bremer, 199 Ga. 285, 34 S.E.2d 40 (1945) (decided under former Code 1933, § 38-617).

Copy of zoning ordinance. — Former O.C.G.A. § 24-8-4 expressly contemplated the hearing of evidence and summoning of witnesses, and former O.C.G.A. § 24-8-3 (see now O.C.G.A. § 24-11-2) required that the copy established must conform as nearly as may be possible to the pages on which they originally existed. When a proceeding was instituted to establish a copy of a public record which had been lost for many years, circumstantial evidence must be resorted to, and any circumstance legitimately offering an inference that the record was as contended could be considered. Establishment of a lost record was necessarily by parol evidence. East Georgia Land & Dev. Co. v. Baker, 286 Ga. 551, 690 S.E.2d 145 (2010) (decided under former O.C.G.A. § 24-8-4).

Burden of proof. — When error was assigned upon the refusal of the judge to approve an exception of fact to an auditor's report in an equity case, the burden was upon the plaintiff in error to show to the satisfaction of the Supreme Court that the finding of the auditor was unsupported by evidence, the presumption being that the finding was correct; and, if it did not distinctly appear that the finding is unsupported, the judgment refusing to approve the exceptions of fact would be affirmed. Christian v. Bremer, 199 Ga. 285, 34 S.E.2d 40 (1945) (decided under former Code 1933, § 38-617).

RESEARCH REFERENCES

ALR. — Admissibility in evidence of audit or testimony of auditor or accountant, 52 ALR 1266.

ARTICLE 2

PRIVATE PAPERS

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-11-20. Establishment of lost office papers.

(a) Upon the loss of any original pleading, declaration, bill of indictment, special presentment, accusation, or other office paper, a duplicate may be established instanter on motion.

(b) As used in this article, the term "office paper" means the instrument upon which a proceeding has been brought after the case has gone to trial. (Code 1981, § 24-11-20, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Analysis

General Consideration
Particular Instruments

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Laws 1799, Cobbs 1851 Digest, p. 463, former Code 1868, §§ 3904, 3905, former Code 1873, §§ 3980 3981, former Civil Code 1895, §§ 4743, 4744, former Civil Code 1910, §§ 5312, 5313, former Code 1933, §§ 63-201, 63-202, and former O.C.G.A. § 24-8-20 are included in the annotations for this Code section.

Pleadings presumed correct. — Lost pleadings established by the court on motion were presumed to be correct. Southern Fertilizer & Chem. Co. v. Kirby, 52 Ga. App. 688, 184 S.E. 363 (1936) (decided under former Code 1933, §§ 63-201, 63-202); Salter v. Salter, 81 Ga. App. 864, 60 S.E.2d 424 (1950) (decided under former Code 1933, §§ 63-201, 63-202).

Papers lost or unrecorded. — Fact that the papers were not recorded or the record cannot be found is no excuse for not establishing according to law. Eagle & Phenix Mfg. Co. v. Bradford, 57 Ga. 249 (1876) (decided under former Code 1873, §§ 3980, 3981).

Proof of contents by parol. — Contents may have been proved by parol without establishing the lost or destroyed original. Bridges v. Thomas, 50 Ga. 378 (1873) (decided under former Code 1868, §§ 3904, 3905); Saffold v. Banks, 69 Ga. 289 (1882) (decided under former Code 1873, §§ 3980, 3981); Lewis v. State Bd. of Medical Exmrs., 23 Ga. App. 647, 99 S.E. 147 (1919) (decided under former Civil Code 1910, §§ 5312, 5313).

Notice not indispensably necessary to be given of a motion to the court to establish copies of office papers. Doe v. Roe, 3 Ga. 121 (1847) (decided under former Laws 1799, Cobb's 1851 Digest, p. 463); Eagle & Phenix Mfg. Co. v. Bradford, 57 Ga. 249 (1876) (decided under former Code 1873, §§ 3980, 3981).

Rule nisi and notice not required. — Copies of lost papers belonging to or pertaining to a suit pending in court may have been established instanter on motion; and it was not indispensably essential to the validity of an order of court establishing lost papers that a formal rule nisi should issue, or that the opposite party should be served with notice of the proceeding. Southern Fertilizer & Chem. Co. v. Kirby, 52 Ga. App. 688, 184 S.E. 363 (1936) (decided under former Code 1933, §§ 63-201, 63-202).

Waiver. — When judgment establishing lost papers rendered in municipal court in a case which had originated in a justice's court and which was transferable to the municipal court, a judgment afterwards rendered in the municipal court against the garnishee on the garnishee's default in answering the summons of garnishment was not illegal and void and subject to be set aside as void on motion in arrest on the ground that the papers had been lost while the case was pending in the justice's court, and before the estab-

lishment by the municipal court, and therefore that the municipal court had no jurisdiction to establish the papers, where no attack upon the validity of the order establishing the papers in the municipal court was made by the garnishee on the ground that the papers could not legally have been established in the municipal court. Southern Fertilizer & Chem. Co. v. Kirby, 52 Ga. App. 688, 184 S.E. 363 (1936) (decided under former Code 1933, §§ 63-201, 63-202).

Traverse. — When a motion is made to establish a lost paper and the opposite party files a written traverse, denying the existence of the alleged lost original, it was error to refuse that party the right to offer competent evidence in support of the traverse. Beall v. Patterson, 146 Ga. 233, 91 S.E. 71 (1916) (decided under former Civil Code 1910, §§ 5312, 5313).

Variance between original and copy. — Plaintiff having introduced in evidence a copy of the indictment alleged to have been maliciously procured, together with an order of the court thereon, establishing the same as an office paper in lieu of the lost original, and an order of nolle prosequi entered upon the established copy, the court did not err in permitting the defendant to know, by parol, that the established copy was prepared by counsel for the accused, that there was a material variance between it and the original indictment, and that, after being so established, it was nolle prosequied solely because of that variance. O'Berry v. Davis, 31 Ga. App. 755, 121 S.E. 857 (1924) (decided under former Civil Code 1910, §§ 5312, 5313).

When case transferred to new county. — When a case was to be transferred from an old county to a new one, lost court papers in the case must have been established, before the transfer, in the old county. McDougald v. Maitland, Kennedy & Co., 30 Ga. 703 (1860) (decided under former Laws 1799, Cobb's 1851 Digest, p. 463).

Paper subsequently found. — Superior court had power to rectify an order establishing a lost paper, by the paper itself, when found. Phillips v. Behn & Foster, 19 Ga. 298 (1856) (decided under former Laws 1799, Cobb's 1851 Digest, p. 463).

State as party. — State through its solicitor general (now district attorney) should have been a party to all motions to establish lost papers belonging to a state case. Buchanan v. Beckham, 18 Ga. 527 (1855) (decided under former Laws 1799, Cobb's 1851 Digest, p. 463).

Particular Instruments

Bill of exceptions deposited in the clerk's officer but not with the clerk, never became an office paper and the court erred in establishing it in a summary manner. Perry v. Friedin, 17 Ga. App. 417, 87 S.E. 683 (1916) (decided under former Civil Code 1910, §§ 5312, 5313).

Certiorari, though sanctioned, which was never in the office of the clerk of the superior court was not an office paper. Lovelady v. Hockenhull, 58 Ga. 469 (1877) (decided under former Code 1873, §§ 3980, 3981).

Unfiled certiorari. — Certiorari not marked "filed in office" and which was never in the office of the clerk of the superior court or even in the possession of the clerk at all, was not an office paper so as to be established by copy instanter on motion. Humphries v. Morris, 179 Ga. 55, 175 S.E. 242 (1934) (decided under former Code 1933, §§ 63-201, 63-202).

Claim affidavit. — Claim affidavit transmitted to the superior court became an office paper and could be established instanter. Crawford v. Crawford, 139 Ga. 68, 76 S.E. 564 (1912) (decided under former Civil Code 1910, §§ 5312, 5313).

Guardian's bond was not an office paper and cannot be established instanter. Bryant v. Owen, 1 Ga. 355 (1846) (decided under former Laws 1799, Cobb's 1851 Digest, p. 463).

Written sentence in criminal case in the superior court did not cease to be an office paper or record because the sentence had not been recorded in the record book of writs in the office of the clerk of the superior court. Teasley v. Nelson, 164 Ga. 242, 138 S.E. 72 (1927) (decided under former Civil Code 1910, §§ 5312, 5313).

Summons and pleadings. — After a suit in a justice's court upon a note had proceeded to judgment and execution issued thereon, the summons, service thereof and pleas, if any, were office pa-

Particular Instruments (Cont'd)

pers, and if lost may have been established in that court instanter on motion. Bell v. Bowdoin, 109 Ga. 209, 34 S.E. 339 (1899) (decided under former Civil Code 1895, §§ 4743, 4744).

Transcript. — Copy of an official transcript preserved in the office of the clerk of the Supreme Court, duly certified, was competent and sufficient evidence as to contents. Eagle & Phenix Mfg. Co. v. Bradford, 57 Ga. 249 (1876) (decided under former Code 1873, §§ 3980, 3981).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 63-201 and 63-202, are included in the annotations for this Code section.

Clerk's certification insufficient. — Clerk's certification that the indictment was lost was not sufficient replacement for a certified copy of the actual indictment. 1970 Op. Att'y Gen. No. 70-61 (decided under former Code 1933, §§ 63-201, 63-202).

RESEARCH REFERENCES

C.J.S. — 54 C.J.S., Lost Instruments, § 8 et seq.

24-11-21. Summary establishment of lost or destroyed evidence of indebtedness in probate court — Petition; service of notice; hearing and decision; recordation; appeal to superior court.

(a) The owner, agent of the owner, or legal representative of the owner of any bond, bill, note, draft, check, or other evidence of indebtedness which has been lost or destroyed may establish a duplicate of the same in a summary manner by filing a petition with the judge of the probate court of the county of the residence of the alleged debtor or maker, if he or she is a resident of this state; and the judge of the probate court shall be deemed a judicial officer for the purpose of this Code section. The petition shall be sworn to by the party applying and shall contain as full and accurate a description as possible of the lost paper, of the loss and mode of loss, and of the inability to find the same and why, along with a prayer for the establishment of a duplicate setting forth the duplicate desired to be established.

(b) Upon the filing of a petition, the judge shall issue a citation or notice to the alleged debtor or maker requiring the debtor or maker to appear at a day not more than ten days distant and show cause, if he or she has any, why the duplicate should not be established in lieu of the lost original. The citation or notice shall be personally served in the manner provided in Code Section 9-11-4 at least five days before the time of the hearing.

(c) If no successful defense is made at the time and place appointed, the judge shall proceed to establish, by an order entered on the petition,

the duplicate so prayed to be established, which shall have all the effect of the original. The petition, notice, and order shall be entered in a book of record specially prepared for this purpose.

(d) If the debtor or maker files a defense under oath to the effect that the original never existed as claimed, the judge shall decide the case, after giving the parties time for preparation and hearing, not to exceed 20 days. If the judge's decision is in favor of the applicant and no appeal is entered as provided in subsection (e) of this Code section, the decision shall be entered on the petition, and the duplicate so established shall have the same effect as an original. If the judge's decision is in favor of the alleged debtor or maker, the judge shall also enter his or her decision on the petition. In all cases, the proceedings shall be recorded as provided in subsection (c) of this Code section.

(e) Except as provided in Article 6 of Chapter 9 of Title 15, if either party to the proceedings provided for in this Code section is dissatisfied, such party may appeal upon giving the usual bond and security for costs, as in cases of appeal from the probate court to the superior court. The appeal shall be tried in the superior court from all the pleadings and proceedings as were before the judge of the probate court. In the superior court, the case shall be tried and determined as provided in Code Sections 24-11-23 through 24-11-26.

(f) This Code section shall not apply to evidences of indebtedness to which Title 11, the "Uniform Commercial Code," is applicable. (Code 1981, § 24-11-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Maintenance of action on lost or destroyed instrument governed by T. 11, the "Uniform Commercial Code," § 11-3-804.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Lost and Destroyed Instruments, § 7.

C.J.S. — 54 C.J.S., Lost Instruments, § 8 et seq.

ALR. — Constitutionality, construction, and effect of statutes in relation to issuance by public body of duplicates of mutilated, lost, or destroyed bonds or warrants, 39 ALR 1246; 63 ALR 388.

24-11-22. Summary establishment of lost or destroyed evidence of indebtedness in probate court — Service of nonresidents; effect.

When the person alleged to be a debtor or maker of a lost or destroyed paper as set forth in Code Section 24-11-21 does not reside in this state, the alleged debtor or maker may be made a party to the proceedings by publication, in a newspaper to be designated by the judge of the probate court, twice a month for two months. When the person has been made

a party, this article shall apply in his or her case. (Code 1981, § 24-11-22, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Lost and Destroyed Instruments, §§ 18, 23.

24-11-23. Establishment of lost or destroyed paper in superior court — Petition and affidavit; issuance and service of rule nisi.

(a) The owner of a lost or destroyed paper which is not an office paper, as defined in Code Section 24-11-20, who desires to establish such paper shall present to the clerk of the superior court of the county where the maker of the paper resides, if the maker is a resident of this state, a petition in writing, together with a duplicate, in substance, of the paper lost or destroyed, as nearly as he or she can recollect, which duplicate shall be sworn to by the petitioner, the petitioner's agent, or the petitioner's attorney.

(b) The clerk shall issue a rule nisi in the name of the judge of the superior court calling upon the opposite party to show cause, if he or she has any, why the duplicate sworn to should not be established in lieu of the lost or destroyed original. If the respondent is found in this state, the rule nisi shall be served personally upon the respondent in the manner provided by Code Section 9-11-4 at least 20 days before the sitting of the court to which the rule nisi is made returnable. If the respondent cannot be found in this state, the rule nisi shall be served upon the respondent by publication in the manner provided in Code Section 9-11-4 before the final hearing of the rule nisi. (Code 1981, § 24-11-23, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Filing of foreign judgments, § 9-12-132.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Code 1873, § 3982, Civil Code 1895, §§ 4751, 4754, former Civil Code 1910, §§ 5314 to 5320, and Ga. L. 1855-56, p. 238, §§ 1, 2, former Code 1933, § 63-203, and former O.C.G.A. § 24-8-24 are included in the annotations for this Code section.

Effect of establishment. — When once established, the copy was original evidence and is admissible as such in any controversy where the original would be admissible. Leggett v. Patterson, 114 Ga. 714, 40 S.E. 736 (1902) (decided under former Civil Code 1895, §§ 4751, 4754).

Remedy cumulative. — An established copy may thereafter have afforded a basis for an action at law. This procedure, however, was merely cumulative, and not exclusive of the right of the owner or holder of a lost paper to sue upon a copy of the paper, and prove the existence of the lost original if it was disputed. Continen-

tal Fertilizer Co. v. Pass, 7 Ga. App. 721, 67 S.E. 1052 (1910) (decided under former Civil Code 1895, §§ 4751, 4754).

Petition. — It was not necessary (though it was the better practice) for the petition to allege the loss; and if the loss is proved, the plaintiff may have recovered upon sufficient evidence of the contents. Trice v. Adams, 33 Ga. App. 257, 125 S.E. 878 (1924) (decided under former Civil Code 1910, §§ 5314-5320).

Allegation of jurisdiction. — Petition must have alleged that the defendants, or one of the defendants, resided in the county in which the application was made, in order to give that court jurisdiction. Cobb v. Cobb, 10 Ga. 445 (1851) (decided under former law).

Copy attached to petition. — Something must have been presented in the petition, or annexed to the petition, which was claimed to be a copy in substance of the lost volume or document. Ex parte Calhoun, 87 Ga. 359, 13 S.E. 694 (1891) (decided under former law).

Copy of entire instrument. — Copy required by the former section must have been a copy of the entire instrument. Jefferson v. Bowers, 33 Ga. 452 (1863) (decided under former law).

Personal service. — Notice of a proceeding to establish a lost or destroyed paper must have been served personally on the party, if to be found within the state; and if a party residing out of the county was served by leaving a copy at the party's residence, the proceeding was void. Bond v. Whitfield, 28 Ga. 537 (1859) (decided under former law).

Proper parties. — Law did not contain any provision as to who were proper parties to a suit for the establishment of lost papers. Bogle & Fields v. Maddox, 27 Ga. 472 (1859) (decided under former law).

Need not be party. — Procedure need not have been by a party but may be by any one who best knows the facts. Banks v. Dixon, 24 Ga. 483 (1858) (decided under former law).

Representative of deceased as party. — Legal representatives of deceased makers of a note need not have been made parties. Jefferson v. Bowers, 33 Ga. 452 (1863) (decided under former law).

Acceptor of draft as party. — If the proceeding be against the drawer of a draft, the acceptors should have been made parties. Bond v. Whitfield, 28 Ga. 537 (1859) (decided under former law).

Standing of heir. — An heir at law of the grantee in an unrecorded deed conveying land had such an interest in the land as would authorize the heir to maintain an action to establish a copy of the deed after the deed had been lost. Orr v. Dunn, 145 Ga. 137, 88 S.E. 669 (1916) (decided under former Civil Code 1910, §§ 5314-5320).

Res judicata. — Judgment establishing a copy of an alleged lost original constitutes a conclusive determination that a genuine original had in fact existed and was binding upon the parties in that proceeding and upon heirs at law of the alleged deceased grantor since the grantor's administrator was a party defendant therein. Milner v. Allgood, 184 Ga. 288, 191 S.E. 132 (1937) (decided under former Code 1933, § 63-203).

Effect of decree. — When in a suit to establish a copy of a lost deed the jury found in favor of the plaintiff's contention as to the character of the deed, and upon such verdict the judge entered a decree that the plaintiff recover the land described, that fee-simple title be vested in the plaintiff, and that the deed attached to the petition be established as prayed, the only effect of the decree was to establish the deed as prayed by the plaintiff, the provisions therein as to recovery of land and decree of title being surplusage. Loftin v. Carroll County Bd. of Educ., 195 Ga. 689, 25 S.E.2d 293 (1943) (decided under former Code 1933, § 63-203).

Equitable jurisdiction. — When a petition in equity was consolidated with the petition at law in the same court for the establishment of the lost bond, the fact that law and equity had a concurrent jurisdiction in the establishment of lost instruments would not have defeated the equitable jurisdiction of the court or precluded the court from granting all necessary and proper relief to each of the parties. Bainbridge Farm Co. v. Bower, 194 Ga. 304, 21 S.E.2d 224 (1942) (decided under former Code 1933, § 63-203).

Appellate jurisdiction. — When a petition in a superior court to establish a

copy of a deed claimed to have been lost alleged only that the debtor resided in the county in which the suit was filed, that the debtor had executed to the plaintiff a certain deed, a true copy of which was attached to the petition, and that the deed had been lost, and in which petition the only prayer was that "the clerk of this court issue a rule nisi calling upon (the defendant) to show cause, if any he has, why the copy deed aforesaid should not be established in lieu of said lost original," such petition was a mere statutory proceeding to establish a copy of the deed claimed to have been lost, and was not a suit in equity such as to grant appellate jurisdiction in the Supreme Court. Loftin v. Carroll County Bd. of Educ., 195 Ga. 689, 25 S.E.2d 293 (1943) (decided under former Code 1933, § 63-203).

Establishment as bar to defense on note. — Establishment of a lost note was no bar to any defense that might be set up to the original note. Jenkins v. Forbes, 121 Ga. 383, 49 S.E. 284 (1904) (decided under former Civil Code 1895, §§ 4751, 4754).

Schedule and plot in homestead. — After the plot and schedule had been approved by the ordinary (now judge of the probate court) and have been recorded those documents were private papers and may be established. Paschal v. Turner, 116 Ga. 736, 42 S.E. 1010 (1902) (decided under former Civil Code 1895, §§ 4751, 4754); Paschal v. Hutchinson, 119 Ga. 243, 46 S.E. 103 (1903) (decided under former Civil Code 1895, §§ 4751, 4754).

Lost wills. — Superior courts of this state had no jurisdiction to establish copies of lost wills. Perkins v. Perkins, 21 Ga. 13 (1857) (decided under Ga. L. 1855-56, p. 238, §§ 1, 2); Ponce v. Underwood, 55 Ga. 601 (1876) (decided under former Code 1873, 3982).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 17 Am. Jur. Pleading and Practice Forms, Lost and Destroyed Instruments, § 6.

24-11-24. Establishment of lost or destroyed paper in superior court — When continuance granted.

In a proceeding to establish lost papers under Code Section 24-11-23, no continuance shall be granted unless it appears reasonable and just to the court; nor shall a continuance be allowed to the same party more than once, except for providential cause. (Code 1981, § 24-11-24, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-11-25. Establishment of lost or destroyed paper.

When a rule nisi has been served as provided in Code Section 24-11-23, the court shall grant a rule absolute establishing the duplicate of the lost or destroyed paper sworn to, unless good and sufficient cause is shown why the rule absolute should not be granted. (Code 1981, § 24-11-25, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5316 are included in the annotations for this Code section.

Judgment conclusive. — Judgment

establishing a copy of a deed was conclusive, and evidence of nondelivery of the original was excluded. Graham v. Graham, 137 Ga. 668, 74 S.E. 426 (1912) (decided under former Civil Code 1910, § 5316).

24-11-26. Establishment of lost or destroyed paper — Furnishing of certified endorsement of copy.

When the duplicate of the lost or destroyed paper is established, the clerk of the court in which it is done shall furnish the duplicate to the party who had it established, with a certified endorsement thereon of the day and term of the court when the rule absolute was granted, provided all costs of the proceeding have been paid. (Code 1981, § 24-11-26, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-11-27. Procedure as to action on lost or destroyed note, bill, bond, or other instrument.

(a) If the paper which has been lost or destroyed is a note, bill, bond, or other instrument upon which a proceeding may be brought, the owner may institute a proceeding thereon as soon as the rule nisi has been issued as provided for in Code Section 24-11-23. The complaint shall set forth that the paper upon which the proceeding is based is lost or destroyed. In no case shall a judgment be entered in the proceeding until it is determined whether the application to establish the paper is granted or not. If the application is granted, then judgment shall be entered as in other proceedings.

(b) In a proceeding as provided for in subsection (a) of this Code section, production of the paper upon which the proceeding is based shall not be demanded until the time for rendition of judgment in the proceeding; at that time, if the plaintiff produces a duplicate of the paper with a certified endorsement thereon by the clerk of the court in which it was established, as provided in Code Section 24-11-26, it shall be taken and considered as the original.

(c) This Code section shall not apply to instruments to which Title 11, the "Uniform Commercial Code," is applicable. (Code 1981, § 24-11-27, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Maintenance of action on lost or destroyed instrument governed by T. 11, the "Uniform Commercial Code," § 11-3-804.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Civil Code 1895, §§ 4750, 4751 and 4754, former Code 1868, §§ 3910, 3911, former Civil Code 1910, §§ 5319, 5320, former Code 1933, § 63-207, and former O.C.G.A. § 24-8-28 are included in the annotations for this Code section.

Parol evidence. — It was, on the trial of an action upon a promissory note, after

showing the loss or destruction thereof, competent to prove by parol that a paper attached as an exhibit to the plaintiff's declaration was a true and correct copy of the lost original. Haug v. Riley, 101 Ga. 372, 29 S.E. 44, 40 L.R.A. 244 (1897) (decided under former Civil Code 1895, § 4750).

Admission of copy. — In answer to a plea of non est factum it was only necessary for the plaintiff to make out a prima facie case to authorize the admission in evidence of the paper alleged to be a substantial copy of the original note. Brown v. Wilson, 55 Ga. App. 262, 189 S.E. 860 (1937) (decided under former Code 1933, § 63-207).

Finding original pending suit. — When proceedings were instituted to establish a lost note, and suit was commenced after the rule nisi has issued and, pending the cause, the original note was found, it was not error to allow plaintiff to amend plaintiff's declaration so as to sue upon the original note thus found, even though there may be some immaterial discrepancies between the original note and the copy which it was sought to establish. Cheney v. Dalton, 46 Ga. 401 (1872) (decided under former Code 1868, §§ 3910, 3911).

Judgment on note. — Suit on a lost note was as effectual as a suit upon an established copy if the only purpose of establishing the copy was to obtain judgment upon the note, and fact that there was a plea of non est factum made no difference; and a suit upon an established copy of a note was as effectual as a suit upon the original. Brown v. Wilson, 55 Ga. App. 262, 189 S.E. 860 (1937) (decided under former Code 1933, § 63-207).

Prior payment on note. — In an action upon an established copy of a lost promissory note, payment made prior to the judgment establishing the copy may have been pleaded. Jenkins v. Forbes, 121 Ga. 383, 49 S.E. 284 (1904) (decided under former Civil Code 1895, §§ 4751, 4754).

Owner of a lost negotiable promissory note no longer has the option of "establishing" the note. The owner must have brought suit directly on the lost note itself pursuant to O.C.G.A. § 11-3-804. Ballard v. Frey, 179 Ga. App. 455, 346 S.E.2d 893 (1986) (decided under former law).

Dismissal of action. — Although the petition in an action on a lost note might have been subject to a timely demurrer (now motion to dismiss), still the action could not properly be dismissed on oral motion. Witherington v. Ware, 17 Ga. App. 433, 87 S.E. 603 (1916) (decided under former Civil Code 1910, §§ 5319, 5320).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Lost and Destroyed Instruments, §§ 25, 34, 38.

C.J.S. — 54 C.J.S., Lost Instruments, § 20 et seq.

24-11-28. Joinder of additional party defendants in proceedings to establish lost or destroyed papers.

In all proceedings for the purpose of establishing any lost or destroyed paper other than an office paper, as defined in Code Section 24-11-20, any person whose interest will be affected by the establishment of the lost paper shall, upon motion, by order of the court, be made a party respondent in the proceeding and shall be allowed all the rights of defense against the establishment of the paper as fully as if he or she was the maker of the lost paper. (Code 1981, § 24-11-28, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Lost and Destroyed Instruments, § 9.

C.J.S. — 54 C.J.S., Lost Instruments, § 11 et seq.

24-11-29. Applicability of article.

Other than Code Section 24-11-20, this article shall not apply to lost or destroyed papers to which Title 11, the "Uniform Commercial Code," is applicable. (Code 1981, § 24-11-29, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

CHAPTER 12

MEDICAL AND OTHER CONFIDENTIAL INFORMATION

Article 1

Release of Medical Information and Confidentiality of Raw Research Data

Sec.

24-12-1. When medical information may be released by physician, hospital, health care facility, or pharmacist; immunity from liability; waiver of privilege; psychiatrists and hospitals excepted.
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Article 2

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24-12-11. Disclosure of medical records — Effect on confidential or privileged character thereof.
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Article 4

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24-12-30. Confidential nature of certain library records.
24-12-31. Confidential nature of veterinarian records.

Cross references. — Power of Department of Community Health to require reporting of certain diseases and injuries, § 31-12-2. Disclosure of medical records and other medical information pertaining to the mentally ill, the mentally retarded, alcoholics, and others, §§ 37-3-166, 37-4-125, 37-7-166. Privilege of state officers and employees to refuse to disclose identity of persons furnishing information pursuant to medical or public health investigation by Department of Community Health, § 50-18-72.

Law reviews. — For article, "Criminal Law," see 53 Mercer L. Rev. 209 (2001). For article, "The Medical Records Custodian's Perspective," see 6 Ga. St. B.J. 8 (2001). For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Medical Malpractice — Use of Hospital Records, 22 POF2d 1.

Qualification of Medical Expert Witness, 33 POF2d 179.

Foundation for Admissibility of Hospital Records and X-Rays, 38 POF2d 145.

Qualification of Chiropractor as Expert Witness, 45 POF2d 137.

Protected Communication Between Physician and Patient, 45 POF2d 595.

Foundation for Admission of Thermogram, 46 POF2d 275.

Admissibility and Reliability of Electrocardiogram, 4 POF3d 73.

Use of CAT Scans in Litigation, 8 POF3d 145.

Proof of Paralysis, 67 POF3d 1.

Sexual Organ Injuries: Male Genitalia, 70 POF3d 229.

Traumatic Brain Injuries, 72 POF3d 363.

ARTICLE 1

RELEASE OF MEDICAL INFORMATION AND CONFIDENTIALITY OF RAW RESEARCH DATA

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-12-1. When medical information may be released by physician, hospital, health care facility, or pharmacist; immunity from liability; waiver of privilege; psychiatrists and hospitals excepted.

(a) No physician licensed under Chapter 34 of Title 43 and no hospital or health care facility, including those operated by an agency or bureau of this state or other governmental unit, shall be required to release any medical information concerning a patient except to the Department of Public Health, its divisions, agents, or successors when required in the administration of public health programs pursuant to Code Section 31-12-2 and where authorized or required by law, statute, or lawful regulation; or on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or on appropriate court order or subpoena; provided, however, that any physician, hospital, or health care facility releasing information under written authorization or other waiver by the patient, or by his or her parents or guardian ad litem in the case of a minor, or pursuant to law, statute, or lawful regulation, or under court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any judicial proceeding. This Code section shall not apply to psychiatrists or to hospitals in which the patient is being or has been treated solely for mental illness.

(b) No pharmacist licensed under Chapter 4 of Title 26 shall be required to release any medical information concerning a patient except on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena; provided, however, that any pharmacist releasing information under written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that

the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any judicial proceeding. (Code 1981, § 24-12-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 141, § 24/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, substituted "Department of Public Health" for "Department of Community Health" in the first sentence of subsection (a).

Cross references. — Physical examination of state employees, T. 4, C. 2, A. 3.

Administrative rules and regulations. — Release of Confidential Prescription Drug Order Information, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia State Board of Pharmacy, Miscellaneous Guidelines for Pharmacists, Rule 480-16-.07.

Law reviews. — For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For article, "Controlling Conflicts of Interest in the Doctor-Patient Relationship: Lessons from Moore v. Regents of the University of California," see 42 Mercer L. Rev. 989 (1991). For survey article on criminal law and procedure for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003). For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For note, "The Final Patient Privacy Regulations Under the Health Insurance Portability and Accountability Act — Promoting Patient Privacy or Public Confusion?," see 37 Ga. L. Rev. 723 (2003).

For comment, "The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved," see 34 Emory L.J. 777 (1985).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-418 and former O.C.G.A. § 24-9-40 are included in the annotations for this Code section.

Federal law preempts state law. — Regulations enacted under 42 U.S.C. § 1320d-2(d)(2)(A) of the Health Insurance Portability and Accountability Act (HIPAA) preempted former O.C.G.A. § 24-9-40(a) with regard to ex parte communications between defense counsel and a plaintiff's prior treating physicians because HIPAA afforded patients more control over their medical records than former § 24-9-40(a) when it came to informal contacts between litigants and physicians. Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68 (2008) (decided under former O.C.G.A. § 24-9-40).

Fact of employment is not within the physician-patient privilege. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844 (1969) (decided under former Code 1933, § 38-418).

Employee and company-appointed physician. — No physician-patient relationship existed between an employee and a company-appointed physician retained to give the employee a return to work physical. Payne v. Sherrer, 217 Ga. App. 761, 458 S.E.2d 916 (1995) (decided under former O.C.G.A. § 24-9-40).

Ex parte communications not required. — Denial of the defendants' motion for a qualified protection order in a medical malpractice and wrongful death action was not erroneous because the defendants failed to support the defendants' assertions that ex parte interviews were necessary to obtain affidavits or medical narratives from the healthcare providers or to protect the providers' work product or why the providers needed to meet with the provider ex parte to "prepare" the providers for trial testimony, as the providers were not parties, were not the defendants' expert witnesses, were not agents or employees of the defendants, were in a confidential patient-physician relationship with the decedent, and had an ongoing fiduciary duty to the decedent to protect that confidential information. Tender Loving Health Care Servs. of Ga., LLC v. Ehrlich, 318 Ga. App. 560, 734

S.E.2d 276 (2012) (decided under former O.C.G.A. § 24-9-40).

Employment agreement regarding confidential medical issues. — Medical director's agreement to abide by policies of contract employer in order to obtain patient privileges at its hospital constituted a waiver under former O.C.G.A. § 24-9-40 of an action for the contract employer's alleged failure to keep the medical director's test result records showing the medical director had tested positive for an infectious disease confidential as the agreement permitted authorized hospital representatives and staff to provide and act upon information bearing on the medical director's professional ability and qualifications, and the medical director agreed to waive all legal claims related to such disclosure. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002) (decided under former O.C.G.A. § 24-9-40).

Applicability of physician shield law to physicians generally and to psychiatrists. — Former O.C.G.A. § 24-9-40 read with former O.C.G.A. § 24-9-21(5) (see now O.C.G.A. § 24-5-501) reflected that the physician shield law applied to physicians generally but required physicians to release information upon proper order, whereas the confidentiality of communications to psychiatrists is protected by public policy and such communications were expressly excepted from the shield statute. Gilmore v. State, 175 Ga. App. 376, 333 S.E.2d 210 (1985) (decided under former O.C.G.A. § 24-9-40).

Protective order under HIPAA. — Trial court did not err in granting a hospital's motion for a qualified protective order under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to conduct ex parte interviews with a patient's health care providers because the hospital complied with 45 C.F.R. § 164.512(e)(1)(ii)(B), and any ex parte interviews conducted pursuant to the qualified protective order would be permitted under the HIPAA; because the order prohibited the use or disclosure of the patient's health information for purposes other than the litigation and required the return or destruction thereof at the conclusion of proceedings, it constituted a qualified protective order as defined in § 164.512(e)(1)(v). Baker v. Wellstar Health Sys., 288 Ga. 336, 703 S.E.2d 601 (2010) (decided under former O.C.G.A. § 24-9-40).

In issuing orders authorizing ex parte interviews, trial courts should have stated with particularity: (1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview was at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview was voluntary; in addition, when issuing or modifying such orders, trial courts should have considered whether the circumstances, including any evidence indicating that ex parte interviews have or were expected to stray beyond their proper bounds, warranted requiring defense counsel to provide the patient-plaintiff with prior notice of, and the opportunity to appear at, scheduled interviews or, alternatively, required the transcription of the interview by a court reporter at the patient-plaintiff's request because the use of carefully crafted orders specifying precise parameters within which ex parte interviews may have been conducted would have served to enforce the privacy protections afforded under state law and advance the purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) while at the same time preserved a mode of informal discovery that may have been helpful in streamlining litigation in Georgia. Baker v. Wellstar Health Sys., 288 Ga. 336, 703 S.E.2d 601 (2010) (decided under former O.C.G.A. § 24-9-40).

Transmittal of records to health care professional performing subsequent treatment. — Psychologist who performed the neuropsychological testing and evaluation did not violate the patient's policy rights either by transmitting the records in question to the health care professional who took over the patient's treatment or by discussing the case with

that professional. Jarallah v. Schwartz, 202 Ga. App. 32, 413 S.E.2d 210 (1991), cert. denied, 202 Ga. App. 906, 413 S.E.2d 210 (1992) (decided under former O.C.G.A. § 24-9-40).

Subpoena of personal medical records. — In the absence of waiver and without notice to the accused or an opportunity to object, it was not "appropriate" under former O.C.G.A. § 24-9-40 for the state in a criminal case to subpoena a defendant's own personal medical records which were then in the possession of a physician, hospital, or health care facility. King v. State, 272 Ga. 788, 535 S.E.2d 492 (2000) (decided under former O.C.G.A. § 24-9-40).

Unlike the Fourth Amendment, which required that the state have probable cause prior to the seizure of an accused or an accused's property, former O.C.G.A. § 24-9-40(a) did not contain any express limits on the use of a subpoena to obtain a defendant's medical records for possible introduction as evidence in a criminal proceeding; therefore, defendant was not entitled to notice of a search warrant and an opportunity to object prior to the state's receipt of defendant's private medical records. King v. State, 276 Ga. 126, 577 S.E.2d 764 (2003) (decided under former O.C.G.A. § 24-9-40).

Health information contained in the defendant's hospital records was subject to disclosure under former O.C.G.A. § 24-9-40(a) after the district attorney's office obtained a search warrant, which was narrowly drafted to seek only the records related to the defendant's treatment on the night of a crime. Bowling v. State, 289 Ga. 881, 717 S.E.2d 190 (2011) (decided under former O.C.G.A. § 24-9-40).

Psychiatrist-patient communications absolutely privileged. — Legislature has clearly expressed legislature's intent that, as a matter of public policy, psychiatrist-patient communications were to be privileged and were to remain privileged even though the patient's "care and treatment or the nature and extent of his injuries [have been put] at issue in any civil or criminal proceeding," such that communications between a deceased patient and the psychiatrist did not lose their privileged character and were not discoverable merely because they were the most objective evidence of the relevant issue of the decedent's mental state. Dynin v. Hall, 207 Ga. App. 337, 428 S.E.2d 89 (1993) (decided under former O.C.G.A. § 24-9-40).

Criminal defense attorney who subpoened records from a psychiatric hospital was entitled to rely on the presumption that the records the attorney received from the hospital were either non-privileged or that the hospital first obtained a waiver from the patient. Karpowicz v. Hyles, 247 Ga. App. 292, 543 S.E.2d 51 (2000) (decided under former O.C.G.A. § 24-9-40).

Dentist was not immune from liability under former O.C.G.A. § 24-9-40; however, if the defendant complied in good faith with a production request, or if the defendant had been compelled to comply by a court, the defendant was shielded from liability for the disclosure under former O.C.G.A. § 24-9-44 (see now O.C.G.A. § 24-12-13). McFarlin v. Taylor, 187 Ga. App. 54, 369 S.E.2d 330 (1988) (decided under former O.C.G.A. § 24-9-40).

Trial court did not err in admitting testimony of a family practice physician from whom the defendant sought psychiatric referral two days after an alleged rape and who also consulted with the victim and attempted an examination of her pelvic area. Barnes v. State, 171 Ga. App. 478, 320 S.E.2d 597 (1984) (decided under former O.C.G.A. § 24-9-40).

Past recollections within medical record inadmissible. — If the original of the medical record itself was admissible but diagnostic opinions and conclusions therein were inadmissible, past recollection recorded by a doctor of a patient's medical history contained in a medical record, which included a diagnostic opinion of another doctor, would have been inadmissible. Stoneridge Properties, Inc. v. Kuper, 178 Ga. App. 409, 343 S.E.2d 424 (1986) (decided under former O.C.G.A. § 24-9-40).

Filing of action as waiver. — Once plaintiff filed action questioning the nature and quality of medical treatment rendered to plaintiff's child, the plaintiff

waived the child's qualified right to privacy implicit in the Hippocratic oath, and doctor having source of information pertaining to that action was authorized to release information pertaining thereto and was immune from liability to the patient or any other person for release of that information. Orr v. Sievert, 162 Ga. App. 677, 292 S.E.2d 548 (1982) (decided under former O.C.G.A. § 24-9-40).

Fact that plaintiff was seeking to recover damages for injuries of a mental and emotional nature would not constitute a waiver of the privilege to exclude testimony of a psychiatrist. Wilson v. Bonner, 166 Ga. App. 9, 303 S.E.2d 134 (1983) (decided under former O.C.G.A. § 24-9-40).

Communications to coordinate care. — Trial court properly directed a verdict in favor of the defendant, a psychiatrist, with regard to the plaintiff's invasion of privacy complaint, which asserted that the defendant's letters to the other treating physicians of the plaintiff violated the plaintiff's right to privacy because the evidence established that the information in the three letters disclosed to the plaintiff's other treating physicians was disclosed in an attempt to coordinate care; the sharing of the information did not amount to a public disclosure and there was no evidence that the other treating physicians shared the information with anyone else. Haughton v. Canning, 287 Ga. App. 28, 650 S.E.2d 718 (2007), cert. denied, No. S07C1869, 2008 Ga. LEXIS 157 (Ga. 2008) (decided under former O.C.G.A. § 24-9-40).

Names and addresses of stop-smoking clinic patients not privileged information. — When the trial court ordered the defendant stop smoking clinic to produce the names and addresses of all persons who received the clinic's stop smoking treatment, the trial court was authorized to order disclosure of any relevant, nonprivileged information, and as the information sought by plaintiffs was not privileged there was no reversible error in the trial court's decision. National Stop Smoking Clinic-Atlanta, Inc. v. Dean, 190 Ga. App. 289, 378 S.E.2d 901 (1989) (decided under former O.C.G.A. § 24-9-40).

Whether defendant had AIDS placed "at issue." — Defendant, who was charged with aggravated assault with intent to murder after biting a police officer, placed "at issue" the issue of AIDS by defendant's conduct in committing an act which was inextricably linked to the question of defendant having AIDS. Scroggins v. State, 198 Ga. App. 29, 401 S.E.2d 13 (1990), cert. denied, 198 Ga. App. 898, 401 S.E.2d 13 (1991) (decided under former O.C.G.A. § 24-9-40).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 416.

C.J.S. — 98 C.J.S. (Rev), Witnesses, § 411 et seq.

ALR. — Waiver by beneficiary or personal representative, in actions on insurance policy, of privilege of communications to physician, 15 ALR 1544.

Evidence: privilege as to family matters or affairs incidentally learned by physician while professionally attending patient, 24 ALR 1202.

Evidence: privilege as to facts learned on autopsy or post-mortem examination, 58 ALR 1134.

Classes of persons within term "physician" in rule as to privileged communications, 68 ALR 176.

Privilege in respect of testimony of physician or surgeon that he noticed odor of liquor on patient's breath or other indications of recent use of liquor, 79 ALR 1131.

Presence of third person as affecting privileged character of communications between patient and physician, 96 ALR 1419.

Voluntary disclosure at trial of one's physical condition at certain time as waiver of privilege as regards testimony by physician as to condition at earlier time, 98 ALR 1284.

Physician-patient privilege as affected by contention that purpose was examination and not treatment, 107 ALR 1495.

When testimony by patient deemed to waive physician-patient privilege, 114 ALR 798.

Physician-patient, attorney-client, or

priest-penitent privilege as applicable in nonjudicial proceeding or investigation, 133 ALR 732.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician, 25 ALR2d 1429.

Evidence: privilege of communications by or to nurse or attendant, 47 ALR2d 742.

Admissibility in civil action of electroencephalogram, electrocardiogram, or other record made by instrument used in medical test, or of report based upon such test, 66 ALR2d 536.

Who may waive privilege of confidential communication to physician by person since deceased, 97 ALR2d 393.

Physician-patient privilege: testimony as to communications or observations as to mental condition of patient treated for other condition, 100 ALR2d 648.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.

Applicability in criminal proceedings of privilege as to communications between physician and patient, 7 ALR3d 1458.

Commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings, 21 ALR3d 912.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 ALR3d 1401.

Physician-patient privilege as applied to physicians testimony concerning wound required to be reported to public authority, 85 ALR3d 1196.

Evidence of automobile passenger's blood-alcohol level as admissible in support of defense that passenger was contributorily negligent or assumed risk of automobile accident, 5 ALR4th 1194.

Physician-patient privilege as extending to patient's medical or hospital records, 10 ALR4th 552.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 ALR4th 395.

Physician's tort liability for unauthorized disclosure of confidential information about patient, 48 ALR4th 668.

State statutes or regulations expressly governing disclosure of fact that person has tested positive for human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS), 12 ALR5th 149.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 ALR5th 628.

Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 ALR5th 591.

24-12-2. Confidentiality of raw research data.

(a) The General Assembly finds and declares that protecting the confidentiality of research data from disclosure in judicial and administrative proceedings is essential to safeguarding the integrity of research in this state, guaranteeing the privacy of individuals who participate in research projects, and ensuring the continuation of research in science, medicine, and other fields that benefits the citizens and institutions of Georgia and other states. The protection of such research data has more than local significance, is of equal importance to all citizens of this state, is of state-wide concern, and consequently is properly a matter for regulation under the police power of this state.

(b) As used in this Code section, the term "confidential raw research data" means medical information, interview responses, reports, state-

ments, memoranda, or other data relating to the condition, treatment, or characteristics of any person which are gathered by or provided to a researcher:

(1) In support of a research study approved by an appropriate research oversight committee of a hospital, health care facility, or educational institution; and

(2) With the objective to develop, study, or report aggregate or anonymous information not intended to be used in any way in which the identity of an individual is material to the results.

The term shall not include published compilations of the raw research data created by the researcher or the researcher's published summaries, findings, analyses, or conclusions related to the research study.

(c) Confidential raw research data in a researcher's possession shall not be subject to subpoena, otherwise discoverable, or deemed admissible as evidence in any judicial or administrative proceeding in any court except as otherwise provided in subsection (d) of this Code section.

(d) Confidential raw research data may be released, disclosed, subject to subpoena, otherwise discoverable, or deemed admissible as evidence in a judicial or administrative proceeding as follows:

(1) Confidential raw research data related to a person may be disclosed to that person or to another person on such person's behalf where the authority is otherwise specifically provided by law;

(2) Confidential raw research data related to a person may be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the research participant or where a designation is made in writing by a person authorized by law to act for the participant;

(3) Confidential raw research data related to a person may be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if such data are required by law or regulation to be reported to such agency or department;

(4) Confidential raw research data may be disclosed in any proceeding in which a party was a participant, researcher, or sponsor in the underlying research study, including, but not limited to, any judicial or administrative proceeding in which a research participant places his or her care, treatment, injuries, insurance coverage, or benefit plan coverage at issue; provided, however, that the identity of any research participant other than the party to the judicial or administrative proceeding shall not be disclosed, unless the researcher or sponsor is a defendant in such proceeding;

(5) Confidential raw research data may be disclosed in any judicial or administrative proceeding in which the researcher has either volunteered to testify or has been hired to testify as an expert by one of the parties to such proceeding; and

(6) In a criminal proceeding, the court shall order the production of confidential raw research data if the data are relevant to any issue in the proceeding, impose appropriate safeguards against unauthorized disclosure of the data, and admit confidential raw research data into evidence if the data are material to the defense or prosecution.

(e) Nothing in this Code section shall be construed to permit, require, or prohibit the disclosure of confidential raw research data in any setting other than a judicial or administrative proceeding that is governed by the requirements of this title.

(f) Any disclosure of confidential raw research data authorized or required by this Code section or any other law shall in no way destroy the confidential nature of that data except for the purpose for which the authorized or required disclosure is made. (Code 1981, § 24-12-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Use of confidential, classified, or restricted records for research, § 50-18-101.

ARTICLE 2

CONFIDENTIALITY OF MEDICAL INFORMATION

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-12-10. Definitions.

As used in this article, the term:

(1) "Confidential or privileged" means the protection afforded by law from unauthorized disclosure, whether the protection is afforded by law as developed and applied by the courts, by statute or lawful regulations, or by the requirements of the Constitutions of the State of Georgia or the United States. The term "confidential or privileged" also includes protection afforded by law from compulsory process or testimony.

(2) "Disclosure" means the act of transmitting or communicating medical matter to a person who would not otherwise have access thereto.

(3) "Health care facility" means any institution or place in which health care is rendered to persons, which health care includes, but is

not limited to, medical, psychiatric, acute, intermediate, rehabilitative, and long-term care.

(4) "Laws requiring disclosure" means laws and statutes of the State of Georgia and of the United States and lawful regulations issued by any department or agency of the State of Georgia or of the United States which require the review, analysis, or use of medical matter by persons not originally having authorized access thereto. The term "laws requiring disclosure" also includes any authorized practice of disclosure for purposes of evaluating claims for reimbursement for charges or expenses under any public or private reimbursement or insurance program.

(5) "Limited consent to disclosure" means proper authorization given by or on behalf of a person entitled to protection from disclosure of medical matter and given for a specific purpose related to such person's health or related to such person's application for insurance or like benefits.

(6) "Medical matter" means information respecting the medical or psychiatric condition, including without limitation the physical and the mental condition, of a natural person or persons, however recorded, obtained, or communicated.

(7) "Nurse" means a person authorized by license issued under Chapter 26 of Title 43 as a registered professional nurse or licensed practical nurse to practice nursing.

(8) "Physician" means any person lawfully licensed in this state to practice medicine and surgery pursuant to Chapter 34 of Title 43. (Code 1981, § 24-12-10, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

RESEARCH REFERENCES

ALR. — Admissibility of hospital chart or other hospital record, 120 ALR 1124.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician, 25 ALR2d 1429.

Admissibility of hospital record relating to physician's opinion as to whether patient is malingering or feigning injury, 55 ALR2d 1031.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 ALR4th 395.

Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 ALR5th 591.

24-12-11. Disclosure of medical records — Effect on confidential or privileged character thereof.

The disclosure of confidential or privileged medical matter constituting all or part of a record kept by a health care facility, a nurse, or a physician, pursuant to laws requiring disclosure or pursuant to limited consent to disclosure, shall not serve to destroy or in any way abridge the confidential or privileged character thereof, except for the purpose for which such disclosure is made. (Code 1981, § 24-12-11, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

RESEARCH REFERENCES

ALR. — Evidence: privilege as to facts learned on autopsy or post-mortem examination, 58 ALR 1134.

Admissibility of hospital chart or other hospital record, 120 ALR 1124.

Evidence: public health record as subject of privilege, 136 ALR 856.

Construction and effect of statute removing or modifying, in personal injury actions, patient's privilege against disclosure by physician, 25 ALR2d 1429.

Admissibility of hospital record relating to physician's opinion as to whether patient is malingering or feigning injury, 55 ALR2d 1031.

Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident, 89 ALR2d 1001.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.

Discovery, in medical malpractice action, of names of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 ALR5th 591.

24-12-12. Disclosure of medical records — Use of medical matter disclosed.

Persons to whom confidential or privileged medical matter is disclosed in the circumstances described in Code Section 24-12-11 shall utilize such matter only in connection with the purpose or purposes of such disclosure and thereafter shall keep such matter in confidence. However, nothing in this article shall prohibit the use of such matter where otherwise authorized by law. (Code 1981, § 24-12-12, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

RESEARCH REFERENCES

ALR. — Admissibility of hospital chart or other hospital record, 120 ALR 1124.

Evidence: public health record as subject of privilege, 136 ALR 856.

Admissibility of hospital record relating to physician's opinion as to whether patient is malingering or feigning injury, 55 ALR2d 1031.

Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident, 89 ALR2d 1001.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.

Discovery, in medical malpractice ac-

tion, of names of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 ALR5th 591.

24-12-13. Disclosure of medical records — Immunity from liability.

Any person, corporation, authority, or other legal entity acting in good faith shall be immune from liability for the transmission, receipt, or use of medical matter disclosed pursuant to laws requiring disclosure or pursuant to limited consent to disclosure. (Code 1981, § 24-12-13, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-44 are included in the annotations for this Code section.

Dentist not liable if good faith disclosure. — Dentist was not immune from liability under former O.C.G.A. § 24-9-40 (see now O.C.G.A. § 24-12-1). However, if the dentist complied in good faith with a production request, or if the dentist had been compelled to comply by a court, the dentist was shielded from liability for the disclosure under former O.C.G.A. § 24-9-44. McFarlin v. Taylor, 187 Ga. App. 54, 369 S.E.2d 330 (1988) (decided under former O.C.G.A. § 24-9-44).

RESEARCH REFERENCES

ALR. — Admissibility of hospital chart or other hospital record, 120 ALR 1124.

Evidence: public health record as subject of privilege, 136 ALR 856.

Waiver of privilege as regards one physician as a waiver as to other physicians, 5 ALR3d 1244.

24-12-14. Disclosure of medical records — Use for educational purposes not precluded.

Nothing in this article shall be construed to prevent the customary and usual audit, discussion, and presentation of cases in connection with medical and public education. (Code 1981, § 24-12-14, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

ARTICLE 3

AIDS INFORMATION

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-12-20. Confidential nature of AIDS information.

AIDS confidential information as defined in Code Section 31-22-9.1 and disclosed or discovered within the patient-physician relationship shall be confidential and shall not be disclosed except as otherwise provided in Code Section 24-12-21. (Code 1981, § 24-12-20, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-40.1 are included in the annotations for this Code section.

Use of pseudonyms. — When a patient filed suit solely alleging that the improper disclosure of HIV confidential information and the non-disclosure exception of former O.C.G.A. § 24-9-47(y) (see now O.C.G.A. § 24-12-21) did not apply, a trial court retained discretion to determine if the patient could prosecute a case under a pseudonym. Doe v. Hall, 260 Ga. App. 421, 579 S.E.2d 838 (2003) (decided under former O.C.G.A. § 24-9-40.1).

24-12-21. (For effective date, see note.) Disclosure of AIDS confidential information.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) Except as otherwise provided in this Code section:

(1) No person or legal entity which receives AIDS confidential information pursuant to this Code section or which is responsible for recording, reporting, or maintaining AIDS confidential information shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity; and

(2) No person or legal entity which receives AIDS confidential information which that person or legal entity knows was disclosed in violation of paragraph (1) of this subsection shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity.

(c) AIDS confidential information shall be disclosed to the person identified by that information or, if that person is a minor or incompetent person, to that person's parent or legal guardian.

(d) AIDS confidential information shall be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the person identified by that information or, if that person is a minor or incompetent person, by that person's parent or legal guardian.

(e) AIDS confidential information shall be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if that information is authorized or required by law to be reported to that agency or department.

(f) The results of an HIV test shall be disclosed to the person, or that person's designated representative, who ordered such tests of the body fluids or tissue of another person.

(g) When the patient of a physician has been determined to be infected with HIV and that patient's physician reasonably believes that the spouse or sexual partner or any child of the patient, spouse, or sexual partner is a person at risk of being infected with HIV by that patient, the physician may disclose to that spouse, sexual partner, or child that the patient has been determined to be infected with HIV, after first attempting to notify the patient that such disclosure is going to be made.

(h)(1) An administrator of an institution licensed as a hospital by the Department of Community Health or a physician having a patient who has been determined to be infected with HIV may disclose to the Department of Public Health:

(A) The name and address of that patient;

(B) That such patient has been determined to be infected with HIV; and

(C) The name and address of any other person whom the disclosing physician or administrator reasonably believes to be a person at risk of being infected with HIV by that patient.

(2) When mandatory and nonanonymous reporting of confirmed positive HIV tests to the Department of Public Health is determined by that department to be reasonably necessary, that department shall establish by regulation a date on and after which such reporting shall be required. On and after the date so established, each health care provider, health care facility, or any other person or legal entity which orders an HIV test for another person shall report to the Department of Public Health the name and address of any person

thereby determined to be infected with HIV. No such report shall be made regarding any confirmed positive HIV test provided at any anonymous HIV test site operated by or on behalf of the Department of Public Health.

(3) The Department of Public Health may disclose that a person has been reported, under paragraph (1) or (2) of this subsection, to have been determined to be infected with HIV to the board of health of the county in which that person resides or is located if reasonably necessary to protect the health and safety of that person or other persons who may have come in contact with the body fluids of the HIV infected person. The Department of Public Health or county board of health to which information is disclosed pursuant to this paragraph or paragraph (1) or (2) of this subsection:

(A) May contact any person named in such disclosure as having been determined to be an HIV infected person for the purpose of counseling that person and requesting therefrom the name of any other person who may be a person at risk of being infected with HIV by that HIV infected person;

(B) May contact any other person reasonably believed to be a person at risk of being infected with HIV by that HIV infected person for the purposes of disclosing that such infected person has been determined to be infected with HIV and counseling such person to submit to an HIV test; and

(C) Shall contact and provide counseling to the spouse of any HIV infected person whose name is thus disclosed if both persons are reasonably likely to have engaged in sexual intercourse or any other act determined by the Department of Public Health likely to have resulted in the transmission of HIV between such persons within the preceding seven years and if that spouse may be located and contacted without undue difficulty.

(i) Any health care provider authorized to order an HIV test may disclose AIDS confidential information regarding a patient thereof if that disclosure is made to a health care provider or health care facility which has provided, is providing, or will provide any health care service to that patient and as a result of such provision of service that health care provider or facility:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(j) A health care provider or any other person or legal entity authorized but not required to disclose AIDS confidential information pursuant to this Code section shall have no duty to make such disclosure and shall not be liable to the patient or any other person or legal entity for failing to make such disclosure. A health care provider or any other person or legal entity which discloses information as authorized or required by this Code section or as authorized or required by law or rules or regulations made pursuant thereto shall have no civil or criminal liability therefor.

(k) When any person or legal entity is authorized or required by this Code section or any other law to disclose AIDS confidential information to a person at risk of being infected with HIV and that person at risk is a minor or incompetent person, such disclosure may be made to any parent or legal guardian of the minor or incompetent person, to the minor or incompetent person, or to both the minor or incompetent person and any parent or legal guardian thereof.

(l) When an institutional care facility is the site at which a person is at risk of being infected with HIV and as a result of that risk a disclosure of AIDS confidential information to any person at risk at that site is authorized or required under this Code section or any other law, such disclosure may be made to the person at risk or to that institutional care facility's chief administrative or executive officer, or such officer's designee, in which case that officer or designee shall be authorized to make such disclosure to the person at risk.

(m) When a disclosure of AIDS confidential information is authorized or required by this Code section to be made to a physician, health care provider, or legal entity, that disclosure may be made to employees of that physician, health care provider, or legal entity who have been designated thereby to receive such information on behalf thereof. Those designated employees may thereafter disclose to and provide for the disclosure of that information among such other employees of that physician, health care provider, or legal entity, but such disclosures among those employees shall only be authorized when reasonably necessary in the ordinary course of business to carry out the purposes for which that disclosure is authorized or required to be made to that physician, health care provider, or legal entity.

(n) Any disclosure of AIDS confidential information authorized or required by this Code section or any other law and any unauthorized disclosure of such information shall in no way destroy the confidential nature of that information except for the purpose for which the authorized or required disclosure is made.

(o) Any person or legal entity which violates subsection (b) of this Code section shall be guilty of a misdemeanor.

(p) Nothing in this Code section or any other law shall be construed to authorize the disclosure of AIDS confidential information if that disclosure is prohibited by federal law, or regulations promulgated thereunder, nor shall anything in this Code section or any other law be construed to prohibit the disclosure of information which would be AIDS confidential information except that such information does not permit the identification of any person.

(q) (For effective date, see note.) A public safety agency or prosecuting attorney may obtain the results from an HIV test to which the person named in the request has submitted under Code Section 15-11-603, 17-10-15, 42-5-52.1, or 42-9-42.1, notwithstanding that the results may be contained in a sealed record.

(r) Any person or legal entity required by an order of a court to disclose AIDS confidential information in the custody or control of such person or legal entity shall disclose that information as required by that order.

(s) AIDS confidential information shall be disclosed as medical information pursuant to Code Section 24-12-1 or pursuant to any other law which authorizes or requires the disclosure of medical information if:

(1) The person identified by that information:

(A) Has consented in writing to that disclosure; or

(B) Has been notified of the request for disclosure of that information at least ten days prior to the time the disclosure is to be made and does not object to such disclosure prior to the time specified for that disclosure in that notice; or

(2) A superior court in an in camera hearing finds by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this paragraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal.

(t)(1) A superior court of this state may order a person or legal entity to disclose AIDS confidential information in its custody or control to:

(A) A prosecutor in connection with a prosecution for the alleged commission of reckless conduct under subsection (c) of Code Section 16-5-60;

(B) Any party in a civil proceeding; or

(C) A public safety agency or the Department of Public Health if that agency or department has an employee thereof who has, in the course of that employment, come in contact with the body fluids of the person identified by the AIDS confidential information sought in such a manner reasonably likely to cause that employee to become an HIV infected person and provided the disclosure is necessary for the health and safety of that employee,

and, for purposes of this subsection, the term "petitioner for disclosure" means any person or legal entity specified in subparagraph (A), (B), or (C) of this paragraph.

(2) An order may be issued against a person or legal entity responsible for recording, reporting, or maintaining AIDS confidential information to compel the disclosure of that information if the petitioner for disclosure demonstrates by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests.

(3) A petition seeking disclosure of AIDS confidential information under this subsection shall substitute a pseudonym for the true name of the person concerning whom the information is sought. The disclosure to the parties of that person's true name shall be communicated confidentially, in documents not filed with the court.

(4) Before granting any order under this subsection, the court shall provide the person concerning whom the information is sought with notice and a reasonable opportunity to participate in the proceedings if that person is not already a party.

(5) Court proceedings as to disclosure of AIDS confidential information under this subsection shall be conducted in camera unless the person concerning whom the information is sought agrees to a hearing in open court.

(6) Upon the issuance of an order that a person or legal entity be required to disclose AIDS confidential information regarding a person named in that order, that person or entity so ordered shall disclose to the ordering court any such information which is in the control or custody of that person or entity and which relates to the person named in the order for the court to make an in camera inspection thereof. If the court determines from that inspection that the person

named in the order is an HIV infected person, the court shall disclose to the petitioner for disclosure that determination and shall impose appropriate safeguards against unauthorized disclosure which shall specify the persons who may have access to the information, the purposes for which the information shall be used, and appropriate prohibitions on future disclosure.

(7) The record of the proceedings under this subsection shall be sealed by the court.

(8) An order may not be issued under this subsection against the Department of Public Health, any county board of health, or any anonymous HIV test site operated by or on behalf of that department.

(u) A health care provider, health care facility, or other person or legal entity who, in violation of this Code section, unintentionally discloses AIDS confidential information, notwithstanding the maintenance of procedures thereby which are reasonably adopted to avoid risk of such disclosure, shall not be civilly or criminally liable, unless such disclosure was due to gross negligence or wanton and willful misconduct.

(v) AIDS confidential information may be disclosed when that disclosure is otherwise authorized or required by Code Section 42-1-6, if AIDS or HIV infection is the communicable disease at issue, or when that disclosure is otherwise authorized or required by any law which specifically refers to "AIDS confidential information," "HIV test results," or any similar language indicating a legislative intent to disclose information specifically relating to AIDS or HIV.

(w) A health care provider who has received AIDS confidential information regarding a patient from the patient's health care provider directly or indirectly under the provisions of subsection (i) of this Code section may disclose that information to a health care provider which has provided, is providing, or will provide any health care service to that patient and as a result of that provision of service that health care provider:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(x) Neither the Department of Public Health nor any county board of health shall disclose AIDS confidential information contained in its records unless such disclosure is authorized or required by this Code section or any other law, except that such information in those records

shall not be a public record and shall not be subject to disclosure through subpoena, court order, or other judicial process.

(y) The protection against disclosure provided by Code Section 24-12-20 shall be waived and AIDS confidential information may be disclosed to the extent that the person identified by such information, his or her heirs, successors, assigns, or a beneficiary of such person, including, but not limited to, an executor, administrator, or personal representative of such person's estate:

(1) Files a claim or claims other entitlements under any insurance policy or benefit plan or is involved in any civil proceeding regarding such claim;

(2) Places such person's care and treatment, the nature and extent of his or her injuries, the extent of his or her damages, his or her medical condition, or the reasons for his or her death at issue in any judicial proceeding; or

(3) Is involved in a dispute regarding coverage under any insurance policy or benefit plan.

(z) AIDS confidential information may be collected, used, and disclosed by an insurer in accordance with the provisions of Chapter 39 of Title 33.

(aa) In connection with any judicial proceeding in which AIDS confidential information is disclosed as authorized or required by this Code section, the party to whom that information is thereby disclosed may subpoena any person to authenticate such AIDS confidential information, establish a chain of custody relating thereto, or otherwise testify regarding that information, including, but not limited to, testifying regarding any notifications to the patient regarding results of an HIV test. The provisions of this subsection shall apply to records, personnel, or both of the Department of Public Health or a county board of health notwithstanding Code Section 50-18-72, but only as to test results obtained by a prosecutor under subsection (q) of this Code section and to be used thereby in a prosecution for reckless conduct under subsection (c) of Code Section 16-5-60.

(bb) AIDS confidential information may be disclosed as a part of any proceeding or procedure authorized or required pursuant to Chapter 3, 4, or 7 of Title 37, regarding a person who is alleged to be or who is mentally ill, developmentally disabled, or alcoholic or drug dependent, or as a part of any proceeding or procedure authorized or required pursuant to Title 29, regarding the guardianship of a person or that person's estate, as follows:

(1) Any person who files or transmits a petition or other document which discloses AIDS confidential information in connection with any

such proceeding or procedure shall provide a cover page which contains only the type of proceeding or procedure, the court in which the proceeding or procedure is or will be pending, and the words "CONFIDENTIAL INFORMATION" without in any way otherwise disclosing thereon the name of any individual or that such petition or other document specifically contains AIDS confidential information;

(2) AIDS confidential information shall only be disclosed pursuant to this subsection after disclosure to and with the written consent of the person identified by that information, or that person's parent or guardian if that person is a minor or has previously been adjudicated as being incompetent, or by order of court obtained in accordance with subparagraph (C) of paragraph (3) of this subsection;

(3) If any person files or transmits a petition or other document in connection with any such proceeding or procedure which discloses AIDS confidential information without obtaining consent as provided in paragraph (2) of this subsection, the court receiving such information shall either obtain written consent as set forth in that paragraph (2) for any further use or disclosure of such information or:

(A) Return such petition or other document to the person who filed or transmitted same, with directions against further filing or transmittal of such information in connection with such proceeding or procedure except in compliance with this subsection;

(B) Delete or expunge all references to such AIDS confidential information from the particular petition or other document; or

(C)(i) If the court determines there is a compelling need for such information in connection with the particular proceeding or procedure, petition a superior court of competent jurisdiction for permission to obtain or disclose that information. If the person identified by the information is not yet represented by an attorney in the proceeding or procedure in connection with which the information is sought, the petitioning court shall appoint an attorney for such person. The petitioning court shall have both that person and that person's attorney personally served with notice of the petition and time and place of the superior court hearing thereon. Such hearing shall not be held sooner than 72 hours after service, unless the information is to be used in connection with an emergency guardianship proceeding under Code Section 29-4-14, in which event the hearing shall not be held sooner than 48 hours after service.

(ii) The superior court in which a petition is filed pursuant to division (i) of this subparagraph shall hold an in camera hearing on such petition. The purpose of the hearing shall be to determine whether there is clear and convincing evidence of a com-

pelling need for the AIDS confidential information sought in connection with the particular proceeding or procedure which cannot be accommodated by other means. In assessing compelling need, the superior court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this subparagraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal; and

(4) The court having jurisdiction over such proceeding or procedure, when it becomes apparent that AIDS confidential information will likely be or has been disclosed in connection with such proceeding or procedure, shall take such measures as the court determines appropriate to preserve the confidentiality of the disclosed information to the maximum extent possible. Such measures shall include, without being limited to, closing the proceeding or procedure to the public and sealing all or any part of the records of the proceeding or procedure containing AIDS confidential information. The records of any appeals taken from any such proceeding or procedure shall also be sealed. Furthermore, the court may consult with and obtain the advice of medical experts or other counsel or advisers as to the relevance and materiality of such information in such proceedings or procedures, provided that the identity of the person identified by such information is not thereby revealed. (Code 1981, § 24-12-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942; Ga. L. 2013, p. 294, § 4-42/HB 242.)

Delayed effective date. — Subsection (q), as set out above, becomes effective January 1, 2014. For version of subsection (q) in effect until January 1, 2014, see the 2013 amendment note.

Cross references. — Child committing delinquent act constituting AIDS transmission crime including testing and reporting, § 15-11-603.

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, deleted "as" following "shall apply" in the second sentence of subsection (aa).

The 2013 amendment, effective January 1, 2014, substituted "Code Section 15-11-603" for "Code Section 15-11-66.1" in subsection (q). See editor's note for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2013, "Department of Public Health" was substituted for "Department of Community Health" throughout subsection (h), in subparagraph (t)(1)(C), paragraph (t)(8), subsection (x), and in the last sentence of subsection (aa).

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring

before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Administrative rules and regulations. — Acquired Immune Deficiency Syndrome, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Public Health, Chapter 290-5-48.

Law reviews. — For comment, "Confidentiality and Dissemination of Personal Information: An Examination of State Laws Governing Data Protection," see 41 Emory L.J. 1185 (1992).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-9-47 are included in the annotations for this Code section.

Statute not intended as shield in prosecution for criminal conduct. — Former O.C.G.A. § 24-9-47 was never intended to be a shield in a prosecution for criminal conduct involving the AIDS disease. Scroggins v. State, 198 Ga. App. 29, 401 S.E.2d 13 (1990), cert. denied, 198 Ga. App. 898, 401 S.E.2d 13 (1991) (decided under former O.C.G.A. § 24-9-47).

Subparagraph (t)(1)(A) of former O.C.G.A. § 24-9-47 proved an overriding policy to facilitate prosecution of HIV-infected persons for criminal conduct with potential for endangering any member of society. The legislature's failure in this directive to include prosecutions for a crime of wilful conduct by a person with the AIDS disease or HIV virus was an oversight. Scroggins v. State, 198 Ga. App. 29, 401 S.E.2d 13 (1990), cert. denied, 198 Ga. App. 898, 401 S.E.2d 13 (1991) (decided under former O.C.G.A. § 24-9-47).

Defendant, who was charged with aggravated assault with intent to murder after biting a police officer, placed "at issue" the issue of AIDS by defendant's conduct in committing an act which was inextricably linked to the question of defendant having AIDS. Scroggins v. State, 198 Ga. App. 29, 401 S.E.2d 13 (1990), cert. denied, 198 Ga. App. 898, 401 S.E.2d 13 (1991) (decided under former O.C.G.A. § 24-9-47).

Right of patient to keep HIV-infected status confidential. — Trial court properly granted summary judgment to doctor who disclosed to HIV-infected dental hygienist's employer, a dentist who occasionally provided the dental hygienist with free dental care, that the dental hygienist had tested positive for HIV as not only did the dental hygienist sign a consent form allowing disclosure, but the right of the dental hygienist to keep that status confidential was outweighed by the right of the doctor to disclose that status pursuant to former O.C.G.A. § 24-9-47 to specified people in that statute so that those people could take appropriate precautions. Waddell v. Bhat, 257 Ga. App. 580, 571 S.E.2d 565 (2002) (decided under former O.C.G.A. § 24-9-47).

Use of pseudonym in trial court's discretion. — When a patient filed suit solely alleging that the improper disclosure of HIV confidential information under former O.C.G.A. § 24-9-40.1 (see now O.C.G.A. § 24-12-20) and the non-disclosure exception of former O.C.G.A. § 24-9-47(y) did not apply, a trial court retained discretion to determine if the patient could prosecute a case under a pseudonym. Doe v. Hall, 260 Ga. App. 421, 579 S.E.2d 838 (2003) (decided under former O.C.G.A. § 24-9-47).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting not required. — Offenses arising from a violation of O.C.G.A. § 24-12-21 do not, at this time, appear to be offenses for which fingerprinting is required. 2011 Op. Att'y Gen. No. 11-5.

RESEARCH REFERENCES

ALR. — Rescission or cancellation of insurance policy for insured's misrepresentation or concealment of information concerning human immunodeficiency virus (HIV), acquired immunodeficiency syndrome (AIDS), or related health problems, 15 ALR5th 92.

ARTICLE 4

OTHER CONFIDENTIAL INFORMATION

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-12-30. Confidential nature of certain library records.

(a) Circulation and similar records of a library which identify the user of library materials shall not be public records but shall be confidential and shall not be disclosed except:

(1) To members of the library staff in the ordinary course of business;

(2) Upon written consent of the user of the library materials or the user's parents or guardian if the user is a minor or ward; or

(3) Upon appropriate court order or subpoena.

(b) Any disclosure authorized by subsection (a) of this Code section or any unauthorized disclosure of materials made confidential by subsection (a) of this Code section shall not in any way destroy the confidential nature of that material, except for the purpose for which an authorized disclosure is made. A person disclosing material as authorized by subsection (a) of this Code section shall not be liable therefor. (Code 1981, § 24-12-30, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-12-31. Confidential nature of veterinarian records.

No veterinarian licensed under Chapter 50 of Title 43 shall be required to disclose any information concerning the veterinarian's care of an animal except on written authorization or other waiver by the veterinarian's client or on appropriate court order or subpoena. Any veterinarian releasing information under written authorization or other waiver by the client or under court order or subpoena shall not be

liable to the client or any other person. The confidentiality provided by this Code section shall be waived to the extent that the veterinarian's client places the veterinarian's care and treatment of the animal or the nature and extent of injuries to the animal at issue in any judicial proceeding. As used in this Code section, the term "client" means the owner of the animal; or if the owner of the animal is unknown, client means the person who presents the animal to the veterinarian for care and treatment. (Code 1981, § 24-12-31, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

CHAPTER 13

SECURING ATTENDANCE OF WITNESSES AND PRODUCTION AND PRESERVATION OF EVIDENCE

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24-13-92. Criminal or grand jury proceeding in foreign state — Certificate of need for testimony; expenses; punishment.
24-13-93. Criminal or grand jury proceeding in foreign state — Certificate of need for prisoner's testimony; order by judge in requesting state; applicability.
24-13-94. Criminal or grand jury proceeding in this state — Issuance of certificate; how long witness detained; punishment.
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Cross references. — Depositions and discovery, § 9-11-26 et seq. Power of court to compel attendance of witnesses, § 17-7-25.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011).

RESEARCH REFERENCES

ALR. — Compelling testimony of opponent's expert in state court, 66 ALR4th 213.

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-13-1. Freedom of witnesses from arrest.

A witness shall not be arrested on any civil process while attending any court to which he or she is subpoenaed or otherwise required to attend as a witness or while going to or returning from such court. An officer who holds such witness imprisoned after seeing his or her subpoena or being satisfied of the fact that such person was a witness shall be liable for false imprisonment. (Code 1981, § 24-13-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For comment on White v. Henry, 232 Ga. 64, 205 S.E.2d 206 (1974), see 26 Mercer L. Rev. 317 (1974).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, § 3850, former Civil Code 1910, § 5854, former Code 1933, § 38-1506, and former O.C.G.A. § 24-10-1 are included in the annotations for this Code section.

In general. — Nonresident witness or suitor in attendance upon the trial of any case in court was exempt from service of any writ or summons while so attending and in going to or returning from the court. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123 (1935) (decided under former Code 1933, § 38-1506); Ausbon v. Ausbon, 131 Ga. App. 530, 206 S.E.2d 546 (1974) (decided under former Code 1933, § 38-1506).

Service is voidable. — Service of process in violation of the former statute was not void, but voidable upon proper action in proper time by the person served. Thornton v. American Writing Mach. Co., 83 Ga. 288, 9 S.E. 679, 20 Am. St. R. 320 (1889) (decided under former Code 1882, § 3850).

Officer's satisfaction. — It was not essential that a witness show any subpoena to the sheriff, all that was required was that the officer be "satisfied of the fact." Turner v. McGee, 217 Ga. 769, 125 S.E.2d 36 (1962) (decided under former Code 1933, § 38-1506).

Nonjudicial proceedings. — Privilege of exemption from service was not only assured while a nonresident was attending upon strictly judicial proceedings, but upon any tribunal whose business had reference to or was intended to affect judicial proceedings. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123 (1935) (decided under former Code 1933, § 38-1506).

Inapplicable to criminal defendant. — Privilege was limited to witnesses and did not apply to a defendant in a criminal case. Rogers v. Rogers, 138 Ga. 803, 76 S.E. 48 (1912) (decided under former Civil Code 1910, § 5854); Warren v. Hiers, 105 Ga. App. 202, 124 S.E.2d 445 (1962) (decided under former Code 1933, § 38-1506).

Applicable to criminal defendant. — Immunity from civil process extended to a nonresident defendant who voluntarily appeared in answer to a criminal charge or who appeared in compliance with a bail bond, because the defendant's appearance saved the state the expense, delay, and uncertainty of extradition and promoted the orderly, expeditious, and unobstructed administration of justice. White v. Henry, 232 Ga. 64, 205 S.E.2d 206 (1974) (decided under former Code 1933, § 38-1506), for comment, see 26 Mercer L. Rev. 317 (1974).

Parties. — Suitors were exempted from arrest while going to, attending on, or returning from court and the fact that one of the suitors resided out of the state and has previously had the suitors adversary arrested under bail process did not justify a departure from the practice. Lomax v.

Lomax, 176 Ga. 605, 168 S.E. 863 (1933) (decided under former Civil Code 1910, § 5854).

Deposition. — If a person was present in a county other than that of the person's residence for the sole purpose of attending the taking of depositions therein in a case to which the person was a party, and advantage was taken of the person's presence to serve process on the person in another action, to compel the person to defend it in a jurisdiction other than that of the person's residence, the service of such process should have been quashed. Ewing v. Elliott, 51 Ga. App. 565, 181 S.E. 123 (1935) (decided under Code 1933, § 38-1506).

Service of habitual-violator notice. — Former O.C.G.A. § 24-10-1 did not immunize defendant from service of notice that the defendant was a habitual violator under O.C.G.A. § 40-5-58 while defendant was being tried on an unrelated offense, since former § 24-10-1 pertained to civil process, and service of notice of revocation under § 40-5-58 was not service of a civil process. Hill v. State, 162 Ga. App. 637, 292 S.E.2d 512 (1982) (decided under former O.C.G.A. § 24-10-1).

RESEARCH REFERENCES

ALR. — Waiver of privilege against or nonliability to arrest in civil action, 8 ALR 754.

Duration of imprisonment for refusal to answer question as a witness before the grand jury, 28 ALR 1364.

Privilege of party, witness, or attorney while going to, attending, or returning from court as extending to privilege from arrest for crime, 74 ALR2d 592.

Immunity from service of process as affected by relationship between subject matters of litigation in which process was issued, and litigation which nonresident served was attending, 84 ALR2d 421.

24-13-2. Procedure for claiming witness fees.

A witness in making a claim or proof of a claim for witness fees for attendance shall indicate the date on which he or she attended and, in the event of a continuance, shall not claim or receive witness fees for any day after the date to which the docket shows the proceeding was continued nor for any day before the continuance was granted on which he or she did not attend. (Code 1981, § 24-13-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-13-3. Witness fee exceptions.

(a) A witness shall not receive any witness fees for attendance on a subpoena if such witness is absent from the proceeding, or if the proceeding is continued at any time due to his or her absence, where such absence did not arise from providential cause.

(b) No witness shall receive witness fees from both parties in the same proceeding; the fees of a witness for both parties shall be apportioned equally between the parties unless the costs are all taxed against one party. (Code 1981, § 24-13-3, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-13-4. Penalty for excessive witness fee claim.

A witness who claims more than is due to such witness shall forfeit all witness fees and shall pay to the injured party, in addition thereto, four times the amount so unjustly claimed. (Code 1981, § 24-13-4, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-4 are included in the annotations for this Code section.

Attendance pursuant to subpoena. — Expert, who was asked to conduct a preliminary review of evidence in order to better give an opinion as an expert, was entitled to demand extra compensation for attendance in court pursuant to a subpoena. Kent v. Brown, 238 Ga. App. 607, 518 S.E.2d 737 (1999) (decided under former O.C.G.A. § 24-10-4).

24-13-5. Production of evidence when item not available; oath.

When any person is served with a subpoena for the production of evidence or a notice to produce, seeking books in his or her possession to be used as testimony on the trial of any cause, if the person makes oath that he or she cannot produce the books required without suffering a material injury in his or her business and also makes or causes to be made out a full transcript from the books of all the accounts and dealings with the opposite party, has the transcript examined and sworn to by an impartial witness, and produces the same in court, the witness shall be deemed to have complied with the notice to produce or subpoena for the production of evidence. (Code 1981, § 24-13-5, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Discovery of documents generally, § 9-11-34.

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 1020.

24-13-6. Procedure when adverse party dissatisfied with response pursuant to Code Section 24-13-5.

When the transcript provided for in Code Section 24-13-5 is produced in court, if the adverse party is dissatisfied therewith and swears that he or she believes that the books contain entries material to the adverse party which do not appear in the transcript, the court shall grant him or her a commission directed to certain persons named by the parties and approved by the court. The commission shall cause the person with possession of the books to produce the books required with the person swearing that the books produced are all that he or she has or had that

answer to the description in the subpoena or notice to produce. The commission shall examine the books and transmit to the court a full and fair statement of the accounts and entries between the parties under their hand. When received by the court, the statement of the commission shall be deemed a compliance with the notice to produce or subpoena for the production of evidence. (Code 1981, § 24-13-6, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, § 3518, former Civil Code 1895, § 5259, former Civil Code 1910, § 5848, former Code 1933, § 38-1002, and former O.C.G.A. § 24-10-6 are included in the annotations for this Code section.

Notice to insurance company. — When notice was served on defendant insurance company to produce all the records of the company's dealings in Georgia, and the defendant furnished a transcript of the defendant's dealings with the plaintiff, this was sufficient. If the plaintiff was dissatisfied, plaintiff had a remedy under the former statute. Grant v. Alabama Gold Life Ins. Co., 76 Ga. 575 (1886) (decided under former Code 1882, § 3518).

Merchant's books. — Transcript from merchant's books, made out and produced under notice, and inspected by the party giving the notice, should be allowed to go to the jury as evidence in the case. Fielder & Bros. & Co. v. Collier, 13 Ga. 496 (1853) (decided under former law).

24-13-7. Withdrawal of originals introduced in evidence; substitution of copies; discretion of court.

Parties interested and participating in the trial of all cases tried in the courts are authorized and empowered, on the order of the court trying the case, to withdraw from the court and record of the case all original deeds, maps, blueprints, notes, papers, and documents belonging to the parties and which are introduced in evidence on the trial, on substituting therefor, when required by the court, duplicates thereof, verified as such by the parties or their agents, representatives, or attorneys. However, if any such deeds, maps, blueprints, notes, papers, or documents shall be attacked by any party to the case as forgeries, or as not being genuine originals, it shall be in the discretion of the court to require the original deeds, maps, blueprints, notes, papers, or documents so attacked to remain on file in the court as a part of the record in the case. (Code 1981, § 24-13-7, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

RESEARCH REFERENCES

ALR. — Necessity, in order to enter judgment by confession on instrument containing warrant of attorney, that original note or other instrument and original warrant be produced or filed, 68 ALR2d 1156.

ARTICLE 2

SUBPOENAS AND NOTICE TO PRODUCE

Cross references. — Issuance of subpoena for taking of depositions, § 9-11-45. Further provisions regarding discovery and securing of attendance of witnesses at criminal proceedings, § 17-7-190 et seq.

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

RESEARCH REFERENCES

ALR. — Right of independent expert to refuse to testify as to expert opinion, 50 ALR4th 680.

24-13-20. Applicability.

This article shall apply to all civil proceedings and, insofar as consistent with the Constitution, to all criminal proceedings. (Code 1981, § 24-13-20, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article discussing available means of discovery for criminal cases in Georgia, see 12 Ga. St. B.J. 134 (1976).

For note, "Criminal Discovery: The Use of Notices to Produce," see 30 Mercer L. Rev. 331 (1978).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1966, p. 502, § 2 and former O.C.G.A. § 24-10-29 are included in the annotations for this Code section.

Limitation on use by state. — Words "insofar as consistent with the Constitution" constituted a limitation on the state's use of subpoenas and notices to produce more than a limitation on its use by an accused. Brown v. State, 238 Ga. 98, 231 S.E.2d 65 (1976) (decided under former Ga. L. 1966, p. 502, § 2); Johnson v. State, 156 Ga. App. 496, 274 S.E.2d 837 (1980) (decided under former Ga. L. 1966, p. 502, § 2).

Unconstitutional self-incrimination. — State may not have used a notice to produce to reseize property and redivest the defendant of custody and possession by retaining the property and using the property as evidence in a criminal proceeding; unconstitutional self-incrimination would have been the result of compliance with the state's notice. Johnson v. State, 156 Ga. App. 496, 274 S.E.2d 837 (1980) (decided under former Ga. L. 1966, p. 502, § 2).

Notice to produce. — Pursuant to Ga. L. 1966, p. 502, § 2 and former Code 1933, §§ 38-801—38-807 (see now O.C.G.A. § 24-13-27), providing for notices to produce writing and tangible objects in lieu of subpoena, was applicable to criminal cases. Goldsmith v. State, 148 Ga. App. 786, 252 S.E.2d 657 (1979) (decided under former Ga. L. 1966, p. 502, § 2); Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Ga. L. 1966, p. 502, § 2).

Discovery as such not available to accused in criminal cases in Georgia, but a motion to produce books, writings, or other documents or tangible things pursuant to former Code 1933, §§ 38-801 and 38-802 (see now O.C.G.A. § 24-13-26) was applicable to criminal cases. Pryor v. State, 238 Ga. 698, 234 S.E.2d 918, cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L.

Ed. 2d 294 (1977), reh'g denied, 434 U.S. 1003, 98 S. Ct. 650, 54 L. Ed. 2d 500 (1977), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006) (decided under former Ga. L. 1966, p. 502, § 2).

Exculpatory matter. — Defendant was entitled to discovery of all exculpatory matter and anything in the district attorney's file which was favorable to defendant's defense. Maddox v. State, 136 Ga. App. 370, 221 S.E.2d 231 (1975) (decided under former Ga. L. 1966, p. 502, § 2).

Material creating reasonable doubt. — Prosecutor was under a duty to furnish the defendant, without request, material which created a reasonable doubt as to the defendant's guilt. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Ga. L. 1966, p. 502, § 2).

Confidential informant. — It was within the sound discretion of a trial court whether to require the state to disclose to the defendant the name and address of a confidential informant. Clayton v. State, 145 Ga. App. 541, 244 S.E.2d 67 (1978) (decided under former Ga. L. 1966, p. 502, § 2).

Reports and summaries made by police investigators were not the types of books, writings, or other documents or tangible things subject to a notice to produce. Bennett v. State, 158 Ga. App. 421, 280 S.E.2d 429 (1981) (decided under former Ga. L. 1966, p. 502, § 2).

Improper use of notice to produce. — Defendant having "moved to suppress" the evidence by virtue of contesting the libel for condemnation of former Code 1933, § 79A-828 (see now O.C.G.A. § 16-13-49) and the state having failed to meet the state's burden in that regard, the state may not have used the notice to produce to "reseize" the property for evidentiary purposes. Johnson v. State, 156 Ga. App. 496, 274 S.E.2d 837 (1980) (decided under former Ga. L. 1966, p. 502, § 2).

Corporate document not protected by self-incrimination privilege. — Defendant in a criminal case, an attorney who was the sole shareholder of a professional corporation, was properly held in civil contempt for not producing a noncompetition agreement between the corporation and a former employee. The agreement was a corporate document, and the defendant had been subpoenaed to produce the document as a corporate agent; thus, the defendant could not assert the defendant's personal right against self-incrimination and the small size of the corporation was immaterial. Thompson v. State, 294 Ga. App. 363, 670 S.E.2d 152 (2008) (decided under former O.C.G.A. § 24-10-29).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 1013.

ALR. — Subpoenaing unnecessary witnesses as contempt, 37 ALR 1113.

Mandamus to compel court or judge to require witness to testify or produce documents, 41 ALR 436.

Construction and application of provisions of Fair Labor Standards Act regarding investigatory subpoena duces tecum, 166 ALR 553.

24-13-21. Subpoena for attendance of witnesses — Form; issuance; subpoena in blank.

(a) As used in this Code section, the term "subpoena" includes a witness subpoena and a subpoena for the production of evidence.

(b) A subpoena shall state the name of the court, the name of the clerk, and the title of the proceeding and shall command each person to whom it is directed to attend and give testimony or produce evidence at a time and place specified by the subpoena.

(c) The clerk of court shall make subpoenas in blank available on demand by electronic or other means to parties or their counsel or to the grand jury.

(d) An attorney who is counsel of record in a proceeding may issue and sign a subpoena obtained by electronic or other means from the clerk of court as an officer of a court for any deposition, hearing, or trial held in conjunction with such proceeding.

(e) A district attorney may issue, and upon the request of the grand jury shall issue, a subpoena in grand jury proceedings.

(f) A subpoena shall be completed prior to being served.

(g) Subpoenas are enforceable as provided in Code Section 24-13-26.

(h) If an individual misuses a subpoena, he or she shall be subject to punishment for contempt of court and shall be punished by a fine of not more than $300.00 or not more than 20 days' imprisonment, or both. (Code 1981, § 24-13-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942.)

Cross references. — Subpoena, Fed. R. Civ. P. 45. Subpoena, Fed. R. Crim. P. 17.

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (h).

Law reviews. — For article, "Best Practices for Issuing Subpoenas Depositions of Georgia Residents in Cases Pending Out of State," see 12 Ga. St. B.J. 12 (2007).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5260, former Civil Code 1910, § 5849, former Code 1933, § 38-1501, Ga. L. 1966, p. 502, § 1, Ga. L. 1980, p. 70, § 2, and former O.C.G.A. § 24-10-20 are included in the annotations for this Code section.

Use of word "shall" in the former statute indicated that the subpoena must be issued by the clerk, signed by the clerk, and under the seal of the court; the word "shall" was in its ordinary signification a word of command. State v. Brantley, 147 Ga. App. 569, 249 S.E.2d 365 (1978) (decided under former Code 1933, § 38-1501).

Signature by clerk. — Subpoena commanding the presence of a person in court as a witness is a judicial writ, and to be valid must, when there was a clerk, be signed and issued by that officer. Horton v. State, 112 Ga. 27, 37 S.E. 100 (1900) (decided under former Civil Code 1895, § 5260).

Signature by attorney. — Subpoena to which the attorney for a defendant has signed the name of the clerk, under a general direction from that officer to "prepare" the subpoenas in the case, was not valid. Horton v. State, 112 Ga. 27, 37 S.E. 100 (1900) (decided under former Civil Code 1895, § 5260).

Signing and sealing were ministerial acts. — Signing and sealing of a subpoena amount to nothing more than ministerial acts which add nothing of substance to the subpoena, the only purpose of which was to give notice to a witness to appear in court; a statute was regarded as directory when no substantial rights depend on it, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner

other than that prescribed, with substantially the same results. State v. Brantley, 147 Ga. App. 569, 249 S.E.2d 365 (1978) (decided under former Code 1933, § 38-1501).

Defendant's responsibility to ensure presence of witnesses. — When defendant elected to represent oneself it was the defendant's responsibility, not the trial court's, to ensure the presence of witnesses by the issuance of subpoenas. Kegler v. State, 267 Ga. 147, 475 S.E.2d 593 (1996) (decided under former O.C.G.A. § 24-10-20).

As the defendant, who was proceeding pro se during a criminal trial, failed to request issuance of subpoenas pursuant to former O.C.G.A. §§ 24-10-20(b) and 24-10-21, there was no violation of the right to compulsory process. Sheppard v. State, 297 Ga. App. 806, 678 S.E.2d 509 (2009), cert. denied, No. S09C1575, 2009 Ga. LEXIS 795 (Ga. 2009) (decided under former O.C.G.A. § 24-10-20).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 24-10-20 and some provisions of former O.C.G.A. § 24-10-21 are included in the annotations for this Code section.

Issuing blank subpoena to requesting party proper. — Under former O.C.G.A. § 24-10-20, the clerk of the superior court may properly issue to a requesting party in a pending case a subpoena which was blank except as to the signature of the clerk and the seal of court. 1981 Op. Att'y Gen. No. U81-37 (decided under former O.C.G.A. § 24-10-21).

Clerks of county recorder's courts may issue in blank subpoenas to police officers to be completed by the officers and served upon witnesses in pending cases. 1983 Op. Att'y Gen. No. U83-41 (decided under former O.C.G.A. § 24-10-21).

Information required by former subsection (a) could be filled in by requesting party. — Since subsection (b) of former O.C.G.A. § 24-10-20 authorized the clerk to issue a subpoena signed and sealed "but otherwise in blank," the information contained in subsection (a) of former § 24-10-20 could be filled in before service by the party requesting the subpoena, thus providing a witness with a subpoena complete with all information required by former § 24-10-20. 1981 Op. Att'y Gen. No. U81-37 (decided under former O.C.G.A. § 24-10-20).

If a police officer had just issued a traffic citation, there would be a pending case for purposes of subpoena issuance. 1983 Op. Att'y Gen. No. U83-41 (decided under former O.C.G.A. § 24-10-21).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 6, 7.

C.J.S. — 98 C.J.S. (Rev), Witnesses, §§ 6, 26 et seq.

ALR. — Subpoenaing unnecessary witnesses as contempt, 37 ALR 1113.

Power of court to control evidence or witnesses going before grand jury, 52 ALR3d 1316.

24-13-22. Subpoena for attendance of witnesses — Attendance at hearing or trial; where served.

At the request of any party, subpoenas for attendance at a hearing or trial shall be issued under the authority of the clerk of the court in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within this

state. (Code 1981, § 24-13-22, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5260, former Code 1933, § 38-1501, Ga. L. 1966, p. 502, § 1, and former O.C.G.A. §§ 24-10-20 and 24-10-21 are included in the annotations for this Code section.

Constitutionality. — Former statute was not unconstitutional as applied to a habeas corpus proceeding. Hooten v. State, 245 Ga. 250, 264 S.E.2d 192, cert. denied, 446 U.S. 942, 100 S. Ct. 2168, 64 L. Ed. 2d 797 (1980) (decided under Ga. L. 1966, p. 502, § 1).

Use of word "shall" in the former statute indicated that the subpoena must be issued by the clerk, signed by the clerk, and under the seal of the court; the word "shall" was in its ordinary signification a word of command. State v. Brantley, 147 Ga. App. 569, 249 S.E.2d 365 (1978) (decided under former Code 1933, § 38-1501).

Signature by clerk. — Subpoena commanding the presence of a person in court as a witness is a judicial writ, and to be valid must, when there was a clerk, be signed and issued by that officer. Horton v. State, 112 Ga. 27, 37 S.E. 100 (1900) (decided under former Civil Code 1895, § 5260).

Signature by attorney. — Subpoena to which the attorney for a defendant has signed the name of the clerk, under a general direction from that officer to "prepare" the subpoenas in the case, was not valid. Horton v. State, 112 Ga. 27, 37 S.E. 100 (1900) (decided under former Civil Code 1895, § 5260).

Defendant's responsibility to ensure presence of witnesses. — When defendant elected to represent oneself it was the defendant's responsibility, not the trial court's, to ensure the presence of witnesses by the issuance of subpoenas. Kegler v. State, 267 Ga. 147, 475 S.E.2d 593 (1996) (decided under former O.C.G.A. § 24-10-20).

As the defendant, who was proceeding pro se during a criminal trial, failed to request issuance of subpoenas pursuant to former O.C.G.A. §§ 24-10-20(b) and 24-10-21 (see now O.C.G.A. §§ 24-13-21 and 24-13-22), there was no violation of the right to compulsory process. Sheppard v. State, 297 Ga. App. 806, 678 S.E.2d 509 (2009), cert. denied, No. S09C1575, 2009 Ga. LEXIS 795 (Ga. 2009) (decided under former O.C.G.A. §§ 24-10-20 and 24-10-21).

Expenses. — Former statute did not contemplate that the public should bear the expense of bringing witnesses into court because the residents of other counties could be examined by depositions (oral examination or written interrogatories) if the defendant so desired. Neal v. Smith, 226 Ga. 96, 172 S.E.2d 684 (1970) (decided under former Ga. L. 1966, p. 502, § 1).

Habeas corpus proceeding. — Sixth Amendment guarantee to the accused of compulsory process to obtain the testimony of witnesses had no application in the context of habeas corpus proceedings, which were civil in nature. Pulliam v. Balkcom, 245 Ga. 99, 263 S.E.2d 123, cert. denied, 447 U.S. 927, 100 S. Ct. 3023, 65 L. Ed. 2d 1121 (1980) (decided under former Ga. L. 1966, p. 502, § 1).

Argument to jury. — When a witness was not amendable to subpoena, the witness's failure to testify in person was not a proper subject matter of argument by counsel. Floyd v. Colonial Stores, Inc., 121 Ga. App. 852, 176 S.E.2d 111 (1970) (decided under former Ga. L. 1966, p. 502, § 1).

Charge to jury that any accused had a right to subpoena any witnesses to testify that the accused wishes, but that the accused had no burden to produce any witnesses, and that the jury should arrive at a decision from the evidence presented without speculating about other matters, was without error. Miller v. State, 155 Ga. App. 54, 270 S.E.2d 466 (1980) (decided under former Ga. L. 1966, p. 502, § 1).

Trial court did not impermissibly shift the burden of proof when the court charged the jury that defendant had the right to subpoena witnesses. The jury charge was an accurate statement of the law and provided no ground for reversal. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348 (2009) (decided under former O.C.G.A. § 24-10-21).

Criminal defendant's right to compulsory process. — Trial court erred in making a determination that a prospective witness was incompetent to testify based on ex parte statements made by the administrator of the institution where the prospective witness was confined. When this error is not harmless beyond a reasonable doubt, if it is determined that one was competent, then defendant's right to compulsory process was abridged and a new trial must be ordered. Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981) (decided under former O.C.G.A. § 24-10-21).

Determination of whether witness is necessary and material. — Court of appeals erred in ruling that the trial court did not abuse the court's discretion in denying the defendant's motion under the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), to obtain evidence possessed by a witness in Kentucky because the proper statute was not applied since the court of appeals stated that the defendant was required to show that the out-of-state witness was necessary and material to the case; whether the witness was "necessary and material" was one of the determinations that must be made under the Act, former O.C.G.A. § 24-10-92(b) (see now O.C.G.A. § 24-13-92), by the judge in the county where the out-of-state witness was located, and the Georgia trial court evaluated the request under the Act, former O.C.G.A. § 24-10-94 (see now O.C.G.A. § 24-13-94), and must determine only whether the out-of-state witness was a "material witness" in the Georgia criminal prosecution and whether the court should issue the certificate requesting the out-of-state court to order the out-of-state witness to attend the criminal proceeding in Georgia. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011) (decided under former O.C.G.A. § 24-10-21).

Attendance by agent of out-of-state corporation. — Court of appeals erred when the court concluded that a request under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. Yeary v. State, 289 Ga. 394, 711 S.E.2d 694 (2011) (decided under former O.C.G.A. § 24-10-21).

Prior deposition. — Trial court's sua sponte determination that the existence of a prior deposition rendered the presence of a material witness subpoenaed by the plaintiff superfluous and that, hence, that witness would be excused, but no continuance would be granted, denied the plaintiff the right to present plaintiff's case to the jury in the manner in which plaintiff chose. Ricketson v. Blair, 171 Ga. App. 714, 320 S.E.2d 788 (1984) (decided under former O.C.G.A. § 24-10-21).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 6, 7.

C.J.S. — 98 C.J.S. (Rev), Witnesses, §§ 6, 26 et seq.

ALR. — Subpoenaing unnecessary witnesses as contempt, 37 ALR 1113.

Power of court to control evidence or witnesses going before grand jury, 52 ALR3d 1316.

24-13-23. Subpoena for production of documentary evidence; motion to quash or modify.

(a) A subpoena may also command the person to whom it is directed to produce the evidence designated therein.

(b) The court, upon written motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:

(1) Quash or modify the subpoena if it is unreasonable and oppressive; or

(2) Condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the evidence. (Code 1981, § 24-13-23, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Discovery of documentary and tangible evidence generally, § 9-11-34.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, §§ 3514, 3515, former Civil Code 1895, §§ 5255, 5256, former Civil Code 1910, §§ 5844, 5845, former Code 1933, §§ 38-901, 38-902, and former O.C.G.A. § 24-10-22 are included in the annotations for this Code section.

Relevance. — While admissibility was a matter to be determined when records, documents, or other items were tendered in evidence and was not a test for determining whether an order requiring production should be entered, pertinence or relevance was. Horton v. Huiet, 113 Ga. App. 166, 147 S.E.2d 669 (1966) (decided under former Code 1933, § 38-902).

Required prima facie showing of relevancy under the former statute entailed proof of: (1) the existence of a grand jury investigation; (2) a general characterization of the subject matter and purpose of the investigation; and (3) the fact that each general category of the subpoenaed documents bore some relevance to the investigation being pursued. Morris v. State, 246 Ga. 510, 272 S.E.2d 254 (1980) (decided under former Code 1933, §§ 38-901, 38-902).

"Unreasonable and oppressive" standard was tested by the peculiar facts arising from the subpoena itself and other proper sources. Kamensky v. Southern Oxygen Supply Co., 127 Ga. App. 343, 193 S.E.2d 164 (1972) (decided under former Code 1933, §§ 38-901, 38-902); Aycock v. Household Fin. Corp., 142 Ga. App. 207, 235 S.E.2d 578 (1977), cert. dismissed, 240 Ga. 570, 241 S.E.2d 835 (1978) (decided under former Code 1933, §§ 38-901, 38-902); Washburn v. Sardi's Restaurants, 191 Ga. App. 307, 381 S.E.2d 750, cert. denied, 191 Ga. App. 923, 381 S.E.2d 750 (1989) (decided under former O.C.G.A. § 24-10-22).

Applicable only to court proceedings. — Former statute providing for quashing or modifying a subpoena upon stated grounds was applicable only to

court proceedings and not to investigative procedures. Southeastern Adjusters, Inc. v. Caldwell, 229 Ga. 4, 189 S.E.2d 76 (1972) (decided under former O.C.G.A. § 24-10-22).

Parties. — Subpoena duces tecum never issued to any one who is a party to the cause. Ex parte Calhoun, 87 Ga. 359, 13 S.E. 694 (1891) (decided under former Code 1882, §§ 3514, 3515).

Grand jury. — In a proper case, a subpoena duces tecum may have issued in a cause pending before the grand jury to be brought before that body. In re Lester, 77 Ga. 143 (1886) (decided under former Code 1882, §§ 3514, 3515).

Necessity for production. — Court, before requiring the peremptory order to produce the books or papers of the adverse party, should have satisfied itself of the necessity for such production. Fluker v. Bank of Union Point, 178 Ga. 297, 173 S.E. 149 (1934) (decided under former Code 1933, §§ 38-901, 38-902).

Inauguration of suit. — Subpoena duces tecum was not process by which to inaugurate a suit, or by which to connect a new party with a pending suit. Ex parte Calhoun, 87 Ga. 359, 13 S.E. 694 (1891) (decided under former Code 1882, §§ 3514, 3515).

Burden of proof. — An individual moving to quash a grand jury subpoena duces tecum as unreasonable had the general burden of persuasion. Morris v. State, 246 Ga. 510, 272 S.E.2d 254 (1980) (decided under former Code 1933, §§ 38-901, 38-902).

Burden of going forward. — Regarding the relevancy component of reasonableness, since the secrecy of grand jury deliberations ensured that the party moving to quash a subpoena duces tecum had no precompliance knowledge of the subject matter of the investigation, the party who caused a subpoena duces tecum to issue had the burden of going forward, to make a prima facie showing that the subpoenaed documents are relevant to a legitimate grand jury investigation. Morris v. State, 246 Ga. 510, 272 S.E.2d 254 (1980) (decided under former Code 1933, §§ 38-901, 38-902).

Pleadings. — An abstract company could not be compelled by a subpoena duces tecum to make discovery of the contents of lost public records in a proceeding to establish a copy of such records since the pleadings did not allege or set out anything whatever as the specific contents to be proved. Ex parte Calhoun, 87 Ga. 359, 13 S.E. 694 (1891) (decided under former Code 1882, §§ 3514, 3515).

Sufficiency of subpoena. — After a document had been produced under a subpoena duces tecum, the sufficiency of the subpoena as a means of compelling is not a material question in the case. Starr v. Mayer & Co., 60 Ga. 546 (1878) (decided under former Code 1873, § 3514, 3515).

Deletion of privileged matter. — When any document sought to be produced contained a mixture of privileged and nonprivileged communication or information, ample remedy wais provided to delete privileged matter, and this also would have been within the inherent power of the court. Cranford v. Cranford, 120 Ga. App. 470, 170 S.E.2d 844 (1969) (decided under former Code 1933, §§ 38-901, 38-902).

Subpoena directed to corporation. — It was proper to issue a subpoena directed simply to a named company, and to have it served upon the general manager of such corporation; the documents called for being in the possession of the manager at the time, it was the manager's duty to respond to the subpoena duces tecum and produce the documents before the grand jury unless the manager desired to test the validity and sufficiency of the subpoena duces tecum by legal means. Jones v. State, 99 Ga. App. 858, 109 S.E.2d 859 (1959) (decided under former Code 1933, §§ 38-901, 38-902).

Interference by third party in ordering individual in possession of corporate documents sought by subpoena duces tecum to turn the documents over to the party for the purpose of concealing, destroying, or otherwise withholding the information therein contained from the grand jury would be an act of contempt which the court would be well authorized to punish. Jones v. State, 99 Ga. App. 858, 109 S.E.2d 859 (1959) (decided under former Code 1933, §§ 38-901, 38-902).

Identical subpoenas served on president and employee of corpora-

tion. — When identical subpoenas directed to a corporation were served upon the president in control of the corporation and an employee having actual custody of the papers, it was perfectly proper for the president to demand and acquire custody of the documents from the president's employee for the purpose of producing the papers in compliance with the subpoena served upon the individual as such president; it did not constitute a contempt of court that the defendant, before complying with the subpoena, saw fit to test its sufficiency by means of a motion to quash, since the defendant did in fact, upon obtaining a ruling by the court adverse to the defendant's contentions, surrender the documents called for by the subpoena. Jones v. State, 99 Ga. App. 858, 109 S.E.2d 859 (1959) (decided under former Code 1933, §§ 38-901, 38-902).

Agent of receiver. — Fact that the person directed to produce evidence was the agent of the receiver for a railway did not exempt the person from the enforcement of the order for the production of the freight-bills and receipts in the person's possession, where they were material evidence in the investigation of criminal charges against the accused named in certain cases pending before the grand jury. Blitch v. State, 145 Ga. 882, 90 S.E. 42 (1916) (decided under former Civil Code 1910, §§ 5844, 5845).

An entire record could not be removed from one court to another by a notice to the officers to produce the record, or by a subpoena duces tecum directed to and served upon them. In re Lester, 77 Ga. 143 (1886) (decided under former Code 1882, §§ 3514, 3515).

Cell phone records not discoverable. — Trial court did not abuse the court's discretion in quashing a subpoena for the appellee's cell phone records as those cell phone records were not reasonably calculated to lead to the discovery of admissible evidence under former O.C.G.A. § 24-10-22 (see now O.C.G.A. § 24-13-23) or information relevant to the intrusiveness nature of the behavior alleged to be tortious. Anderson v. Mergenhagen, 283 Ga. App. 546, 642 S.E.2d 105 (2007) (decided under former O.C.G.A. § 24-10-22).

Continuance on ground of absence of witness. — When the postponement of a case was requested on the ground of the absence of a witness served with a subpoena duces tecum, it was not an abuse of discretion to refuse the request in view of this statute, when it appeared that the witness was a resident of the county and was not served with the subpoena duces tecum ten days prior to the trial of the case. Frost v. Pennington, 6 Ga. App. 298, 65 S.E. 41 (1909) (decided under former Civil Code 1895, §§ 5255, 5256).

Post-judgment discovery. — It was clear that any forfeiture would not result from the answering of the questions or production of documents, but rather, as a result of a judgment already entered. Any other interpretation of this privilege would make the Georgia post-judgment discovery rules meaningless. Kushner v. Mascho, 143 Ga. App. 801, 240 S.E.2d 290 (1977) (decided under former Code 1933, §§ 38-901, 38-902).

Mayor, who was ex-officio the presiding judge of a court of record, was not subject to the subpoena duces tecum, commanding the mayor to bring into the superior court "the information docket" of this court, to be used in evidence before the grand jury, either in a specific case or generally. In re Lester, 77 Ga. 143 (1886) (decided under former Code 1882, §§ 3514, 3515).

Request for records of homicides overbroad. — Request for statistical information contained in notes, books, records, writings, and/or documents pertaining to any and all homicides both solved and unsolved, either committed within the city limits of Atlanta, Fulton County or the surrounding counties in which bodies were found covering a period of almost a decade was overbroad rendering it unreasonable and oppressive. Williams v. State, 251 Ga. 749, 312 S.E.2d 40 (1983) (decided under former O.C.G.A. § 24-10-22).

Subpoena for irrelevant evidence. — In the personal injury action filed by plaintiff against the pawn shop, the trial court did not err in granting the pawn shop's motion to quash a subpoena for production of the saw that caused the injury at the hearing on the summary

judgment motion; the trial court did not abuse the court's discretion under former O.C.G.A. § 24-10-22(b)(1) (see now O.C.G.A. § 24-13-23) in quashing the subpoena since the manner in which the saw was functioning three years after the accident was not relevant. Walker v. Bruhn, 281 Ga. App. 149, 635 S.E.2d 322 (2006) (decided under former O.C.G.A. § 24-10-22).

Court committed reversible error in quashing subpoena for former police officer's personnel file, where anything in the file tending to show training the former officer received which would enable the officer to commit and cover up the crimes of murder, arson, and rape was relevant to defendant's contention that the former officer committed the crimes. Henderson v. State, 255 Ga. 687, 341 S.E.2d 439 (1986) (decided under former O.C.G.A. § 24-10-22).

Quashing of subpoena for gas chromatograph results reversible error. — Defendant had right to discovery of printed results from gas chromatograph test of defendant's blood alcohol level, and the trial court's quashing of a subpoena seeking such discovery was reversible error. Price v. State, 269 Ga. 222, 498 S.E.2d 262 (1998) (decided under former O.C.G.A. § 24-10-22).

In a prosecution for driving with an unlawful blood-alcohol level, defendant was entitled to subpoena from the state's forensic chemist the chain of custody documents and other documents which pertained to the actual test of defendant's blood, including gas chromatograph results. Bazemore v. State, 244 Ga. App. 460, 535 S.E.2d 830 (2000) (decided under former O.C.G.A. § 24-10-22).

Documents which pertained to the qualifications of the person who drew defendant's blood and the certification documentation on the machine were not sufficiently relevant to be discovered by defendant in defendant's prosecution for driving with an unlawful blood-alcohol level. Bazemore v. State, 244 Ga. App. 460, 535 S.E.2d 830 (2000) (decided under former O.C.G.A. § 24-10-22).

Attorney fees for quashing subpoena not permitted. — Trial judge in a criminal case was not authorized to award attorney fees as compensation in conjunction with an order quashing a subpoena duces tecum pursuant to former O.C.G.A. § 24-10-22 (see now O.C.G.A. § 24-13-23). Garcia v. Allen, 202 Ga. App. 529, 414 S.E.2d 742 (1992) (decided under former O.C.G.A. § 24-10-22).

Motion to quash improperly denied. — When attorneys for a defendant in a capital case served a subpoena regarding the funding of indigent services on the Executive Director of the Georgia Public Defender Standards Council, it was error to deny the Council's motion to quash the subpoena. The documents had no bearing on the defendant's guilt or innocence and were irrelevant to the criminal case; moreover, the general funding that other capital defendants might have received had nothing to do with the funding of the present defendant's specific defense. Britt v. State, 282 Ga. 746, 653 S.E.2d 713 (2007) (decided under former O.C.G.A. § 24-10-22).

ADVISORY OPINIONS OF THE STATE BAR

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-22 are included in the annotations for this Code section.

Subpoena issued pursuant to former O.C.G.A. § 24-10-22(a) should only have been issued for actual hearings and trials and should not have been requested when in fact no hearing or trial had been scheduled. Likewise, a subpoena issued pursuant to O.C.G.A. § 9-11-45 of the Civil Practice Act should have been requested and issued only for depositions which have been actually scheduled by agreement between parties or when a notice of deposition had been filed and served upon all parties, and should not be issued when no deposition had been scheduled. Adv. Op. No. 84-40 (September 21, 1984) (decided under former O.C.G.A. § 24-10-22).

There was no need for notice of a subpoena issued pursuant to former O.C.G.A. § 24-10-22(a) because all parties receive notice of hearings and trials,

so long as they were real hearings and real trials. Adv. Op. No. 84-40 (September 21, 1984) (decided under former O.C.G.A. § 24-10-22).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, §§ 1012 et seq., 1023, 1024. 98 C.J.S. (Rev), Witnesses, §§ 6, 67et seq.

ALR. — Construction and application of provisions of Fair Labor Standards Act regarding investigatory subpoena duces tecum, 166 ALR 553.

Compelling production or authentication for use as evidence of court records or writings or objects in custody of court or officer thereof, 170 ALR 334.

Form, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records, and documents, 23 ALR2d 862.

Pretrial examination or discovery to ascertain from defendant in action for injury, death, or damages, existence and amount of liability insurance and insurer's identity, 13 ALR3d 822.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege, but owned by another, 37 ALR3d 1373.

Right of member, officer, agent, or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records, 52 ALR3d 636.

Availability of sole shareholder's Fifth Amendment privilege against self-incrimination to resist production of corporation's books and records--modern status, 87 ALR Fed. 177.

24-13-24. Service of subpoenas.

A subpoena may be served by any sheriff, by his or her deputy, or by any other person not less than 18 years of age. Proof may be shown by return or certificate endorsed on a copy of the subpoena. Subpoenas may also be served by registered or certified mail or statutory overnight delivery, and the return receipt shall constitute prima-facie proof of service. Service upon a party may be made by serving his or her counsel of record. (Code 1981, § 24-13-24, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Issuance of subpoenas by Superior Court of Fulton County on behalf of the Committees on Ethics of the Senate and House of Representatives, § 28-1-16.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-1501 and former O.C.G.A. § 24-10-23 are included in the annotations for this Code section.

Invalid subpoena. — When service of the subpoenas was not effected either by personal service or by certified mail, the only two modes authorized by the former statute, the lack of service invalidated the legal force and effect of the subpoena; therefore, the subpoena could not serve as the basis for a conviction as a defaulting witness. Edenfield v. State, 147 Ga. App. 502, 249 S.E.2d 316 (1978) (decided under former Code 1933, § 38-1501).

Actual receipt immaterial. — With respect to subpoenas which must have been served upon an adversary party, it was immaterial that the party actually received the pleading or other matter when service was otherwise improper. Heard v. Hopper, 233 Ga. 617, 212 S.E.2d

797 (1975) (decided under former Code 1933, § 38-1501); Edenfield v. State, 147 Ga. App. 502, 249 S.E.2d 316 (1978) (decided under former Code 1933, § 38-1501); Lake v. Hamilton Bank, 148 Ga. App. 348, 251 S.E.2d 177 (1978) (decided under former Code 1933, § 38-1501).

Incompetent witness. — Defendant's offer to prove service of the subpoena in compliance with former O.C.G.A. § 24-10-23 was foreclosed and its necessity mooted by the trial court's ruling, communicated to the jury, that the person upon whom the subpoena was purportedly served was incompetent to testify. Cofield v. State, 247 Ga. 98, 274 S.E.2d 530 (1981) (decided under former O.C.G.A. § 24-10-23).

Inability of witness to appear. — When the failure to hand the subpoena to the witness personally appeared to have had nothing to do with the absence of the witness, a motion for continuance should have been granted. Waters v. State, 85 Ga. App. 79, 68 S.E.2d 233 (1951) (decided under former Code 1933, § 38-1501).

Informal notice of hearing date change sufficient. — Witness's duty to testify after the witness was properly served with the initial witness subpoena, was not dissolved merely because the witness received notice of a change in the hearing date from the witness's receptionist rather than by the means authorized for service of subpoenas under former O.C.G.A. § 24-10-23. Mijajlovic v. State, 179 Ga. App. 506, 347 S.E.2d 325 (1986) (decided under former O.C.G.A. § 24-10-23).

Nonparties. — Although former O.C.G.A. § 24-10-23 permitted service on a party by service on that party's attorney, it did not provide for such service on nonparties. Haywood v. Aerospec, Inc., 193 Ga. App. 479, 388 S.E.2d 367 (1989) (decided under former O.C.G.A. § 24-10-23).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 9, 15.

C.J.S. — 98 C.J.S. (Rev), Witnesses, §§ 31, 53 et seq.

24-13-25. Fees and mileage; when tender required.

Except as provided in Code Section 24-13-28, the witness fee shall be $25.00 per diem, and execution shall be issued by the clerk upon affidavit of the witness to enforce payment thereof. The payment of witness fees shall not be demanded as a condition precedent to attendance; but, when a witness resides outside the county where the testimony is to be given, service of the subpoena, to be valid, shall be accompanied by tender of the witness fee for one day's attendance plus mileage of 45¢ per mile for traveling expenses for going from and returning to his or her place of residence by the nearest practical route. Tender of witness fees and mileage may be made by United States currency, postal money order, cashier's check, certified check, or the check of an attorney or law firm. When the subpoena is issued on behalf of this state, or an officer, agency, or political subdivision thereof, or an accused in a criminal proceeding, witness fees and mileage need not be tendered. (Code 1981, § 24-13-25, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Witness fees for attendance before Judicial Qualifications Commission, Rules of the Judicial Qualifications Commission, Rule 18(d).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Laws 1799, Cobb's 1851 Digest, p. 277, former Laws 1842, Cobb's 1851 Digest, p. 280, former Code 1863, §§ 3765, 3768, former Code 1868, §§ 3789, 3792, former Code 1873, §§ 3842, 3845, former Code 1882, §§ 3842, 3845, former Civil Code 1895, § 5261, former Penal Code 1895, § 1115, former Civil Code 1910, § 5850, former Penal Code 1910, § 1144, former Code 1933, §§ 38-1502, 38-1902, and former O.C.G.A. § 24-10-24 are included in the annotations for this Code section.

Tender of fee and mileage. — Mileage and per diem required by the former statute for out of county residents must have been tendered before their attendance could have been compelled. Neal v. Smith, 226 Ga. 96, 172 S.E.2d 684 (1970) (decided under former Code 1933, §§ 38-1502, 38-1902).

Determination of mileage. — Nonresident witness was entitled to mileage from the county treasurer for the whole distance traveled from and returning to the witness's home. Dutcher v. Justices of Inferior Court, 38 Ga. 214 (1868) (decided under former Code 1863, §§ 3765, 3768).

Continuance. — Witness could not charge for attendance rendered after the case had been postponed or continued, whether the witness happened to hear the announcement of the postponement or continuance or not. Robison v. Banks, 17 Ga. 211 (1855) (decided under Laws 1842, Cobb's 1851 Digest, p. 280).

Expert witnesses. — No statute in Georgia allowed or prohibited fees to expert witnesses, and while there could be no charge beyond the legal fees of ordinary witnesses for attendance on the court in obedience to subpoena, still, as a physician could not be required to make any examination or preliminary preparations, or to listen to the testimony, in order the better to give the expert's opinion as an expert, the expert may have for such services demanded extra compensation. Schofield v. Little, 2 Ga. App. 286, 58 S.E. 666 (1907) (decided under former Penal Code 1895, § 1115).

Lodging and airfare costs. — There was no specific statutory authorization for assessing a criminal defendant for the lodging and airfare costs of witnesses for the state. Smith v. State, 272 Ga. 83, 526 S.E.2d 59 (2000), reversing Smith v. State, 236 Ga. App. 548, 512 S.E.2d 19 (1999) (decided under former O.C.G.A. § 24-10-24).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, §§ 38-1502 and 38-1902, and former O.C.G.A. § 24-10-24 are included in the annotations for this Code section.

Legislative intent of the former provisions was to eliminate witness fees in justice courts. 1970 Op. Att'y Gen. U70-234 (decided under former Code 1933, §§ 38-1502 and 38-1902).

Applicability. — Former statute applied to both civil and criminal cases. 1972 Op. Att'y Gen. No. U72-55 (decided under former Code 1933, §§ 38-1502 and 38-1902).

Criminal cases. — County must pay the per diem witness fee to witnesses summoned in criminal cases as well as to those summoned in civil cases; the source of funds for witness fees was from county taxes. 1970 Op. Att'y Gen. No. U70-11 (decided under former Code 1933, §§ 38-1502 and 38-1902).

Resident of county from which the subpoena originated was entitled to payment of the witness fee, but the resident cannot demand prepayment as a condition to the resident's appearance in court. 1967 Op. Att'y Gen. No. 67-311 (decided under former Code 1933, §§ 38-1502 and 38-1902).

Peace officer who, required by subpoena, attended court on behalf of the state during any hours except regular duty hours, was entitled to mileage as provided by former Code 1933, §§ 38-1502 and 38-1902; under these con-

ditions, the officer was also entitled to per diem. 1971 Op. Att'y Gen. No. U71-57 (decided under former Code 1933, §§ 38-1502 and 38-1902).

State officer or agent was to be treated as an ordinary witness and would follow the same procedure and payment as was set forth in the former statute. However, if the state officer was a witness for the state, an officer, agency, or political subdivision thereof, or a defendant in a criminal case, fees and mileage need not be tendered as a condition precedent to appearance; as for the average citizen, service of the subpoena must be accompanied by tender of the above payment to a non-county resident or the subpoena was invalid; with respect to the rights of a county resident, this class of witness still had a right to the per diem witness fee, but the exact time of such payment was within the discretion of the court. 1967 Op. Att'y Gen. No. 67-311 (decided under former Code 1933, §§ 38-1502 and 38-1902).

RESEARCH REFERENCES

C.J.S. — 98 C.J.S. (Rev), Witnesses, §§ 119, 121, 226.

ALR. — Amount of fees allowable to examiners of questioned documents or handwriting experts for serving and testifying, 86 ALR2d 1283.

24-13-26. Enforcement of subpoenas; continuance; secondary evidence of books, papers, or documents.

(a) Subpoenas may be enforced by attachment for contempt and by a fine of not more than $300.00 or not more than 20 days' imprisonment, or both. In all proceedings under this Code section, the court shall consider whether under the circumstances of each proceeding the subpoena was served within a reasonable time, but in any event not less than 24 hours prior to the time that appearance thereunder was required.

(b) The court may also in appropriate proceedings grant continuance of the proceeding. Where subpoenas were issued in blank, no continuance shall be granted because of failure to respond thereto when the party obtaining such subpoenas fails to present to the clerk the name and address of the witness so subpoenaed at least six hours before appearance is required.

(c) When evidence is unsuccessfully sought, secondary evidence thereof shall be admissible. (Code 1981, § 24-13-26, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942.)

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised punctuation in the first sentence of subsection (a).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5263, former Civil Code 1910, § 5852, former Code 1933, § 38-1504, and former O.C.G.A. § 24-10-25 are included in the annotations for this Code section.

Service. — In order to compel the at-

tendance of a witness by attachment, it must have been shown that the witness had been served with the precept of the court. Harrison v. Langston & Woodson, 100 Ga. 394, 28 S.E. 162 (1897) (decided under former Civil Code 1895, § 5263).

Witness not served. — When the defendant's motion for continuance was based upon the absence of a material witness for whom a subpoena was not issued by the defendant until the morning the trial was to begin and who had not been served therewith at the time the motion was made, there was no error in overruling the motion. Eady v. State, 129 Ga. App. 656, 200 S.E.2d 767 (1973) (decided under former Code 1933, § 38-1504).

Service less than 24 hours. — Trial court could not impose sanctions upon a witness who failed or refused to appear in answer to a subpoena served less than 24 hours before the required appearance. Eubanks v. Brooks, 139 Ga. App. 166, 227 S.E.2d 923 (1976) (decided under former Code 1933, § 38-1504).

Trial court did not err in failing to enforce defendant's subpoenas because the subpoenas were not served more than 24 hours prior to trial. Byron v. State, 229 Ga. App. 795, 495 S.E.2d 123 (1998) (decided under former O.C.G.A. § 24-10-25).

In a personal injury action, because a driver waited until the eve of trial to serve the doctor with a subpoena for the doctor's testimony, the trial court: (1) did not abuse the court's discretion in determining that such service was not reasonable under former O.C.G.A. § 24-10-25(a); and (2) did not err in refusing to grant the driver a continuance or citing the physician in contempt for failing to appear in court; moreover, since the subpoena was unenforceable, evidence surrounding the doctor's failure to appear became irrelevant under former O.C.G.A. § 24-2-1 (see now O.C.G.A. § 24-4-401 et seq.). Buster v. Poole, 279 Ga. App. 828, 632 S.E.2d 680 (2006) (decided under former O.C.G.A. § 24-10-25).

Discretion of court. — An important exercise of discretion on the part of the trial judge was necessary under the former statute, and it was only when this discretion was abused that it should have been controlled by the reviewing court. Carter & Co. v. Southern Ry., 3 Ga. App. 34, 59 S.E. 209 (1907) (decided under former Civil Code 1895, § 5263).

Circumstances of each case. — Former statute allowed the trial court to consider the circumstances of each case in determining whether the period between service of the subpoena and the required appearance was sufficient. Eubanks v. Brooks, 139 Ga. App. 166, 227 S.E.2d 923 (1976) (decided under former Code 1933, § 38-1504).

Trial court could extend length of notice when the court believed preparation was required but the trial court could not arbitrarily reduce the notice requirement below 24 hours. Eubanks v. Brooks, 139 Ga. App. 166, 227 S.E.2d 923 (1976) (decided under former Code 1933, § 38-1504).

Contempt power of imprisonment applied only in the event that the witness, after having been cited, refused to testify in the case. Moody v. State, 131 Ga. App. 355, 206 S.E.2d 79 (1974) (decided under former Code 1933, § 38-1504).

Subpoenas may have been enforced by attachment for contempt, but this meant citation, notice, hearing, and assistance of counsel, as in contempts generally, and not the punishment meted out for courtroom incidents under the court's inherent power to maintain order. Moody v. State, 131 Ga. App. 355, 206 S.E.2d 79 (1974) (decided under former Code 1933, § 38-1504).

Challenge to subpoena to produce gun waived by production of gun. — In a prosecution against a defendant for aggravated assault and other charges arising out of a road rage incident, the defendant waived a challenge under former O.C.G.A. § 24-10-25 to the timeliness of a subpoena directing the production of the defendant's gun by producing the gun prior to moving to quash the subpoena, and the defendant failed to provide a means of appellate review by including the subpoena or any service affidavit in the record; the defendant's motion to quash the subpoena under former O.C.G.A. § 24-10-25(a) was therefore properly denied. Adams v. State, 282 Ga. App. 819, 640 S.E.2d 329 (2006) (decided under former O.C.G.A. § 24-10-25).

Interference by third party in ordering individual in possession of corporate documents sought by subpoena duces tecum to turn the documents over to the third party for the purpose of concealing, destroying, or otherwise withholding the information therein contained from the grand jury would have been an act of contempt which the court would have been well authorized to punish. Jones v. State, 99 Ga. App. 858, 109 S.E.2d 859 (1959) (decided under former Code 1933, § 38-1504).

Identical subpoenas served on president and employee of corporation. — When identical subpoenas directed to a corporation were served upon the president in control of the corporation and an employee having actual custody of the papers, it was perfectly proper for the president to demand and acquire custody of the documents from the employee for the purpose of producing the documents in compliance with the subpoena served upon the individual as such president; it did not constitute a contempt of court that the defendant, before complying with the subpoena, saw fit to test the subpoena's sufficiency by means of a motion to quash, since the defendant did in fact, upon obtaining a ruling by the court adverse to the defendant's contentions, surrender the documents called for by the subpoena. Jones v. State, 99 Ga. App. 858, 109 S.E.2d 859 (1959) (decided under former Code 1933, § 38-1504).

Continuance. — When the court offered to issue an attachment to compel the attendance of a witness, and the witness's counsel declined to take the same, but instead thereof relied upon the service of a second subpoena, which latter the witness likewise disobeyed, there was not abuse of discretion in refusing a continuance on account of the absence of the witness. Brady v. State, 120 Ga. 181, 47 S.E. 535 (1904) (decided under former Civil Code 1895, § 5263).

Waiver. — Subpoenaed witness could waive the 24 hour notice requirement. Eubanks v. Brooks, 139 Ga. App. 166, 227 S.E.2d 923 (1976) (decided under former Code 1933, § 38-1504).

Notice period waived by witness testifying. — Subpoenaed witness waived the 24-hour notice requirement when the witness refused the trial court's offer of continuance and voluntarily testified at trial. Stein v. Cherokee Ins. Co., 169 Ga. App. 1, 311 S.E.2d 220 (1983) (decided under former O.C.G.A. § 24-10-25).

Motions to compel and for sanctions were not proper vehicles for the enforcement of a notice to produce. Bergen v. Cardiopul Medical, Inc., 175 Ga. App. 700, 334 S.E.2d 28 (1985) (decided under former O.C.G.A. § 24-10-25).

Motion to produce filed on morning of trial was too late. Williams v. State, 142 Ga. App. 764, 236 S.E.2d 893 (1977) (decided under former Code 1933, § 38-1504).

Secondary evidence admissible. — When a party to a cause served on the opposite party, who was presumably in possession of a once existing material writing, a notice to produce such writing, and the party served responded that the writing was lost, or failed to produce the writing at the trial, secondary evidence as to the contents of the original writing became admissible. Middlebrooks v. Cabaniss, 193 Ga. 764, 20 S.E.2d 10 (1942) (decided under former Code 1933, § 38-1504).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, §§ 1019, 1020, 1022. 98 C.J.S. (Rev), Witnesses, §§ 6, 67 et seq.

ALR. — Mandamus to compel court or judge to require witness to testify or produce documents, 41 ALR 436.

Admissibility of evidence of party's refusal to permit examination or inspection of property or person, 175 ALR 234.

Tort or statutory liability for failure or refusal of witness to give testimony, 61 ALR3d 1297.

24-13-27. Notice to produce.

Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party. Service may be perfected in accordance with Code Section 24-13-24, but no witness fees or mileage shall be allowed therefor. Such notices may be enforced in the manner prescribed by Code Section 24-13-26, and Code Section 24-13-23 shall also apply to such notices. The notice shall be in writing, signed by the party seeking production of the evidence, or the party's attorney, and shall be directed to the opposite party or his or her attorney. (Code 1981, § 24-13-27, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Discovery of documentary and tangible evidence generally, § 9-11-34.

Law reviews. — For article discussing available means of discovery for criminal cases in Georgia, see 12 Ga. St. B.J. 134 (1976).

For note, "Criminal Discovery: The Use of Notices to Produce," see 30 Mercer L. Rev. 331 (1978).

JUDICIAL DECISIONS

Analysis

General Consideration
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1. In General
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Laws 1841, Cobb's 1851 Digest, p. 465, former Code 1873, §§ 3508, 3509, 3510, 3511, 3512, 3513, and 3834, former Code 1882, §§ 3508, 3509, 3510, 3511, 3512, 3513, 3834, former Civil Code 1895, §§ 5248, 5249, 5250, 5251, 5252, 5253, and 5254, former Civil Code 1910, §§ 5837, 5838, 5839, 5840, 5841, 5842, 5843, former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, and 38-807, and former O.C.G.A. § 24-10-26 are included in the annotations for this Code section.

Purpose. — Notice under the former provisions was the appropriate means of procuring the primary evidence, or of laying the foundation for secondary evidence. McAdam v. Weikel & Smith Spice Co., 64 Ga. 441 (1879) (decided under former Code 1873, §§ 3508, 3509, 3510, 3511, 3512, 3513, 3834).

Notice to produce applied only to parties. — Atlantic Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Subpoena duces tecum and notice distinguished. — Papers were produced under notice, when directed to parties or their counsel; when in the possession of others, they must have been reached by a subpoena duces tecum. Wright v. Central R.R. & Banking Co., 21 Ga. 345 (1857) (decided under former Laws 1841, Cobb's 1851 Digest, p. 465); Ex parte Calhoun, 87 Ga. 359, 13 S.E. 694 (1891) (decided under former Code 1882, §§ 3508, 3509, 3510, 3511, 3512, 3513, 3834).

Equitable and legal cases. — Provisions of former statute were applicable to

General Consideration (Cont'd)

all cases, whether the relief prayed for be legal or equitable. Georgia Iron & Coal Co. v. Etowah Iron Co., 104 Ga. 395, 30 S.E. 878 (1898) (decided under former Civil Code 1895, §§ 5248, 5249, 5250, 5251, 5252, 5253, 5254).

General description sufficient. — There was no necessity for a technical description of the papers to have the papers produced; a very general description would have been effectual. Fletcher v. Faust, 22 Ga. 559 (1857) (decided under Laws 1841, Cobb's 1851 Digest, p. 465).

Specificity of notice. — Notice to produce should have been specific enough in its demands to relate the documents sought to the questions at issue. Horton v. Huiet, 113 Ga. App. 166, 147 S.E.2d 669 (1966) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Sufficiency of description. — Description was sufficiently definite if the party who was called on to produce or to give an inspection would have been enabled to know what to produce or what the party must give an inspection of. Fluker v. Bank of Union Point, 178 Ga. 297, 173 S.E. 149 (1934) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Material not in possession of party. — Failure to produce material not in possession, control, or custody did not constitute a failure to comply with notice to produce. Gibson v. State, 150 Ga. App. 718, 258 S.E.2d 537 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Materiality of evidence question for court. — Determination of the materiality of evidence involved the exercise of a judicial function; the conclusion of a witness that the contents of a paper were material, when there was no proof as to what the paper contained, was no proof that the papers sought to be produced were in fact necessary, and could not relieve the court from the duty of passing upon the question of materiality. Central of Ga. Ry. v. Lewis, 2 Ga. App. 428, 58 S.E. 674 (1907) (decided under former Civil Code 1895, §§ 5248, 5249, 5250, 5251, 5252, 5253, 5254).

Term to term. — Notice to produce was not defective in that the notice did not specifically call for the production of the paper from "term to term," and the party served therewith was not relieved from compliance with the notice because the trial occurred at a term subsequent to the term at which such party was notified to produce the paper. Carrington v. Brooks, 121 Ga. 250, 48 S.E. 970 (1904) (decided under former Civil Code 1895, §§ 5248, 5249, 5250, 5251, 5252, 5253, 5254).

All books covered by the notice to produce must have been produced. American Nat'l Bank v. Brunswick Light & Water Co., 100 Ga. 92, 26 S.E. 473 (1896) (decided under former Civil Code 1895, §§ 5248, 5249, 5250, 5251, 5252, 5253, 5254).

Books which were irrelevant, though produced under notice, were not admissible. Gow v. Charlotte, C. & A.R.R., 68 Ga. 54 (1881) (decided under former Code 1873, §§ 3508, 3509, 3510, 3511, 3512, 3513, 3834).

Motion to produce filed on morning of trial was too late. Williams v. State, 142 Ga. App. 764, 236 S.E.2d 893 (1977) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Motion to produce timely despite expiration of time under Superior Court Rule 5.1. — Plaintiff who served a notice to produce approximately 20 days prior to trial was entitled to have documents produced even though the six-month discovery period provided by Superior Court Rule 5.1 had expired. Gaffron v. Metropolitan Atlanta Rapid Transit Auth., 229 Ga. App. 426, 494 S.E.2d 54 (1997) (decided under former O.C.G.A. § 24-10-26).

Quashing or enforcement of notice. — Motions pursuant to O.C.G.A. §§ 9-11-26, 9-11-34, and 9-11-37 for a protective order or sanctions were not proper vehicles for the quashing or the enforcement of a former O.C.G.A. § 24-10-26 notice to produce. Joel v. Duet Holdings, Inc., 181 Ga. App. 705, 353 S.E.2d 548 (1987) (decided under former O.C.G.A. § 24-10-26).

Motions to compel and for sanctions were not proper vehicles for the

enforcement of a notice to produce. Bergen v. Cardiopul Medical, Inc., 175 Ga. App. 700, 334 S.E.2d 28 (1985) (decided under former O.C.G.A. § 24-10-26).

Trial court did not have the discretion to hold that a notice to produce under former O.C.G.A. § 24-10-26 had been converted into a request for production under O.C.G.A. § 9-11-34. Bergen v. Cardiopul Medical, Inc., 175 Ga. App. 700, 334 S.E.2d 28 (1985) (decided under former O.C.G.A. § 24-10-26).

Criminal Cases

1. In General

Application in criminal cases. — See Brown v. State, 238 Ga. 98, 231 S.E.2d 65 (1976) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Phillips v. State, 146 Ga. App. 423, 246 S.E.2d 438 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Natson v. State, 242 Ga. 618, 250 S.E.2d 420 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Watson v. State, 147 Ga. App. 847, 250 S.E.2d 540 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Crosby v. State, 150 Ga. App. 804, 258 S.E.2d 593 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Jackson v. State, 158 Ga. App. 530, 281 S.E.2d 252 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Use of statute by state. — Former statute applied not only to the obligation of the state to produce certain items, but also applied to any party who desired to compel production of books, writings, or other documents or tangible things in the possession, custody, or control of another party; accordingly, the state had as much right to utilize the former statute as a defendant. Phillips v. State, 146 Ga. App. 423, 246 S.E.2d 438 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Constitutionality of use by state. — Sanctioning the state's resort to the former statute in compelling a defendant to produce specific property for use as evidence against the defendant would have been unconstitutional. Johnson v. State, 156 Ga. App. 496, 274 S.E.2d 837 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Unconstitutional self-incrimination. — State may not have used a notice to produce to reseize property and redivest the defendant of custody and possession by retaining the property and using the property as evidence in a criminal proceeding; unconstitutional self-incrimination would have been the result of compliance with the state's notice. Johnson v. State, 156 Ga. App. 496, 274 S.E.2d 837 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Omission of evidence of reasonable doubt is commission of constitutional error. — Proper standard of materiality must have reflected the overriding concern with the justice of the finding of guilt. Such a finding was permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence created a reasonable doubt that did not otherwise exist, constitutional error had been committed. This means that the omission must have been evaluated in the context of the entire record. If there was no reasonable doubt about guilt whether or not the additional evidence was considered, there was no justification for a new trial. On the other hand, if the verdict was already of questionable validity, additional evidence of relatively minor importance might have been sufficient to create a reasonable doubt. Smith v. State, 248 Ga. 507, 284 S.E.2d 406 (1981) (decided under former O.C.G.A. § 24-10-26).

No discovery in criminal cases. — Although an accused may have utilized the notice to produce provision of the former statute to compel the production of tangible objects and documents at trial,

Criminal Cases (Cont'd)
1. In General (Cont'd)

discovery as such was not available to an accused in criminal cases in Georgia. Howard v. State, 144 Ga. App. 208, 240 S.E.2d 908 (1977) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Pryor v. State, 238 Ga. 698, 234 S.E.2d 918, cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L. Ed. 2d 294 (1977), overruled on other grounds by Drinkard v. Walker, 281 Ga. 211, 636 S.E.2d 530 (2006) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Toole v. State, 146 Ga. App. 305, 246 S.E.2d 338 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Notice to produce not used to circumvent discovery reciprocity. — Notice to produce under former O.C.G.A. § 24-10-26 could not be used as a discovery tool to circumvent discovery reciprocity under the discovery act. Farmer v. State, 222 Ga. App. 506, 474 S.E.2d 711 (1996) (decided under former O.C.G.A. § 24-10-26); McGuire v. State, 243 Ga. App. 899, 534 S.E.2d 549 (2000) (decided under former O.C.G.A. § 24-10-26).

Compared with Civil Practice Act. — Notice to produce in a criminal case was not as all-inclusive as a request to produce discoverable evidence under the Civil Practice Act. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

There was no absolute right to examine original evidence; the motion for an independent examination must have been timely made, and the accused must have shown that the original evidence was materially favorable to the accused. Brooks v. State, 141 Ga. App. 725, 234 S.E.2d 541 (1977) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Criminal defendant had burden of showing how defendant's case had been materially prejudiced by failure to produce even when trial court declined to make an in camera inspection. Patterson v. State, 154 Ga. App. 877, 270 S.E.2d 86 (1980) (decided under former O.C.G.A. § 24-10-26).

In camera inspection. — On motion for production of specific material, the defendant must have been furnished exculpatory information; i.e., information favorable to the defendant and material either to guilt or punishment. When a motion was made and the prosecutor did not make the specified material available to defense counsel, the trial judge should have made an in camera inspection of the material sought. On motion by the defendant the material examined in camera should either have been sealed and filed, or an inventory or record of the examined material made so as to permit appellate review. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Refusal to search for evidence. — Prosecution did not suppress evidence by refusing to conduct a search for the evidence, even though the evidence may have been more accessible to the state than to the defense. Baker v. State, 245 Ga. 657, 266 S.E.2d 477 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Right of victim prevails over right of defendant. — Fourth Amendment right of the victim of a crime to be secure against an unreasonable search must have prevailed over the right of the accused to obtain evidence for the accused's defense. State v. Haynie, 240 Ga. 866, 242 S.E.2d 713 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Confidential informant. — It was within the sound discretion of a trial court whether to require the state to disclose to the defendant the name and address of a confidential informant. Clayton v. State, 145 Ga. App. 541, 244 S.E.2d 67 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

2. Items Not Subject to Notice to Produce

Material not in state's possession was not subject to a notice to produce. — Ferrell v. State, 149 Ga. App. 405, 254 S.E.2d 404 (1979), cert. denied, 444 U.S. 1021, 100 S. Ct. 679, 62 L. Ed. 2d 653 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Patterson v. State, 154 Ga. App. 877, 270 S.E.2d 86 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

When the materials sought by defendant were not types of items reasonably expected to be found in the custody of the solicitor (now district attorney) preparing the case against the defendant and such evidence could have been obtained only if the prosecution actively sought the evidence, thereby causing the state to investigate the case for the defense, the trial court did not err in denying the defendant's motion to produce such evidence or in denying the motion for continuance based upon the absence of the materials in the courtroom at the time of trial. Fletcher v. State, 157 Ga. App. 707, 278 S.E.2d 444 (1981) (decided under former O.C.G.A. § 24-10-26).

In a prosecution for homicide by vehicle, it was not error to deny the defendant's motion to produce the deceased's automobile, absent a showing that the automobile was in the state's possession, custody, or control. Wheat v. State, 171 Ga. App. 583, 320 S.E.2d 808 (1984) (decided under former O.C.G.A. § 24-10-26).

State was not required to produce documents pursuant to defendants' motions, since the materials sought were not of the type reasonably expected to be found in the custody of the solicitor (now district attorney) preparing the case. Dixon v. State, 196 Ga. App. 15, 395 S.E.2d 577 (1990) (decided under former O.C.G.A. § 24-10-26).

In a prosecution for driving under the influence, the state was not required to comply with defendant's notice to produce documents relating to the Intoxilyzer because such materials are not reasonably expected to be found in the possession, custody, or control of the prosecutor. Maurer v. State, 240 Ga. App. 145, 525 S.E.2d 104 (1999) (decided under former O.C.G.A. § 24-10-26).

District attorney's work product. — Notice to produce could not be used in a criminal case to require the production of the district attorney's work product; reports, memoranda, and documents in the files of law enforcement officers; addresses and telephone numbers of the state's witnesses; or the names and addresses of other persons with knowledge of the facts. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

File of district attorney. — Defendant in a criminal case did not have the right to inspect the file of the district attorney before the defendant was put on trial. White v. State, 230 Ga. 327, 196 S.E.2d 849, appeal dismissed, 414 U.S. 886, 94 S. Ct. 222, 38 L. Ed. 2d 134 (1973) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Notice to produce could not be used to enable defense counsel to examine, in advance of trial or evidentiary hearing, the contents of the district attorney's file. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Defendant's diaries, which were in the state's possession, were not a proper subject of discovery under former O.C.G.A. § 24-10-26 (now see O.C.G.A § 24-13-27). Sims v. State, 251 Ga. 877, 311 S.E.2d 161 (1984) (decided under former O.C.G.A. § 24-10-26).

Statement of defendant. — State was under no duty to provide defense counsel a prior contradictory statement of defendant which impeached defendant because the statement was neither exculpatory nor likely to be used in evidence by the defense. Farmer v. State, 222 Ga. App. 506, 474 S.E.2d 711 (1996) (decided under former O.C.G.A. § 24-10-26).

Photos of the crime scene not presented in evidence by the state and not

Criminal Cases (Cont'd)
2. Items Not Subject to Notice to Produce (Cont'd)

exculpatory were not subject to discovery. Sims v. State, 251 Ga. 877, 311 S.E.2d 161 (1984) (decided under former O.C.G.A. § 24-10-26).

Statements of witnesses in the prosecutor's files, if nothing more appeared, may not have been reached by statutory provisions on notice to produce. Stevens v. State, 242 Ga. 34, 247 S.E.2d 838 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Spain v. State, 243 Ga. 15, 252 S.E.2d 436 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Holton v. State, 243 Ga. 312, 253 S.E.2d 736 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Hamby v. State, 243 Ga. 339, 253 S.E.2d 759 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Stanley v. State, 153 Ga. App. 42, 264 S.E.2d 533 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981), cert. denied, 456 U.S. 984, 102 S. Ct. 2258, 72 L. Ed. 2d 862 (1982) (decided under former O.C.G.A. § 24-10-26); Hill v. State, 161 Ga. App. 346, 287 S.E.2d 779 (1982) (decided under former O.C.G.A. § 24-10-26); Holbrook v. State, 162 Ga. App. 400, 291 S.E.2d 729 (1982) (decided under former O.C.G.A. § 24-10-26); Ivester v. State, 252 Ga. 333, 313 S.E.2d 674 (1984) (decided under former O.C.G.A. § 24-10-26); Pittman v. State, 175 Ga. App. 50, 332 S.E.2d 356 (1985) (decided under former O.C.G.A. § 24-10-26).

Witness statements have never been subject to a notice to produce, although exculpatory witness statements were subject to disclosure, if requested under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Welch v. State, 251 Ga. 197, 304 S.E.2d 391 (1983) (decided under former O.C.G.A. § 24-10-26); Ivester v. State, 252 Ga. 333, 313 S.E.2d 674 (1984) (decided under former O.C.G.A. § 24-10-26).

Pretrial statements of state's witnesses were not within the ambit of former O.C.G.A. § 24-10-26 (now see O.C.G.A. § 24-13-27) notice to produce. Ford v. State, 256 Ga. 375, 349 S.E.2d 361 (1986) (decided under former O.C.G.A. § 24-10-26).

Evidence used on behalf of state and not needed for defense. — Failure to produce a photo array which was displayed to an eyewitness before the array was introduced at trial did not violate former O.C.G.A. § 24-10-26 (now see O.C.G.A § 24-13-27) since the array and the identification pursuant to it were used as evidence on behalf of the state, and were not needed by the defendant as evidence in support of the defendant's defense. Gilstrap v. State, 256 Ga. 20, 342 S.E.2d 667 (1986) (decided under former O.C.G.A. § 24-10-26).

Trial court did not err in admitting two photographs of a rape victim when, although the state had not supplied the photographs in response to defendant's pretrial notice to produce, the photographs were used as evidence on behalf of the state and were not needed by defendant as evidence in support of defendant's defense. Sweetenburg v. State, 197 Ga. App. 36, 397 S.E.2d 451 (1990) (decided under former O.C.G.A. § 24-10-26).

Police surveillance videotape was not subject to discovery since the tape was not needed for use as evidence on the defendant's behalf and was only introduced on re-direct examination to rehabilitate the testimony of a witness. Deal v. State, 199 Ga. App. 184, 404 S.E.2d 343 (1991) (decided under former O.C.G.A. § 24-10-26).

Statement of nonwitness. — When no exculpatory material was suppressed, there was no requirement that the prosecution allow discovery of a statement of a person who was not a trial witness. Crosby v. State, 150 Ga. App. 804, 258 S.E.2d 593 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Tape recordings of drug transaction. — Tape recording of a drug transac-

tion was not discoverable pursuant to former O.C.G.A. § 24-10-26 nor under § 17-7-210 [repealed], since the recording was not of any taped statement given by the defendant while in police custody, nor under former § 17-7-211, since the tape recording did not constitute a written scientific report. Weldon v. State, 204 Ga. App. 221, 419 S.E.2d 59 (1992) (decided under former O.C.G.A. § 24-10-26).

Police and investigation reports. — Former statute did not require a district attorney to open the district attorney's files to the attorney for the accused, nor was the accused entitled as a matter of right to receive copies of police reports and investigation reports made in the course of preparing the case against the client. Stevens v. State, 242 Ga. 34, 247 S.E.2d 838 (1978), cert. denied, 449 U.S. 891, 101 S. Ct. 251, 66 L. Ed. 2d 118 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

There was no Georgia procedure requiring the district attorney to open the district attorney's files to the accused, nor was the accused entitled as a matter of right to receive copies of police reports and investigation reports made in the course of preparing the case against the accused. Baker v. State, 245 Ga. 657, 266 S.E.2d 477 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Reports and summaries made by police investigators were not the types of "books, writings or other documents or tangible things" subject to a notice to produce. Carter v. State, 150 Ga. App. 119, 257 S.E.2d 11 (1979) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807); Bennett v. State, 158 Ga. App. 421, 280 S.E.2d 429 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Intoximeter data. — Computer data upon which an intoximeter test was based were not the types of items reasonably expected to be found in the "custody" of the solicitor (now district attorney) preparing the case against the defendant. Ross v. State, 192 Ga. App. 850, 386 S.E.2d 721 (1989) (decided under former O.C.G.A. § 24-10-26).

Improper use of notice to produce. — Defendant having "moved to suppress" the evidence by virtue of contesting the libel for condemnation of former Code 1933, § 79A-828 (see now O.C.G.A. § 16-13-49) and the state having failed to meet the state's burden in that regard, the state may not use the notice to produce to "reseize" the property for evidentiary purposes. Johnson v. State, 156 Ga. App. 496, 274 S.E.2d 837 (1980) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Possession of bullet in body of victim. — State could not, under any theory, be deemed to have in the state's possession a bullet lodged in the body of a victim of a crime, and the state did not have any more right to require the removal of a bullet from the body of a living victim than did the accused. State v. Haynie, 240 Ga. 866, 242 S.E.2d 713 (1978) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

3. Items Subject to Notice to Produce

Admissible and necessary evidence. — Notices to produce could be used in a criminal case "to compel production of books, writings or other documents or tangible things in the possession, custody or control" of the opposite party (district attorney and investigating officers), for use at trial or at a pretrial evidentiary hearing, when such books, etc., would be admissible and were needed for use as evidence on behalf of the defendant. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Tangible objects and documents. — Accused may have used the notice to produce provision to compel the production of tangible objects and documents at trial. Brooks v. State, 141 Ga. App. 725, 234 S.E.2d 541 (1977) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Criminal Cases (Cont'd)
3. Items Subject to Notice to Produce (Cont'd)

More than list of witnesses. — Notice to produce was available in criminal cases for more than the limited purpose of obtaining a copy of the accusation and list of witnesses already available under former Code 1933, § 27-1403 [repealed]. Brown v. State, 238 Ga. 98, 231 S.E.2d 65 (1976) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Exculpatory matter. — Defendant was entitled to discovery of all exculpatory matter and anything in the district attorney's file which was favorable to defendant's defense. Maddox v. State, 136 Ga. App. 370, 221 S.E.2d 231 (1975) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

Material creating reasonable doubt. — Prosecutor was under a duty to furnish the defendant, without request, material which created a reasonable doubt as to the defendant's guilt. Wilson v. State, 246 Ga. 62, 268 S.E.2d 895 (1980), cert. denied, 449 U.S. 1103, 101 S. Ct. 901, 66 L. Ed. 2d 830 (1981) (decided under former Code 1933, §§ 38-801, 38-802, 38-803, 38-804, 38-805, 38-806, 38-807).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former O.C.G.A. § 24-10-26 are included in the annotations for this Code section.

Law enforcement officer who was covered by the Fair Labor Standards Act of 1938 would not be entitled to the witness fee established by former O.C.G.A. § 24-10-26 for testifying during "off-duty" hours. 1986 Op. Att'y Gen. No. U86-26 (decided under former O.C.G.A. § 24-10-26).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 755.
ALR. — Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution, 7 ALR3d 8.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 ALR3d 181.

24-13-28. Witness fees for law enforcement officers.

(a) As used in this Code section, the term:

(1) "Director" means the appropriate chief of police, sheriff, director of public safety of a college or university, local fire chief, director of the Georgia Bureau of Investigation, the commanding officer of the Georgia State Patrol, the commissioner of natural resources, the superintendent of a correctional institution, or the state fire marshal.

(2) "Law enforcement officer" means any member of a municipal or county police force, any deputy sheriff, any campus policeman as defined in Code Section 20-8-1, any member of a local fire department, any member of the Georgia State Patrol or Georgia Bureau of Investigation, any correctional officer, any person employed by the Department of Natural Resources as a law enforcement officer, or any arson investigator of the state fire marshal's office.

(3) "Regular duty hours" means the daily shift of duty to which a law enforcement officer is assigned and shall not include paid or unpaid vacation, paid or unpaid sick leave, paid or unpaid holiday leave, or any other paid or unpaid leave status established pursuant to the personnel regulations or scheduling practices of the employing agency.

(b) Any law enforcement officer who shall be required by subpoena to attend any superior court, other courts having jurisdiction to enforce the penal laws of this state, municipal court having jurisdiction to enforce the penal laws of this state as provided by Code Section 40-13-21, juvenile court, grand jury, hearing or inquest held or called by a coroner, or magistrate court involving any criminal matter, as a witness on behalf of the state during any hours except the regular duty hours to which the officer is assigned, shall be paid for such attendance at a fixed rate to be established by the governing authority, but not less than $25.00 per diem. The claim for the witness fees shall be endorsed on the subpoena showing the dates of attendance and stating that attendance was required during the hours other than the regular duty hours to which the claimant was assigned. The claimant shall verify this statement. The dates of attendance shall be certified by the judge or the prosecuting attorney of the court attended. The director or his or her designee shall certify that the claimant has not received any overtime pay for his or her attendance and that his or her attendance was required during hours other than regular duty hours. The amount due shall be paid by the governing body authorized to dispense public funds for the operation of the court. However, no such law enforcement officer shall claim or receive more than one witness fee per day for attendance in any court or before the grand jury regardless of the number of subpoenas which the law enforcement officer may have received requiring such officer to appear in such court or before the grand jury on any one day.

(c)(1) Except as provided in paragraph (2) of this subsection, any law enforcement officer who shall be required by subpoena to attend any court of this state with respect to any civil proceeding, as a witness concerning any matter relative to the law enforcement duties of such law enforcement officer during any hours except the regular duty hours to which the law enforcement officer is assigned, shall be paid for such attendance at a fixed rate to be established by the governing authority, but not less than $25.00 per diem. Any such law enforcement officer shall also be entitled to the mileage allowance provided in Code Section 24-13-25 when such law enforcement officer resides outside the county where the testimony is to be given. The claim for the witness fees shall be endorsed on the subpoena showing the dates of attendance and stating that attendance was required during the hours other than the regular duty hours to which the claimant was

assigned. The claimant shall verify such statement. The dates of attendance shall be certified by the party obtaining the subpoena. The director or his or her designee shall certify that the claimant has not received any overtime pay for the law enforcement officer's attendance and that such law enforcement officer's attendance was required during hours other than regular duty hours.

(2) Any law enforcement officer covered by paragraph (1) of this subsection who is required by subpoena to attend any court with respect to any civil proceeding, as a witness concerning any matter which is not related to the duties of such law enforcement officer, shall be compensated as provided in Code Section 24-13-25.

(d) The fee specified by subsections (b) and (c) of this Code section shall not be paid if the law enforcement officer receives any overtime pay for time spent attending such court pursuant to the subpoena. (Code 1981, § 24-13-28, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-27 are included in the annotations for this Code section.

Failure of proof that fee accrued. — When a police officer did not in the officer's affidavit verify that the officer's attendance was required during hours which were other than the officer's regularly assigned duty hours and there was no certification from the officer's superior that the officer was neither paid additional compensation nor given time off on account of the officer's service, there was a failure of proof that a witness fee had accrued. Walden v. State, 185 Ga. App. 413, 364 S.E.2d 304 (1987), rev'd on other grounds, 258 Ga. 503, 371 S.E.2d 852 (1988), aff'd, 189 Ga. App. 896, 378 S.E.2d 418 (1989) (decided under former O.C.G.A. § 24-10-27).

Lodging and airfare costs. — There was no specific statutory authorization for assessing a criminal defendant for the lodging and airfare costs of witnesses for the state. Smith v. State, 272 Ga. 83, 526 S.E.2d 59 (2000), reversing Smith v. State, 236 Ga. App. 548, 512 S.E.2d 19 (1999) (decided under former O.C.G.A. § 24-10-27).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1968, p. 434, § 1; former Ga. L. 1978, p. 925, § 1; former Ga. L. 1980, p. 439, § 1; and former O.C.G.A. § 24-10-27 are included in the opinions for this Code section.

Purpose of the former statute was to ensure that witness fees were not denied certain officers in cases involving penal statutes when those officers were connected with the enforcement of those statutes in such a way that testimony at a trial during off-duty hours might nevertheless be considered within their regular duties and therefore already compensated for by their salaries. 1972 Op. Att'y Gen. No. 72-157. (decided under former Ga. L. 1968, p. 434, § 1).

Criminal as well as civil cases. — County must pay the per diem witness fee to witnesses summoned in criminal cases, as well as to those summoned in civil cases; the source of funds for witness fees was from county taxes. 1970 Op. Att'y Gen. No. U70-11. (decided under former Ga. L. 1968, p. 434, § 1).

Word "member" in the former statute

did not include fingerprint experts employed by the Division of Investigation. 1972 Op. Att'y Gen. No. 72-157. (decided under former Ga. L. 1968, p. 434, § 1).

Peace officer who, required by subpoena, attended court on behalf of the state during any hours except regular duty hours, was entitled to mileage as provided by former O.C.G.A. § 24-10-24 (see now O.C.G.A. § 24-13-28); under these conditions, the peace officer was also entitled to per diem as provided in Ga. L. 1968, p. 434, § 1 (see O.C.G.A. § 24-13-27). 1971 Op. Att'y Gen. No. U71-57.

State trooper was entitled to be compensated separately from each court in which the trooper appeared as a witness under subpoena; however, the trooper may not have received more than one witness fee per day for appearing as a witness under subpoena in any single court. 1983 Op. Att'y Gen. No. 83-4. (decided under former O.C.G.A. § 24-10-27).

Attendance at justice court commitment hearing did not entitle an officer to a fee. 1970 Op. Att'y Gen. No. U70-234. (decided under former Ga. L. 1968, p. 434, § 1).

University officers not entitled to fees. — University system law enforcement officers may have enforced municipal ordinances of all kinds within 500 yards of the Board of Regents' property and may have prosecuted those cases in any court of this state. However, such officers were not entitled to the statutory witness stipend provided under subsection (a) of former O.C.G.A. § 24-10-27 (now see O.C.G.A. § 24-13-28). 1993 Op. Att'y Gen. No. 93-20. (decided under former O.C.G.A. § 24-10-27).

Endorsement of claim for fees. — Under the provisions of former O.C.G.A. § 24-10-27 (now see O.C.G.A. § 24-13-28), a post commander may have endorsed a state trooper's claim for witness fees stating that attendance was required during hours other than the trooper's regular duty hours. However, only the commanding officer of the division to which the trooper was assigned was authorized to certify that the claimant had been paid no additional compensation and had been given no time off on account of the claimant's court appearance. 1985 Op. Att'y Gen. No. U85-28. (decided under former O.C.G.A. § 24-10-27).

Subpoena of duty records by grand juries. — Grand juries did not have the power to subpoena duty records of the state patrol or city police to determine the accuracy of disbursement of witness fees by the clerk's office. 1985 Op. Att'y Gen. No. U85-28. (decided under former O.C.G.A. § 24-10-27).

RESEARCH REFERENCES

C.J.S. — 98 C.J.S. (Rev), Witnesses, § 147.

24-13-29. Legislators' exemption.

No member of the General Assembly of Georgia shall be compelled to attend and give testimony at any hearing or trial or to produce evidence while the General Assembly is in regular or extraordinary session. (Code 1981, § 24-13-29, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

ARTICLE 3

SECURING ATTENDANCE OF PRISONERS

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-13-60. Order requiring prisoner's delivery to serve as witness or criminal defendant generally; expenses; prisoner under death sentence as witness.

(a) When a prisoner confined in any state prison, county correctional institution, or other penal institution under the jurisdiction of the Board of Corrections, other than a prisoner under a death sentence, is needed as a witness in any judicial proceeding in any court of record in this state or when it is desired that such person stand trial on an indictment or accusation charging the prisoner with commission of a felony or misdemeanor, the judge of the court wherein the proceeding is pending shall be authorized to and shall issue an ex parte order, directed to the commissioner of corrections, requiring the prisoner's delivery to the sheriff of the county where the prisoner is desired as a witness or accused. The sheriff or his or her deputies shall take custody of the prisoner on the date named in the order, safely keep the prisoner pending the proceeding, and return him or her to the original place of detention after the prisoner's discharge by the trial judge.

(b) If the prisoner was desired as a witness by this state in a criminal proceeding or if the prisoner's release to the sheriff was for the purpose of standing trial on criminal charges, the county wherein the proceeding was pending shall pay all expenses of transportation and keeping, including per diem and mileage of the sheriff, jail fees, and any other proper expense approved by the trial judge.

(c) If the prisoner was desired as a witness by the accused in a criminal proceeding or by either party to a civil proceeding, the costs and expenses referred to in subsection (b) of this Code section shall be borne by the party requesting the prisoner as a witness. The court shall require a deposit of money sufficient to defray same, except where the judge, after examining into the matter, determines that the prisoner's presence is required by the interests of justice and that the party requesting it is financially unable to make the deposit, in which case the expenses shall be taxed as costs of court.

(d) If a prisoner under a death sentence is needed as a witness for either the prosecution or the defense in any felony case, the requesting party may interview the proposed witness. Following such interview, the requesting party may move for a writ of habeas corpus ad testificandum. Such motion shall be accompanied by a proffer of the testimony of the proposed witness. The requesting party shall make such motion and proffer as soon as possible but shall not make such motion later than 20 days prior to the date of the trial. Nothing in this Code section shall limit the right of a party from presenting a material witness at a hearing or trial and to have compulsory process for that purpose. (Code 1981, § 24-13-60, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, §§ 38-2001—38-2005 and former O.C.G.A. § 24-10-60 are included in the annotations for this Code section.

Some showing of need was contemplated in the production of convicts as witnesses. Reid v. State, 119 Ga. App. 368, 166 S.E.2d 900 (1969) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005); Brand v. State, 154 Ga. App. 781, 270 S.E.2d 206 (1980) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005).

Trial judge must exercise discretion in determining whether the presence of the witnesses was "required by the ends of justice" (now interests of justice"). In the exercise of the judge's discretion, the trial judge could require this to be shown by affidavits or depositions. Phillips v. Hopper, 237 Ga. 68, 227 S.E.2d 1 (1976) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005).

Defendant has the burden of satisfying the trial court that the defendant was unable to pay the expenses of having prisoners produced as witnesses and that the presence of the prisoners as witnesses was required by the ends of justice before the defendant can secure an order requiring the production of the prisoners as witnesses and taxing the expenses thereof as costs of courts. Phillips v. Hopper, 237 Ga. 68, 227 S.E.2d 1 (1976) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005).

Habeas corpus. — Former law did not require the court to subpoena witnesses at the request of the petitioner for habeas corpus. Phillips v. Hopper, 237 Ga. 68, 227 S.E.2d 1 (1976) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005).

Prisoner not required to pay prisoner's expenses. — Prisoner confined in the state penitentiary under a prior conviction was not required to pay expenses involved in the prisoner's transportation from the state penitentiary to the county of the superior court for trial of a pending indictment or indictments against the prisoner therein, or the expenses of the prisoner's return from the county of the prisoner's trial to the state penitentiary; these expenses were a proper charge of the county of that trial court. Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461 (1967) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005).

Court had no compulsory process powers without state. — Reid v. State, 119 Ga. App. 368, 166 S.E.2d 900 (1969) (decided under former Code 1933, §§ 38-2001, 38-2002, 38-2003, 38-2004, and 38-2005).

RESEARCH REFERENCES

ALR. — Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 ALR2d 762.

Right of defendant in criminal proceeding to have immunity from prosecution granted to defense witness, 4 ALR4th 617.

24-13-61. Issuance of order requiring prisoner's delivery to serve as witness in superior court.

Any judge of the superior court may issue an order to any officer having a lawfully imprisoned person in his or her custody, requiring the production of such person before the court for the purpose of giving evidence in any criminal cause pending therein, without any formal application or writ of habeas corpus ad testificandum for that purpose. (Code 1981, § 24-13-61, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1882, § 4027, former Penal Code 1895, § 1230, former Penal Code 1910, § 1311, former Code 1933, § 50-123, and former O.C.G.A. § 24-10-61 are included in the annotations for this Code section.

Accused had the right to have the presence of the inmate compelled by court order, pursuant to former O.C.G.A. § 24-10-61, and when the witness, without fault on the part of the accused, failed to be present when the case was called, the accused was entitled to a continuance in order to obtain the presence of the witness. Grant v. State, 212 Ga. App. 565, 442 S.E.2d 899 (1994) (decided under former O.C.G.A. § 24-10-61).

Tender of expenses. — Tender of money to defray the expenses of the witness was not necessary since application was made to the court. Roberts v. State, 72 Ga. 673 (1884) (decided under former Code 1882, § 4027).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, § 5.

C.J.S. — 98 C.J.S. (Rev), Witnesses, § 107 et seq.

ALR. — Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 ALR2d 762.

24-13-62. Issuance of writ of habeas corpus requiring prisoner's delivery to serve as witness in superior court.

The writ of habeas corpus ad testificandum may be issued by the superior court to cause the production in court of any witness under legal imprisonment. (Code 1981, § 24-13-62, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 38-1505 and former O.C.G.A. § 24-10-62 are included in the annotations for this Code section.

Some showing of need was contemplated. Brand v. State, 154 Ga. App. 781, 270 S.E.2d 206 (1980) (decided under former Code 1933, § 38-1505).

Dismissal of inmate's mandamus action was error. — Trial court erred when the court dismissed an inmate's mandamus action pursuant to O.C.G.A. § 9-6-20, wherein the inmate sought additional jail time credit, upon the inmate's failure to appear at a hearing in the matter, as the trial court failed to rule on the inmate's motion for habeas corpus ad testificandum under former O.C.G.A. § 24-10-62 and, accordingly, the inmate had no ability to appear in court on the hearing date. Rozar v. Donald, 280 Ga. 111, 622 S.E.2d 850 (2005) (decided under former O.C.G.A. § 24-10-62).

RESEARCH REFERENCES

C.J.S. — 98 C.J.S. (Rev), Witnesses, § 107.

ALR. — Constitutionality of statute restoring competency of convicts as witnesses, 63 ALR 982.

Right of accused to have his witnesses

free from handcuffs, manacles, shackles, or the like, 75 ALR2d 762.

ARTICLE 4

UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE

Cross references. — Securing attendance of witnesses at grand jury or trial proceedings generally, § 17-7-190 et seq.

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. Art. 5, Ch. 10, T. 24 are included in the annotations for this Code section.

Provisions of § 17-7-192 not applicable to procedure to secure witnesses. — Provisions of O.C.G.A. § 17-7-192, prohibiting a continuance due to the absence of witnesses when the accused failed to use the means provided in the former statutory provisions, which dealt with the accused's right to obtain subpoenas for such witnesses as the accused may deem material for the accused's defense, did not apply to the procedure set forth in former O.C.G.A. Art. 5, Ch. 10, T. 24 (see now O.C.G.A. Art. 4, Ch. 13, T. 24). Farrell v. State, 160 Ga. App. 321, 287 S.E.2d 318 (1981) (decided under former O.C.G.A. Art. 5, Ch. 10, T. 24).

Defendant lacked standing to complain of any procedural irregularities involved in obtaining a witness whom the state procured by means of former O.C.G.A. Art. 5, Ch. 10, T. 24 (see now O.C.G.A. Art. 4, Ch. 13, T. 24). Moon v. State, 258 Ga. 748, 375 S.E.2d 442 (1988), cert. denied, 499 U.S. 982, 111 S. Ct. 1638, 113 L. Ed. 2d 733 (1991), rev'd on other grounds sub nom. Zant v. Moon, 264 Ga. 93, 440 S.E.2d 657 (1994) (decided under former O.C.G.A. Art. 5, Ch. 10, T. 24).

RESEARCH REFERENCES

U.L.A. — Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (U.L.A.). Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (U.L.A.).

ALR. — Availability under uniform act to secure the attendance of witnesses from without a state in criminal proceedings of subpoena duces tecum, 7 ALR4th 836.

Sufficiency of evidence to support or require finding that out-of-state witness in criminal case is "material witness" justifying certificate to secure attendance under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 ALR4th 742.

Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifying issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 ALR4th 771.

24-13-90. Short title.

This article shall be known and may be cited as "The Uniform Act to Secure the Attendance of Witnesses from Without the State." (Code 1981, § 24-13-90, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-90 are included in the annotations for this Code section.

Subpoena duces tecum request not sufficiently specific. — Trial court properly denied a child molestation defendant's motion for a subpoena duces tecum to obtain out-of-state records pertaining to the victims. The defendant failed to identify any specific person, entity, agency, or records custodian who should be directed to produce the records and thus did not satisfy the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. French v. State, 288 Ga. App. 775, 655 S.E.2d 224 (2007) (decided under former O.C.G.A. § 24-10-90).

Defendant failed to show evidence sought was material to defendant's case. — Trial court did not err in finding that a defendant had not made a sufficient showing that evidence of adjustments made in the Intoxilyzer 5000 source code for asthma sufferers was material to the defendant's case, which was the defendant's burden under the former Uniform Act to Secure the Attendance of Witnesses From Without the State, former O.C.G.A. § 24-10-90 et seq (see now O.C.G.A. § 24-13-90 et seq.). Davenport v. State, 303 Ga. App. 401, 693 S.E.2d 510 (2010) (decided under former O.C.G.A. § 24-10-90).

Wrong standard applied for refusing certificate. — Trial court applied the wrong standard when the court refused to issue a certificate under the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), to secure the appearance of an out-of-state witness because the trial court concluded that the defendant failed to show that the witness was necessary and material, but the trial court simply had to determine whether a witness was "material." DiMauro v. State, 310 Ga. App. 526, 714 S.E.2d 105 (2011) (decided under former O.C.G.A. § 24-10-90).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 25B Am. Jur. Pleading and Practice Forms, Witnesses, § 1.

24-13-91. Definitions.

As used in this article, the term:

(1) "Penal institution" means a jail, prison, penitentiary, house of correction, or other place of penal detention.

(2) "State" means any state or territory of the United States and the District of Columbia.

(3) "Summons" means a subpoena, order, or other notice requiring the appearance of a witness.

(4) "Witness" means a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal prosecu-

tion or proceeding held by the prosecution or the defense, including a person who is confined in a penal institution in any state. (Code 1981, § 24-13-91, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-91 are included in the annotations for this Code section.

No counsel error in failing to secure witness for trial. — Because the only testimony in a hearing on a motion for a new trial with regard to defendant's murder conviction regarding the content of defendant's sister's potential testimony showed that it would have merely reiterated defendant's mother's testimony, the trial court did not err by failing to secure the attendance of the sister through an interstate subpoena. Tollette v. State, 280 Ga. 100, 621 S.E.2d 742 (2005) (decided under former O.C.G.A. § 24-10-91).

Determination of whether witness was necessary and material. — It was the out-of-state judge who must decide whether the sought-after witness was necessary and material, not the requesting court in Georgia. The Georgia trial judge presented with a request for a certificate was charged with deciding whether the sought-after witness was a "material witness," under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, former O.C.G.A. § 24-10-94(a) (see now O.C.G.A. § 24-13-94); in light of the former Uniform Act, former O.C.G.A. § 24-10-97 (see now O.C.G.A. § 24-13-97), "material witness" was construed as a witness who could testify about matters having some logical connection with the consequential facts, especially if few others, if any, knew about these matters. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011) (decided under former O.C.G.A. § 24-10-91).

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 50, 51.

C.J.S. — 98 C.J.S. (Rev), Witnesses, § 1.

24-13-92. Criminal or grand jury proceeding in foreign state — Certificate of need for testimony; expenses; punishment.

(a) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court or that a grand jury investigation has commenced or is about to commence, that a person within this state is a material witness in such prosecution or grand jury investigation, and that the witness's presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which the person is found, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing. The witness shall at all times be entitled to counsel.

(b) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be

compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and the laws of the state in which the prosecution is pending or grand jury investigation has commenced or is about to commence will give to such witness protection from arrest and the service of civil and criminal process, the judge shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing, the certificate shall be prima-facie evidence of all the facts stated therein.

(c) If such certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure the witness's attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that the witness be forthwith brought before him or her for the hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima-facie proof of such desirability, may, in lieu of issuing a subpoena or summons, order that the witness be forthwith taken into custody and delivered to an officer of the requesting state.

(d) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 45¢ a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending and $25.00 for each day that the witness is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, the witness shall be punished in the manner provided for in Code Section 24-13-26. (Code 1981, § 24-13-92, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942.)

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised language in subsection (c).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1976, p. 1366, § 3 and former O.C.G.A. § 24-10-92 are included in the annotations for this Code section.

Scope. — Former statute did not provide for the issuance of a subpoena, but was rather a process for obtaining a court order for the production of the witness, who could also appear in the jurisdiction where the witness was found and convince the court to deny or quash the subpoena. Mafnas v. State, 149 Ga. App. 286, 254 S.E.2d 409 (1979), overruled on other grounds, Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011) (decided under former law).

Defendant lacked standing to complain of any procedural irregularities involved in obtaining a witness whom the state had procured by means of former O.C.G.A. Art. 5, Ch. 10, T. 24. Moon v. State, 258 Ga. 748, 375 S.E.2d 442 (1988), cert. denied, 499 U.S. 982, 111 S. Ct. 1638,

113 L. Ed. 2d 733 (1991), rev'd on other grounds sub nom. Zant v. Moon, 264 Ga. 93, 440 S.E.2d 657 (1994) (decided under former O.C.G.A. § 24-10-92).

No guarantee of appearance. — Right to compulsory process did not amount to a guarantee by the state that the witness requested by a defendant would in fact appear at trial, but only related to the issuance of the process. Mafnas v. State, 149 Ga. App. 286, 254 S.E.2d 409 (1979), overruled on other grounds, Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011) (decided under Ga. L. 1976, p. 1366, § 3).

Determination of whether witness was necessary and material. — Court of appeals erred in ruling that the trial court did not abuse the court's discretion in denying the defendant's motion under the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), to obtain evidence possessed by a witness in Kentucky because the proper statute was not applied since the court of appeals stated that the defendant was required to show that the out-of-state witness was necessary and material to the case; whether the witness was "necessary and material" was one of the determinations that must be made under the Act, former O.C.G.A. § 24-10-92(b), by the judge in the county where the out-of-state witness was located, and the Georgia trial court evaluated the request under the Act, former O.C.G.A. § 24-10-94 (see now O.C.G.A. § 24-13-94), and must determine only whether the out-of-state witness was a "material witness" in the Georgia criminal prosecution and whether the court should issue the certificate requesting the out-of-state court to order the out-of-state witness to attend the criminal proceeding in Georgia. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011) (decided under former O.C.G.A. § 24-10-92).

It was the out-of-state judge who must decide whether the sought-after witness was necessary and material, not the requesting court in Georgia. The Georgia trial judge presented with a request for a certificate was charged with deciding whether the sought-after witness was a "material witness"; in light of the former Uniform Act, former O.C.G.A. § 24-10-97 (see now O.C.G.A. § 24-13-97), "material witness" was construed as a witness who can testify about matters having some logical connection with the consequential facts, especially if few others, if any, know about these matters. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011) (decided under former O.C.G.A. § 24-10-92).

Witness must be necessary and material. — When the assistant state's attorney in Maryland presented evidence sufficient to persuade the requesting court that the Georgia resident was essential to the grand jury's investigation and the local Georgia trial court found the facts similarly persuasive, the Georgia resident, having presented no evidence, failed to convince the superior court to deny the state's petition to grant Maryland's request. Wollesen v. State, 242 Ga. App. 317, 529 S.E.2d 630 (2000) (decided under former O.C.G.A. § 24-10-92).

Out-of-state corporation. — Court of appeals erred when the court concluded that a request under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. Yeary v. State, 289 Ga. 394, 711 S.E.2d 694 (2011) (decided under former O.C.G.A. § 24-10-92).

Unlocated witness. — Neither the Georgia nor the United States Constitution obligated the state to compel the attendance of witnesses who cannot be located within the state's jurisdiction. Mafnas v. State, 149 Ga. App. 286, 254 S.E.2d 409 (1979), overruled on other grounds, Davenport v. State, 289 Ga. 399,

711 S.E.2d 699 (2011) (decided under Ga. L. 1976, p. 1366, § 3).

Order to testify encompassed production of documents. — Power to order a witness to travel to a foreign state for the purpose of testifying at a grand jury hearing implicitly encompassed the power to order the witness to produce relevant documents. Wollesen v. State, 242 Ga. App. 317, 529 S.E.2d 630 (2000) (decided under former O.C.G.A. § 24-10-92).

RESEARCH REFERENCES

Am. Jur. 2d. — 38A Am. Jur. 2d, Grand Jury, § 38. 81 Am. Jur. 2d, Witnesses, §§ 4, 6, 10, 34, 35, 39, 66, 68.

C.J.S. — 38A C.J.S., Grand Juries, § 42. 98 C.J.S. (Rev), Witnesses, §§ 20 et seq., 32 et seq., 95, 116 et seq., 119, 121, 203, 226.

24-13-93. Criminal or grand jury proceeding in foreign state — Certificate of need for prisoner's testimony; order by judge in requesting state; applicability.

(a) A judge of a state court of record in another state which by its laws has made provision for commanding persons confined in penal institutions within that state to attend and testify in this state may certify that there is a criminal proceeding or investigation by a grand jury or a criminal proceeding pending in the court, that a person who is confined in a penal institution in this state is a material witness in the proceeding or investigation, and that the witness's presence will be required during a specified time. Upon presentation of the certificate to any judge having jurisdiction over the person confined and upon notice to the Attorney General, the judge in this state shall fix a time and place for a hearing and shall make an order directed to the person having custody of the prisoner requiring that the prisoner be produced before him or her at the hearing.

(b) If at the hearing the judge determines that the witness is material and necessary, that the witness attending and testifying are not adverse to the interest of this state or to the health and legal rights of the witness, that the laws of the state in which the witness is required to testify will give the witness protection from arrest and the service of civil and criminal process because of any act committed prior to the witness's arrival in the state under the order, and that as a practical matter the possibility is negligible that the witness may be subject to arrest or to the service of civil or criminal process in any state through which the witness will be required to pass, the judge shall issue an order, with a copy of the certificate attached, directing the witness to attend and testify, directing the person having custody of the witness to produce the witness in the court where the criminal proceeding is pending or where the grand jury investigation is pending at a time and place specified in the order, and prescribing such conditions as the judge shall determine. The judge, in lieu of directing the person having custody of the witness to produce the witness in the requesting

jurisdiction's court, may direct and require in the court's order that the requesting jurisdiction shall come to the Georgia penal institution in which the witness is confined to accept custody of the witness for physical transfer to the requesting jurisdiction; that the requesting jurisdiction shall provide proper safeguards on the witness's custody while in transit; that the requesting jurisdiction shall be liable for and shall pay all expenses incurred in producing and returning the witness, including, but not limited to, food, lodging, clothing, and medical care; and that the requesting jurisdiction shall promptly deliver the witness back to the same or another Georgia penal institution as specified by the Department of Corrections at the conclusion of his or her testimony.

(c) The order to the witness and to the person having custody of the witness shall provide for the return of the witness at the conclusion of his or her testimony, proper safeguards on his or her custody, and proper financial reimbursement or prepayment by the requesting jurisdiction of all expenses incurred in the production and return of the witness and may prescribe such other conditions as the judge thinks proper or necessary. If the judge directs and requires the requesting jurisdiction to accept custody of the witness at the Georgia penal institution in which the witness is confined and to deliver the witness back to the same or another Georgia penal institution at the conclusion of the witness's testimony, no prepayment of expenses shall be necessary. The order shall not become effective until the judge of the state requesting the witness enters an order directing compliance with the conditions prescribed.

(d) This Code section shall not apply to any person in this state confined as insane or mentally ill or under sentence of death. (Code 1981, § 24-13-93, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

RESEARCH REFERENCES

Am. Jur. 2d. — 38A Am. Jur. 2d, Grand Jury, § 38. 81 Am. Jur. 2d, Witnesses, §§ 4, 6, 10, 34, 35, 39, 66, 68.

C.J.S. — 38A C.J.S., Grand Juries, § 42. 98 C.J.S. (Rev), Witnesses, §§ 119, 121, 203, 226.

24-13-94. Criminal or grand jury proceeding in this state — Issuance of certificate; how long witness detained; punishment.

(a) If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations commenced or about to commence in this state is a material witness in a prosecution pending in a court of record in this state or in a grand jury investigation which has commenced or is about to commence a judge of such court may issue a certificate under the seal of the court stating these facts and

specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(b) If the witness is summoned to attend and testify in this state, the witness shall be tendered the sum of 45¢ a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending and $25.00 for each day that the witness is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state for a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, the witness shall be punished in the manner provided for in Code Section 24-13-26. (Code 1981, § 24-13-94, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1976, p. 1366, § 5 and former O.C.G.A. § 24-10-94 are included in the annotations for this Code section.

Scope. — Former statute did not provide for the issuance of a subpoena, but was rather a process for obtaining a court order for the production of the witness, who may also appear in the jurisdiction where the witness was found and convince the court to deny or quash the subpoena. Mafnas v. State, 149 Ga. App. 286, 254 S.E.2d 409 (1979) (decided under Ga. L. 1976, p. 1366, § 5).

No absolute right to witness. — Party requesting the presence of an out-of-state witness did not have an absolute right to obtain the witness. Mafnas v. State, 149 Ga. App. 286, 254 S.E.2d 409 (1979), overruled on other grounds, Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011) (decided under Ga. L. 1976, p. 1366, § 5).

No guarantee of appearance. — Right to compulsory process did not amount to a guarantee by the state that the witness requested by a defendant would in fact appear at trial, but only related to the issuance of the process. Mafnas v. State, 149 Ga. App. 286, 254 S.E.2d 409 (1979), overruled on other grounds, Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011) (decided under Ga. L. 1976, p. 1336, § 5).

Determination of whether witness was necessary and material. — Court of appeals erred in ruling that the trial court did not abuse the court's discretion in denying the defendant's motion under the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), to obtain evidence possessed by a witness in Kentucky because the proper statute was not applied since the court of appeals stated that the defendant was required to show that the out-of-state witness was necessary and material to the case; whether the witness was "necessary and material" was one of the determinations that must be made under the Act, former O.C.G.A. § 24-10-92(b) (see now O.C.G.A. § 24-13-92), by the judge in the county where the out-of-state witness was located, and the Georgia trial court evaluated the request under the Act, former O.C.G.A. § 24-10-94, and must determine only whether the out-of-state witness was a "material witness" in the Georgia criminal prosecution and whether it should

issue the certificate requesting the out-of-state court to order the out-of-state witness to attend the criminal proceeding in Georgia. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011) (decided under former O.C.G.A. § 24-10-94).

Failure to determine if witness material. — Defendant was entitled to a new determination as to whether the defendant was entitled to subpoena an out-of-state witness because the trial court weighed the safeguards protecting the validity of the test results and the trial process generally and essentially determined that the witness was not necessary rather than evaluating whether the out-of-state witness was "material." Spann v. State, 318 Ga. App. 740, 736 S.E.2d 749 (2012) (decided under former O.C.G.A. § 24-10-94).

Judicial discretion. — As to out-of-state witnesses to whom the court's subpoena power was inapplicable, the decision whether to utilize the provisions of the former Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), was purely discretionary. Ealy v. State, 251 Ga. 426, 306 S.E.2d 275 (1983) (decided under former O.C.G.A. § 24-10-94).

Unlocated witness. — Neither the Georgia nor the United States Constitution obligated the state to compel the attendance of witnesses who cannot be located within the state's jurisdiction. Mafnas v. State, 149 Ga. App. 286, 254 S.E.2d 409 (1979), overruled on other grounds, Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011) (decided under Ga. L. 1976, p. 1366, § 5).

Trial counsel was not ineffective for failing to take the steps necessary to try to secure an alibi witness, after counsel made attempts to locate the witness, and based on the testimony of both of defendant's accomplices, and the evidence corroborating that testimony, it was unlikely that the trial would have been different had this alleged alibi witness been found, specially subpoenaed, and testified. Ziegler v. State, 270 Ga. App. 787, 608 S.E.2d 230 (2004), cert. denied, 546 U.S. 1019, 126 S. Ct. 656, 163 L. Ed. 2d 532 (2005) (decided under former O.C.G.A. § 24-10-94).

Out-of-state corporation. — Court of appeals erred when the court concluded that a request under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. Yeary v. State, 289 Ga. 394, 711 S.E.2d 694 (2011) (decided under former O.C.G.A. § 24-10-94).

Out-of-state corporation could be "a person" that was a material witness under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.), and could be determined to be in possession of material evidence, and the expedient course was to permit a party to request that a corporation, rather than the corporation's human agent, be found to be a material witness under the Uniform Act and leave the issue of designation of the corporation's human agent to the corporation; the designation need not occur until after a certificate of materiality had been issued by the Georgia trial court and the court in the county in which the out-of-state corporation was located conducted a hearing which the corporation had been ordered to attend, on the request for issuance of a summons to appear at the Georgia trial with the material evidence purportedly in the corporation's possession under former O.C.G.A. § 24-10-92(a). Yeary v. State, 289 Ga. 394, 711 S.E.2d 694 (2011) (decided under former O.C.G.A. § 24-10-94).

Trial court did not err by denying the defendant's motion for a ruling that the source code for the Intoxilyzer machine on which the defendant's breath was

tested was evidence relevant to the defense because the motion was not in compliance with the former Uniform Act to Secure Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90 et seq.); the defendant's motion sought a relevancy ruling solely to facilitate production of the source code from a corporation in the State of Kentucky, but there was nothing in the record showing that the defendant identified or sought to obtain testimony from a witness who had to be compelled to produce the evidence. Yeary v. State, 302 Ga. App. 535, 690 S.E.2d 901 (2010) (decided under former O.C.G.A. § 24-10-94).

Trial court did not abuse the court's discretion in denying the defendant's motion for a certificate of need for testimony because the testimony of the expert the defendant presented did not establish the materiality of the evidence sought pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-94(a), which must be supported by admissible and probative evidence; the expert was required to testify to some fact indicating the possibility of an error in the case, but the expert was only able to speculate. Cronkite v. State, 317 Ga. App. 57, 730 S.E.2d 694 (2012) (decided under former O.C.G.A. § 24-10-94).

RESEARCH REFERENCES

Am. Jur. 2d. — 38A Am. Jur. 2d, Grand Jury, § 38. 81 Am. Jur. 2d, Witnesses, §§ 4, 6, 10, 34, 35, 39, 66, 68.

C.J.S. — 38A C.J.S., Grand Juries, § 41. 98 C.J.S. (Rev), Witnesses, §§ 20 et seq., 32 et seq., 119, 121, 203, 226.

24-13-95. Criminal or grand jury proceeding in this state — Issuance of certificate seeking testimony of prisoner; notice to attorney general; order of compliance.

(a) If a person confined in a penal institution in any other state is a material witness in a criminal proceeding pending in a court of record or in a grand jury investigation in this state, a judge of the court may certify that there is a criminal proceeding or investigation by a grand jury or a criminal proceeding pending in the court, that a person who is confined in a penal institution in the other state is a material witness in the proceeding or investigation, and that the witness's presence will be required during a specified time. The certificate shall be presented to a judge of a court of record in the other state having jurisdiction over the confined prisoner, and a notice shall be given to the attorney general of the state in which the prisoner is confined.

(b) The judge of the court in this state may enter an order directing compliance with the terms and conditions prescribed by the judge of the state in which the witness is confined. (Code 1981, § 24-13-95, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

RESEARCH REFERENCES

Am. Jur. 2d. — 81 Am. Jur. 2d, Witnesses, §§ 4, 34, 35, 39.

C.J.S. — 98 C.J.S. (Rev), Witnesses, §§ 20 et seq., 32 et seq.

24-13-96. Exemption of witnesses from arrest and service of process.

(a) If a person comes into this state in obedience to a summons directing him or her to attend and testify in this state, such person shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before such person's entrance into this state under the summons.

(b) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he or she shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before such person's entrance into this state under the summons. (Code 1981, § 24-13-96, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Exercise of personal jurisdiction over nonresidents generally, § 9-10-90 et seq.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 85. 62B Am. Jur. 2d, Process, § 36 et seq. 81 Am. Jur. 2d, Witnesses, §§ 34, 35, 39.

C.J.S. — 6A C.J.S., Arrest, § 5. 72 C.J.S., Process, § 33 et seq.

ALR. — Immunity of nonresident litigant or witness from service of process as affected by transactions or activities unrelated to action, 162 ALR 280.

Privilege of party, witness, or attorney while going to, attending, or returning from court as extending to privilege from arrest for crime, 74 ALR2d 592.

24-13-97. Construction.

This article shall be interpreted and construed so as to effectuate its general purpose to make uniform the laws of the states which enact it and shall be applicable only to such states as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses as provided in this article. (Code 1981, § 24-13-97, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Statutes, § 227 et seq.

C.J.S. — 82 C.J.S., Statutes, § 505.

ARTICLE 5

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

Effective date. — This article becomes effective January 1, 2013. See editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 651, § 2-1/HB 46, effective January 1, 2013, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 24-13-110 through 24-13-112, relating to the Uniform Foreign Depositions Act, and was based on Code 1981, §§ 24-13-110—24-13-112, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Ga. L. 2012, p. 651, § 3-1(b)(1)/HB 46, not codified by the General Assembly, provides, in part, that this article shall apply to subpoenas served on or after July 1, 2013, and in actions pending on or after July 1, 2013.

24-13-110. Short title.

This article shall be known and may be cited as the "Uniform Interstate Depositions and Discovery Act." (Code 1981, § 24-13-110, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

24-13-111. Definitions.

As used in this article, the term:

(1) "Foreign jurisdiction" means a state other than this state.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Native American tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) Attend and give testimony at a deposition;

(B) Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of such person; or

(C) Permit inspection of premises under the control of such person. (Code 1981, § 24-13-111, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

24-13-112. Requirements for issuance of foreign subpoenas; application.

(a) To request issuance of a subpoena under this Code section, a party shall submit a foreign subpoena to the clerk of superior court of the county in which the person receiving the subpoena resides. A request for the issuance of a subpoena under this Code section shall not constitute an appearance in the courts of this state.

(b) When a party submits a foreign subpoena to a clerk of superior court in this state, the clerk shall promptly issue and provide to the requestor a subpoena for service upon the person to which the foreign subpoena is directed.

(c) A subpoena under subsection (b) of this Code section shall:

(1) Incorporate the terms used in the foreign subpoena; and

(2) Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(d) This Code section shall only apply to a subpoena to be issued in this state if the foreign jurisdiction that issued the foreign subpoena has adopted a version of the "Uniform Interstate Depositions and Discovery Act."

(e) This Code section shall not apply to criminal proceedings. (Code 1981, § 24-13-112, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

24-13-113. Compelling foreign witness to appear and testify.

(a) For purposes of this Code section, the term "subpoena" shall have only the meaning set forth in subparagraph (A) of paragraph (5) of Code Section 24-13-111.

(b) In addition to the mechanism for issuing subpoenas provided for in Code Section 24-13-112, whenever any mandate, writ, or commission is issued out of any court of record in a foreign jurisdiction, a witness may be compelled by subpoena issued by the clerk of superior court of the county in which such witness resides to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state. (Code 1981, § 24-13-113, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

24-13-114. Service of foreign subpoena.

A subpoena issued by the clerk of superior court under Code Section 24-13-112 or 24-13-113 shall be served in compliance with Code Section

24-13-23 and shall be served within a reasonable time prior to the appearance required by such subpoena. (Code 1981, § 24-13-114, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

24-13-115. Applicability of Article 2 to certain provisions of this article.

Article 2 of this chapter shall apply to subpoenas issued under Code Section 24-13-112 or 24-13-113. (Code 1981, § 24-13-115, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

24-13-116. Protective order or enforcement, quashing, or modification of foreign subpoena.

An application for a protective order or to enforce, quash, or modify a subpoena issued by the clerk of superior court under Code Section 24-13-112 or 24-13-113 shall comply with the statutes and court rules of this state and shall be submitted to the superior court of the county in which the subpoena was issued. (Code 1981, § 24-13-116, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

ARTICLE 6

DEPOSITIONS TO PRESERVE TESTIMONY IN CRIMINAL PROCEEDINGS

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

RESEARCH REFERENCES

ALR. — Use, in federal criminal prosecution, of deposition of absent witness taken in foreign country, as affected by Federal Rule of Criminal Procedure 15(b) and (d) requiring presence of accused and that deposition be taken in manner provided in civil actions, 105 ALR Fed. 537.

24-13-130. When deposition to preserve testimony in criminal proceedings may be taken.

(a)(1) At any time after an accused has been charged with an offense against the laws of this state or an ordinance of any political subdivision or authority thereof, upon motion of the state or the accused, the court having jurisdiction to try the offense charged may, after notice to the parties, order that the testimony of a prospective material witness of a party be taken by deposition and that any designated evidence not privileged be produced at the same time and place.

(2) At any time after an accused has been charged with an offense of child molestation, aggravated child molestation, or physical or sexual abuse of a child, upon motion of the state or the accused, the court having jurisdiction to try the offense charged may, after notice to the parties, order that the testimony of any physician whose testimony is relevant to such charge be taken by deposition and that any designated evidence not privileged be produced at the same time and place.

(b) The court shall not order the taking of the witness's testimony, except as provided in paragraph (2) of subsection (a) of this Code section, unless it appears to the satisfaction of the court that the testimony of the witness is material to the proceeding and the witness:

(1) Is in imminent danger of death or great bodily harm;

(2) Has been threatened with death or great bodily harm because of the witness's status as a potential witness in a criminal trial or proceeding;

(3) Is about to leave this state, and there are reasonable grounds to believe that such witness will be unable to attend a criminal trial or proceeding;

(4) Is so sick or infirm as to afford reasonable grounds to believe that such witness will be unable to testify as a witness at a criminal trial or proceeding;

(5) Is being detained as a material witness, and there are reasonable grounds to believe that the witness will flee if released from detention; or

(6) Is 72 years of age or older.

(c) A motion to take a deposition of a material witness, or a physician as provided in paragraph (2) of subsection (a) of this Code section, shall be verified and shall state:

(1) The nature of the offense charged;

(2) The status of the criminal proceedings;

(3) The name of the witness and an address in Georgia where the witness may be contacted unless, for good cause shown, the court allows an exception to this paragraph;

(4) That the testimony of the witness is material to the proceeding or that the witness is a physician as provided in paragraph (2) of subsection (a) of this Code section; and

(5) The basis for taking the deposition as provided in subsection (b) of this Code section.

(d) A motion to take a deposition shall be filed in the court having jurisdiction to try the accused for the offense charged; provided, however, that if the accused is charged with multiple offenses, only the court having jurisdiction to try the most serious charge against the accused shall have jurisdiction to hear and decide the motion to take a deposition.

(e) The party moving the court for an order pursuant to this Code section shall give not less than one day's notice of the hearing to the opposite party. A copy of the motion shall be sent to the opposing party or his or her counsel by any means which will reasonably ensure timely delivery, including transmission by facsimile or by digital or electronic means. A copy of the notice shall be attached to the motion and filed with the clerk of court.

(f) If the court is satisfied that the examination of the witness is authorized by law and necessary, the court shall enter an order setting a time period of not more than 30 days during which the deposition shall be taken.

(g) On motion of either party, the court may designate a judge who shall be available to rule on any objections to the interrogation of the witness or before whom the deposition shall be taken. The judge so designated may be a judge of any court of this state who is otherwise qualified to preside over the trial of criminal proceedings in the court having jurisdiction over the offense charged. (Code 1981, § 24-13-130, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2013, p. 524, § 1-4A/HB 78.)

The 2013 amendment, effective July 1, 2013, in subsection (b), added "or great bodily harm" at the end of paragraph (b)(1), substituted "state," for "state" and substituted "a criminal trial or proceeding" for "the trial" in paragraph (b)(3), substituted "testify as a witness at a criminal trial or proceeding;" for "attend the trial; or" in paragraph (b)(4), substituted "witness," for "witness" and substituted "; or" for a period at the end of paragraph (b)(5), and added paragraph (b)(6); and added "unless, for good cause shown, the court allows an exception to this paragraph" at the end of paragraph (c)(3).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-130 are included in the annotations for this Code section.

Any technical violation of the notice provision of former O.C.G.A. § 24-10-130 was harmless since the defendant did in fact receive notice of the date, time, and place of the deposition and did not request a predeposition hearing on the propriety or necessity of taking a deposition. Burrell v. State, 258 Ga. 841, 376 S.E.2d 184 (1989) (decided under former O.C.G.A. § 24-10-130).

Defendant's pretrial request to depose victims after the victims refused to talk with defense counsel was properly denied by the trial court. Evans v. State, 233 Ga. App. 85, 503 S.E.2d 344 (1998) (decided under former O.C.G.A. § 24-10-130).

Introduction of material witness's sworn statement improper. — Because the state never filed a motion to take a material witness's deposition as required by former O.C.G.A. § 24-10-130, the trial court never held a hearing, never found grounds for the deposition, and never ordered that the deposition be taken during a particular time period; therefore, the defendant's conviction for financial transaction card fraud under O.C.G.A. § 16-9-33(a) was reversed and the case was remanded for a new trial. Evans v. State, 275 Ga. App. 621, 621 S.E.2d 584 (2005) (decided under former O.C.G.A. § 24-10-130).

Victim's deposition properly taken. — Trial court did not abuse the court's discretion in allowing an 80-year-old victim's deposition to be taken under former O.C.G.A. § 24-10-130(b)(4) because the victim had a brain tumor, which predisposed the victim to dizziness and vertigo, and a generalized anxiety disorder, which sometimes caused the victim to suffer chest pains, shortness of breath, blurred vision, confusion, and loss of consciousness when the victim was exposed to unfamiliar or stressful public situations. Austin v. State, 275 Ga. App. 560, 621 S.E.2d 546 (2005) (decided under former O.C.G.A. § 24-10-130).

Deposition of allegedly ineffective counsel. — When a habeas court found an inmate's claim of ineffective assistance of counsel was not procedurally barred, under O.C.G.A. § 9-14-48(d), for failing to raise the issue on direct appeal because the allegedly ineffective counsel could not, due to illness, attend a hearing held on remand during the inmate's direct appeal, and, thus, could not be cross-examined, this was error because, even if the claim was different enough from barred claims to fall within a defaulted-claim analysis, it overlooked the readily available legal remedy of a court order to obtain counsel's sworn testimony for use at the remand hearing, under former O.C.G.A. § 24-10-130, so counsel's absence from the hearing did not establish cause for failure to raise the ineffective assistance claim. Schofield v. Meders, 280 Ga. 865, 632 S.E.2d 369 (2006), cert. denied, 549 U.S. 1126, 127 S. Ct. 958, 166 L.Ed.2d 729 (2007) (decided under former O.C.G.A. § 24-10-130).

24-13-131. Notice of deposition; presence of defendant at examination; child witness.

(a) The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined.

(b) On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition.

(c) The officer having custody of an accused shall be notified of the time and place set for the examination and shall, unless the accused waives in writing the right to be present, produce the accused at the examination and keep the accused in the presence of the witness during the examination unless, after being warned by the judge that disruptive conduct will cause the accused's removal from the place where the deposition is being taken, the accused persists in conduct which would justify exclusion from that place.

(d) An accused not in custody shall have the right to be present at the examination; but failure of the accused to appear, absent good cause

shown, after notice and tender of expenses, shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(e) Notwithstanding the provisions of subsections (c) and (d) of this Code section, if the witness is a child, the court may order that the deposition be taken in accordance with Code Section 17-8-55. (Code 1981, § 24-13-131, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-131 are included in the annotations for this Code section.

Interviews not depositions. — In a prosecution for child molestation, audio and videotapes of interviews with the victims were not depositions, and former O.C.G.A. § 24-10-131 did not require that the state notify the defendant before the interviews were conducted. Price v. State, 223 Ga. App. 185, 477 S.E.2d 353 (1996) (decided under former O.C.G.A. § 24-10-131).

24-13-132. Appointment of counsel; payment of costs and expenses.

(a) If an accused is financially unable to employ counsel, the court shall appoint counsel as provided in Chapter 12 of Title 17, unless the accused elects to proceed without counsel.

(b) Whenever a deposition is taken at the instance of the state, the cost of any such deposition shall be paid by the state by the Prosecuting Attorneys' Council of the State of Georgia out of such funds as may be appropriated for the operations of the district attorneys.

(c) Depositions taken at the instance of an accused shall be paid for by the accused; provided, however, that, whenever a deposition is taken at the instance of an accused who is eligible for the appointment of counsel as provided in Chapter 12 of Title 17, the court shall direct that the reasonable expenses for the taking of the deposition and of travel and subsistence of the accused and the accused's attorney for attendance at the examination, not to exceed the limits established pursuant to Article 2 of Chapter 7 of Title 45, be paid for out of the fine and forfeiture fund of the county where venue is laid. (Code 1981, § 24-13-132, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-13-133. Manner of taking and filing deposition.

Except as provided in Code Section 24-13-137, a deposition shall be taken and filed in the manner provided in civil proceedings, provided that (1) in no event shall a deposition be taken of an accused party without his or her consent and (2) the scope of examination and

cross-examination shall be such as would be allowed in the trial itself. On request or waiver by the accused, the court may direct that a deposition be taken on written interrogatories in the manner provided in civil proceedings. Such request shall constitute a waiver by the accused of any objection to the taking and use of the deposition based upon its being so taken. If a judge has been designated to rule on objections or to preside over the deposition, objections to interrogation of the witness shall be made to and ruled on by such judge in the same manner as at the trial of a criminal proceeding. (Code 1981, § 24-13-133, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-13-134. Availability to state and defendant of deponent's previous statements.

The state or the accused shall make available to each other, for examination and use at the taking of a deposition pursuant to this article, any statement of the witness being deposed which is in the possession of the state or the accused and which would be required to be made available if the witness were testifying at the trial. (Code 1981, § 24-13-134, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-13-135. Admissibility and use of deposition.

At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if the witness is unavailable. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered, and any party may offer other parts. A witness is not unavailable if the exemption, refusal to testify, claim of lack of memory, inability, or absence of such witness is due to the procurement or wrongdoing of the party offering the deposition at the hearing or trial for the purpose of preventing the witness from attending or testifying. (Code 1981, § 24-13-135, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 24-10-135 are included in the annotations for this Code section.

Prosecuting attorney's agreement to cooperate with defense counsel in videotaping of a deposition did not constitute an agreement of stipulation that the deposition could be admitted at trial. Hullender v. State, 256 Ga. 86, 344 S.E.2d 207 (1986) (decided under former O.C.G.A. § 24-10-135).

Victim's deposition at retrial. — Trial court did not abuse the court's discretion in allowing a deposition of an 80-year-old victim, who had a brain tumor and a generalized anxiety disorder, to be

offered in lieu of the victim's testimony at defendant's retrial because the trial court had overruled defendant's former O.C.G.A. § 24-10-135 objection in defendant's first trial and stood on the court's earlier ruling in defendant's retrial; while it would have been better to make an explicit finding of unavailability in the retrial, the finding was implicit in the trial court's ruling and was authorized by the evidence. Austin v. State, 275 Ga. App. 560, 621 S.E.2d 546 (2005) (decided under former O.C.G.A. § 24-10-135).

24-13-136. Objections to admission of deposition.

Objections to receiving in evidence a deposition or part thereof may be made as provided in civil proceedings. (Code 1981, § 24-13-136, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-13-137. Recordation of deposition.

(a) Any party shall have the right to require that the deposition be recorded and preserved by the use of audio-visual equipment in addition to a stenographic record. The audio-visual recording shall be transmitted to the clerk of the court which ordered the deposition and shall be made available for viewing and copying only to the prosecuting attorney and accused's attorney prior to trial. An audio-visual recording made pursuant to this Code section shall not be available for inspection or copying by the public until such audio-visual recording has been admitted into evidence during a trial or hearing in the case in which such deposition is made.

(b) An audio-visual recording made pursuant to this Code section may be admissible at a trial or hearing as an alternative to the stenographic record of the deposition.

(c) A stenographic record of the deposition contemplated in this Code section shall be made pursuant to Code Section 9-11-28. (Code 1981, § 24-13-137, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-13-138. Agreement of parties to deposition.

Nothing in this article shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition by agreement of the parties with the consent of the court. (Code 1981, § 24-13-138, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-13-139. Depositions taken only in exceptional circumstances; misuse of procedures.

It is the intent of the General Assembly that depositions shall be taken in criminal proceedings only in exceptional circumstances when it is in the interests of justice that the testimony of a prospective

witness be taken and preserved for use at trial. If the court finds that any party or counsel for a party is using the procedures set forth in this article for the purpose of harassment or delay, such conduct may be punished as contempt of court. (Code 1981, § 24-13-139, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

ARTICLE 7

PERPETUATION OF TESTIMONY

Cross references. — Depositions before action or pending appeal, § 9-11-27.

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-13-150. When proceedings to perpetuate testimony may be had.

Superior courts may entertain proceedings for the perpetuation of testimony in all proceedings in which the fact to which the testimony relates cannot immediately be made the subject of investigation at law and in which, for any cause, the common-law proceeding authorized under this title is not as available, or as completely available, as a proceeding in equity. (Code 1981, § 24-13-150, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 4.

24-13-151. Inadequacy of usual proceeding to be shown.

A petition for discovery merely or to perpetuate testimony shall not be sustained unless some reason is shown why the usual proceeding at law is inadequate. (Code 1981, § 24-13-151, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Orig. Code 1863, § 4094, former Code 1868, § 4123, former Code 1873, § 4182, former Code 1882, § 4182, former Civil Code 1895, § 3959, former Civil Code 1910, § 4556, former Code 1933, § 38-1302, and former O.C.G.A. § 24-10-151 are included in the annotations for this Code section.

Discovery must be necessary. — For equity to take jurisdiction on the ground of discovery, it must appear that the discovery was necessary, not merely that discovery was desirable or could be useful or that the complainant can more satisfactorily prove the complainant's case with than without discovery. Lucas v. Neidlinger, 210 Ga. 557, 81 S.E.2d 825 (1954) (decided under former Code 1933, § 38-1302).

Pleading. — Pleadings must set forth

facts which show either that the matter to which the testimony would apply can not be immediately investigated in a court of law; or if it can be so investigated, that the sole right of action belonged to the other party; or that the opposite party had interposed some impediment to an immediate trial of the suit, so that there was danger of a loss of the evidence before trial. Booker v. Booker, 20 Ga. 777 (1856) (decided under former law).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Depositions and Discovery, § 4.

24-13-152. Materiality of possession of property; of availability of parties in interest.

The possession of the property is immaterial; nor shall the proceeding be denied though all parties in interest cannot be ascertained or reached. (Code 1981, § 24-13-152, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-13-153. Use of testimony.

Testimony taken in the proceedings contemplated under Code Section 24-13-150 shall be used only from the necessity of the case, but in such case may be used against all persons, whether parties to the proceeding or not. (Code 1981, § 24-13-153, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Orig. Code 1863, § 3043, former Code 1868, § 3055, former Code 1873, § 3110, former Code 1882, § 3110, former Civil Code 1895, § 3961, former Civil Code 1910, § 4558, former Code 1933, § 38-1304, and former O.C.G.A. § 24-10-153 are included in the annotations for this Code section.

Witness available. — When a witness was alive and capable of examination at the time of trial, the testimony could not be read. Booker v. Booker, 20 Ga. 777 (1856) (decided under former law), compare, Howard v. Crawford, 15 Ga. 423 (1854).

24-13-154. Costs of proceedings.

The complainant shall in all cases be taxed with the costs of proceedings to perpetuate testimony. (Code 1981, § 24-13-154, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

CHAPTER 14

PROOF GENERALLY

Article 1

General Provisions

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24-14-46. United States Department of Agriculture inspection certificates prima-facie evidence.
24-14-47. Proof that person is dead or missing as evidence.

Law reviews. — For article, "An Analysis of Georgia's Proposed Rules of Evidence," see 26 Ga. St. B.J. 173 (1990). For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011).

For note, "Evidence-Voiceprints-The Value of Spectrographic Analysis," see 9 Ga. St. B.J. 242 (1973).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. Ch. 4, T. 24 are included in the annotations for this Code section.

Documents must be offered. — It is elementary that documents upon which a party rests the party's case must be offered into evidence. Hadden v. Owens, 154 Ga. App. 467, 268 S.E.2d 760 (1980) (decided under former O.C.G.A. Ch. 4, T. 24).

Documents admissible. — Documentary evidence illustrative of oral testimony and authenticated by oral testimony

is admissible. King v. Browning, 246 Ga. 46, 268 S.E.2d 653 (1980) (decided under former O.C.G.A. Ch. 4, T. 24).

Tampering with evidence. — It is not necessary that the state negative all possibility of tampering with evidence but only that the state show that it is reasonably certain there was no alteration — when there is only a bare speculation of tampering, it is proper to admit the evidence and let what doubt remains go to the weight of the evidence. Marshall v. State, 153 Ga. App. 198, 264 S.E.2d 718 (1980) (decided under former O.C.G.A. Ch. 4, T. 24).

Lie detector test. — Upon an express stipulation of the parties that lie detector results shall be admissible, the results of the test shall be admissible as evidence for the jury to attach to the results whatever probative value the jury may find the results to have. Jordan v. State, 159 Ga. App. 716, 285 S.E.2d 71 (1981) (decided under former O.C.G.A. Ch. 4, T. 24).

Proof of a fact by unobjected to evidence renders harmless subsequent incompetent or inadmissible evidence. Lightsey v. State, 160 Ga. App. 62, 286 S.E.2d 41 (1981) (decided under former O.C.G.A. Ch. 4, T. 24).

RESEARCH REFERENCES

Am. Jur. Trials. — Excluding Illegally Obtained Evidence, 5 Am. Jur. Trials 331.

ALR. — Death certificate as evidence, 17 ALR 359; 42 ALR 1454; 96 ALR 324.

Admissibility of evidence obtained by illegal search and seizure, 32 ALR 408; 41 ALR 1145; 52 ALR 477; 88 ALR 348; 134 ALR 819; 150 ALR 566; 50 ALR2d 531.

Admissibility in favor of writer of unanswered letter not part of mutual correspondence, 34 ALR 560; 55 ALR 460.

Admissibility in favor of accused in criminal case of extrajudicial confession by stranger, 48 ALR 348.

Admission of bankrupt or insolvent before or during bankruptcy or insolvency proceedings as evidence against trustee in bankruptcy or assignee in insolvency, 53 ALR 650.

Presumption or burden of proof as to whether or not instrument affecting title to property is recorded, 53 ALR 668.

Admissibility of evidence obtained by government or other public officer by intercepting letter or telegraph or telephone message, 53 ALR 1485; 66 ALR 397; 134 ALR 614.

Demonstrative evidence on issue of negligence or contributory negligence at railroad crossing, 55 ALR 1340.

Conduct and actions of animals or fowls as evidence, 61 ALR 888.

Admissibility of evidence of other offenses in criminal prosecution to prove identity of defendant, 63 ALR 602.

Admissibility of subsequent declarations of vendor on issue whether sale was in fraud of creditors, 64 ALR 797.

Admissibility of evidence as to character or conduct of plaintiff or reputation of his house in action for alienation of affections or criminal conversation, 68 ALR 560.

Admissibility of check stubs as evidence, 68 ALR 692.

Admissibility of report of operator filed pursuant to law, respecting automobile accident, 69 ALR 905.

Production of paper purporting to be indorsed in blank by payee or by a special indorsee as prima facie evidence of plaintiff's title, 85 ALR 304.

Experimental evidence as affected by similarity or dissimilarity of conditions, 85 ALR 479.

Admissibility in criminal prosecution of adjudication or judgment in civil case or procedure, 87 ALR 1258.

Tax deeds and recitals therein as evidence of regularity of tax proceedings as to advertising and notice of sale, and as to time, manner, and place of sale, 88 ALR 264.

Admissibility and weight of evidence of resemblance on question of paternity or other relationship, 95 ALR 314.

Competency of testimony as to one's mental condition, based upon handwriting, 103 ALR 900.

Admissibility of telephone conversations in evidence, 105 ALR 326.

Questions of evidence involved in the inspection and examination of typewritten documents and typewriting machines, 106 ALR 721.

Offering improper evidence, or asking improper question, as ground for new trial or reversal, 109 ALR 1089.

Admissibility of testimony of person who spoke or wrote the words upon which an action for slander or libel is predicated as to his intention or the sense in which the words were spoken or written, 113 ALR 670.

Admissibility of declarations of testator on issue of undue influence, 148 ALR 1225.

Admissibility of report of public officer or employee on cause of or responsibility for injury to person or damage to property, 153 ALR 163; 69 ALR2d 1148.

Ancient instrument of executor, administrator, receiver, or other fiduciary or officer as affected by matters of judicial or other public record touching his authority, 159 ALR 436.

Admissibility in civil case of testimony by one charged with willful misconduct as to his intention or state of mind at time in question, 171 ALR 683.

Authentication or verification of photograph as basis for introduction in evidence, 9 ALR2d 899; 41 ALR4th 812; 41 ALR4th 877.

Proof of unadjudged incompetency which prevents running of statute of limitations, 9 ALR2d 964.

Propriety of permitting jury to take X-ray picture, introduced in evidence, with them into jury room, 10 ALR2d 918.

Admissibility of evidence of fact of making or receiving telephone calls, 13 ALR2d 1409.

Admissibility of posed photograph based on recollection of position of persons or movable objects, 19 ALR2d 877.

Valuation for taxation purposes as admissible to show value for other purposes, 39 ALR2d 209.

Admissibility, in Federal Employers' Liability Act action, of rules, practices, precautions, safety devices, etc., used by other railroads, 43 ALR2d 618.

Admissibility of opinion or estimate by nonexpert witness in personal injury action of future hospital expenses, future hospitalization, or the like, 45 ALR2d 1148.

Right to have reporter's notes read to jury, 50 ALR2d 176.

Admissibility in evidence of withdrawn, superseded, amended, or abandoned pleading as containing admissions against interest, 52 ALR2d 516.

Modern status of rule governing admissibility of evidence obtained by unlawful search and seizure, 50 ALR2d 531.

Admissibility of sound recordings, in evidence, 58 ALR2d 1024; 57 ALR3d 746; 58 ALR3d 598.

Admissibility of report of police or other public officer or employee, or portions of report, as to cause of or responsibility for accident, injury to person, or damage to property, 69 ALR2d 1148.

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death, 73 ALR2d 769.

Admissibility in evidence, in civil action, of tachograph or similar paper or tape recording of speed of motor vehicle, railroad locomotive, or the like, 73 ALR2d 1025.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 86 ALR2d 611.

Admissibility of evidence of accused's re-enactment of crime, 100 ALR2d 1257.

Official death certificate as evidence of cause of death in civil or criminal action, 21 ALR3d 418.

Admissibility, and prejudicial effect of admission, of "mug shot," "rogues' gallery" photograph, or photograph taken in prison, of defendant in criminal trial, 30 ALR3d 908.

Refusal of defendant in "public figure" libel case to identify claimed sources as raising presumption against existence of source, 19 ALR4th 919.

Admissibility of evidence of fingernail comparisons in criminal case, 40 ALR4th 575.

Consumption or destruction of physical evidence due to testing or analysis by prosecution's expert as warranting suppression of evidence or dismissal of case against accused in state court, 40 ALR4th 594.

Admissibility of visual recording of event or matter giving rise to litigation or prosecution, 41 ALR4th 812.

Admissibility of visual recording of event or matter other than that giving rise

to litigation or prosecution, 41 ALR4th 877.

Proof of mailing by evidence of business or office custom, 45 ALR4th 476.

Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, 50 ALR4th 1049.

Admissibility of traffic conviction in later state civil trial, 73 ALR4th 691.

Admissibility of lie detector test results, or of offer or refusal to take test, in attorney disciplinary proceeding, 79 ALR4th 576.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 11 ALR5th 497.

Propriety of attorney's surreptitious sound recording of statements by others who are or may become involved in litigation. 32 ALR5th 715.

Admissibility in homicide prosecution of allegedly gruesome or inflammatory visual recording of crime scene, 37 ALR5th 515.

Failure of police to preserve potentially exculpatory evidence as violating criminal defendant's rights under state constitution, 40 ALR5th 113.

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-14-1. On whom burden of proof lies.

The burden of proof generally lies upon the party who is asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential. If a negation or negative affirmation is essential to a party's case or defense, the proof of such negation or negative affirmation shall lie on the party so affirming it. (Code 1981, § 24-14-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, the right to open and conclude the argument in tort cases, see 22 Ga. B.J. 297 (1960). For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

For comment on Moore v. Allen, 80 Ga. App. 784, 57 S.E.2d 511 (1950), see 12 Ga. B.J. 481 (1950). For comment on Parham v. State, 120 Ga. App. 723, 171 S.E.2d 911 (1969) and the rejection of charge that defendant must prove alibi to the satisfaction of the jury, see 21 Mercer L. Rev. 511 (1970).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATIONS
SPECIFIC ACTIONS
JURY INSTRUCTIONS

General Considerations

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3758, former Code 1882, § 3758, former Civil Code 1895, § 5160, former Penal Code 1895, § 994, former Civil Code 1910,

§ 5746, former Penal Code 1910, § 1020, former Code 1933, §§ 38-103 and 38-105, and former O.C.G.A. § 24-4-1 are included in the annotations for this Code section.

In general. — Burden of proof as applied to the facts of a given case under its facts has a dual meaning; one of those meanings applies to the ultimate burden of proof which rests with the plaintiff from the beginning throughout the trial of the case, and the other meaning applies when the burden of procedure or burden of introducing evidence shifts from one party to the other. Central of Ga. Ry. v. Hester, 94 Ga. App. 226, 94 S.E.2d 124 (1956) (decided under former Code 1933, § 38-103); Evans v. DeKalb County Hosp. Auth., 154 Ga. App. 17, 267 S.E.2d 319 (1980) (decided under former Code 1933, § 38-103).

Burden determined by pleadings. — Generally, the burden of proof rests where the pleadings originally placed the burden. Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S.E. 391 (1917) (decided under former Civil Code 1910, § 5746); Richter Bros. v. Atlantic Co., 59 Ga. App. 137, 200 S.E. 462 (1938), later appeal, 65 Ga. App. 605, 16 S.E.2d 259 (1941) (decided under former Code 1933, § 38-103); Atlantic Coast Line R.R. v. Thomas, 83 Ga. App. 477, 64 S.E.2d 301 (1951) (decided under former Code 1933, § 38-103); Whitley v. Wilson, 90 Ga. App. 16, 81 S.E.2d 877 (1954) (decided under former Code 1933, § 38-103); Lovett v. American Family Life Ins. Co., 107 Ga. App. 603, 131 S.E.2d 70 (1963) (decided under former Code 1933, § 38-103).

Effect of defendant's admission of prima facie case. — If the plaintiff alleges a right to recover, and the defendant denies the allegations without more, the plaintiff, upon the case as a whole carries the burden of proof; that is, the burden of showing, by a preponderance of the evidence, that the plaintiff is entitled to recover. If the defendant does not file a denial of the plaintiff's allegations, but admits in defendant's pleadings a prima facie case in favor of the plaintiff, and sets up an affirmative plea, the defendant then assumes the burden. Williamson-Inman & Co. v. Thompson, 53 Ga. App. 821, 187 S.E. 194 (1936) (decided under former Code 1933, § 38-103); Atlantic Coast Line R.R. v. Thomas, 83 Ga. App. 477, 64 S.E.2d 301 (1951) (decided under former Code 1933, § 38-103).

Plaintiff carries burden of proving plaintiff's right to recover by a preponderance of the evidence. Courson v. Pearson, 132 Ga. 698, 64 S.E. 997 (1909) (decided under former Civil Code 1895, § 5160); Thigpen v. Aldred, 175 Ga. 120, 165 S.E. 27 (1932) (decided under former Civil Code 1910, § 5746); Grimsley v. Morgan, 178 Ga. 40, 172 S.E. 49 (1933) (decided under former Code 1933, § 38-103); Abernathy v. Putnam, 85 Ga. App. 644, 69 S.E.2d 896 (1952) (decided under former Code 1933, § 38-103); Maloy v. Dixon, 127 Ga. App. 151, 193 S.E.2d 19 (1972) (decided under former Code 1933, § 38-103); Carr v. Jacuzzi Bros., 133 Ga. App. 70, 210 S.E.2d 16 (1974) (decided under former Code 1933, § 38-103); Anderson v. Poythress, 246 Ga. 435, 271 S.E.2d 834 (1980) (decided under former Code 1933, § 38-103).

When the plaintiff failed to present any evidence which raised a question of fact as to whether the defendant was negligent, plaintiff's contentions regarding what might have happened disappeared in light of the uncontradicted witness testimony as to what did happen, and the trial court correctly granted summary judgment to the defendant. Etheredge v. Kersey, 236 Ga. App. 243, 510 S.E.2d 544 (1998) (decided under former O.C.G.A. § 24-4-1).

The burden of proof is determined by the pleadings, and a defendant's denial of the plaintiff's allegations is notice to the plaintiff that the plaintiff has the burden to prove the allegations. Carver v. Jones, 166 Ga. App. 197, 303 S.E.2d 529 (1983) (decided under former O.C.G.A. § 24-4-1).

Standing. — Trial court did not err in dismissing state agency's petition for downward modification of father's child support obligation as the agency did not prove the agency's assertion that the agency had standing to bring such an action, since the agency did not show the legislature intended to give the state agency the power to seek modification of

General Considerations (Cont'd)

support to the same extent a parent could do so; accordingly, the state agency could only prove the agency had standing if the agency showed there was a prior court order which established or enforced a child support obligation and which the state agency participated in obtaining, and the agency was unable to make that showing. Dep't of Human Res. v. Allison, 276 Ga. 175, 575 S.E.2d 876 (2003) (decided under former O.C.G.A. § 24-4-1).

Burden on state in criminal case. — In all criminal trials the burden is upon the state to prove every allegation which is material to an essential element of the offense. Conyers v. State, 50 Ga. 103, 15 Am. R. 686 (1873) (lack of parental consent) (decided under former Code 1873, § 3758); Bell v. State, 91 Ga. 15, 16 S.E. 207 (1892) (capacity of infant to commit crime) (decided under former Code 1882, § 3758); Neil v. State, 117 Ga. 14, 43 S.E. 435 (1903) (marital status of alleged fornicator) (decided under former Penal Code 1895, § 994); Sikes v. State, 120 Ga. 494, 48 S.E. 153 (1904) (decided under former Penal Code 1895, § 994); Harris v. State, 14 Ga. App. 574, 81 S.E. 815 (1914) (decided under former Penal Code 1910, § 1020); McLemore v. State, 181 Ga. 462, 182 S.E. 618 (1935) (voluntariness of confession) (decided under former Code 1933, § 38-103) Butts v. State, 153 Ga. App. 464, 265 S.E.2d 370 (1980) (decided under former Code 1933, § 38-103).

Effect of denial by defendant of the plaintiff's allegations is to put the plaintiff on notice that the burden is on the plaintiff to prove those allegations. Whitley v. Wilson, 90 Ga. App. 16, 81 S.E.2d 877 (1954) (decided under former Code 1933, § 38-103).

Defendant has burden of proof as to all matters purely of defense. Life & Cas. Ins. Co. v. Cartrell, 74 Ga. App. 204, 39 S.E.2d 437 (1946) (decided under former Code 1933, § 38-103).

When a third-party defendant was unable to demonstrate any specific evidence that a claim was paid wrongfully by the third-party plaintiff, a surety, and that any consideration of the surety's late affidavit led to an unjust result, the trial court's grant of summary judgment was not error. Horton v. U.S. Fid. & Guar. Co., 194 Ga. App. 881, 392 S.E.2d 25 (1990) (decided under former O.C.G.A. § 24-4-1).

Affirmative defenses generally. — When the defendant admits the essential facts of the petition and sets up other facts in justification or avoidance, plaintiff has the burden of proving such affirmative defense. Hunter v. Sanders, Swan & Co., 113 Ga. 140, 38 S.E. 406 (1901) (decided under former Civil Code 1895, § 5160); Brunswick & W.R.R. v. Wiggins, 113 Ga. 842, 39 S.E. 551, 61 L.R.A. 513 (1901) (decided under former Civil Code 1895, § 5160); Milledgeville Cotton Co. v. Bacon, 138 Ga. 470, 75 S.E. 604 (1912) (decided under former Civil Code 1910, § 5746); Larzenby v. Citizen's Bank, 20 Ga. App. 53, 92 S.E. 391 (1917) (decided under former Civil Code 1910, § 5746); Branch v. American Agric. Chem. Co., 22 Ga. App. 52, 95 S.E. 476 (1918) (decided under former Civil Code 1910, § 5746); Alston v. Mobley, 42 Ga. App. 98, 155 S.E. 81 (1930) (decided under former Civil Code 1910, § 5746); Hill v. City of Calhoun, 47 Ga. App. 753, 171 S.E. 459 (1933) (decided under former Code 1933, § 38-103); Jones v. Knightstown Body Co., 52 Ga. App. 667, 184 S.E. 427 (1936) (decided under former Code 1933, § 38-103); Whitley v. Wilson, 90 Ga. App. 16, 81 S.E.2d 877 (1954) (decided under former Code 1933, § 38-103); Purcell v. Hill, 111 Ga. App. 256, 141 S.E.2d 153 (1965) (decided under former Code 1933, § 38-103); Willis v. Kemp, 130 Ga. App. 758, 204 S.E.2d 486 (1974) (decided under former Code 1933, § 38-103); Metropolitan Publishers Representatives, Inc. v. Arnsdorff, 153 Ga. App. 877, 267 S.E.2d 260 (1980) (decided under former Code 1933, § 38-103).

When the defendant asserts affirmative defenses, it is not improper to argue that the burden of establishing those defenses lies on the one asserting the defenses. Pembrook Mgt., Inc. v. Cossaboon, 157 Ga. App. 675, 278 S.E.2d 100 (1981) (decided under former O.C.G.A. § 24-4-1).

Justification and avoidance are affirmative defenses. — When a defendant admits the essential facts of a plaintiff's petition but sets up other facts in

justification or avoidance, an affirmative defense is presented and the defendant ordinarily has the burden of proving the defense. Carver v. Jones, 166 Ga. App. 197, 303 S.E.2d 529 (1983) (decided under former O.C.G.A. § 24-4-1).

Effect of entry of appearance. — When the defendant filed no written plea, but simply entered an appearance as required by the rules of the municipal court in cases of the character of this case, this amounted to a plea of general denial; it was not a plea in the nature of one in confession and avoidance, and therefore, being one merely generally denying the allegations of the plaintiff, the burden which may have rested upon the plaintiff, if any, was the burden only of going on with the evidence, and this burden the plaintiff was not required to carry by a preponderance of the evidence. Boss v. Ed. & Al. Matthews, Inc., 51 Ga. App. 889, 181 S.E. 688 (1935) (on motion for rehearing) (decided under former Code 1933, § 38-103).

Effect of proving prima facie case. — Fact that the plaintiff introduced sufficient evidence to make out a prima facie case, and that in so doing plaintiff was relieved by statute of the burden of introducing evidence on an issue, the affirmative of which was essential to a recovery, in no way relieved the plaintiff of ultimately establishing the essential facts of plaintiff's case by a preponderance of the evidence. Richter Bros. v. Atlantic Co., 59 Ga. App. 137, 200 S.E. 462 (1938), later appeal, 65 Ga. App. 605, 16 S.E.2d 259 (1941) (decided under former Code 1933, § 38-103).

Effect of failure to prove prima facie case. — Rule that the burden is on the defendant to establish defendant's defense of contributory negligence on the part of the plaintiff, such as would bar a recovery, would not impose upon defendant such a duty in a case when the plaintiff personally had failed to make out a prima facie case, by failing to show negligence on the part of the defendant as alleged or by personally showing defendant's own contributory negligence. McCrackin v. McKinney, 52 Ga. App. 519, 183 S.E. 831 (1936) (decided under former Code 1933, § 38-103).

Right to open and conclude argument. — Party having the burden of proof is entitled to open and conclude the argument before the jury. Willett Seed Co. v. Kirkeby-Gundestrup Seed Co., 145 Ga. 559, 89 S.E. 486 (1916) (decided under former Civil Code 1910, § 5746); Simmons v. Brannen, 155 Ga. 494, 117 S.E. 318 (1923) (decided under former Civil Code 1910, § 5746); Seagraves v. Couch & Jackson, 168 Ga. 38, 147 S.E. 61 (1929) (decided under former Civil Code 1910, § 5746); Morgan-Hill Paving Co. v. Shanks, 45 Ga. App. 274, 164 S.E. 221 (1932) (decided under former Civil Code 1910, § 5746).

Defendant in defendant's plea may admit a prima facie case for the plaintiff, and if the defendant does so before the plaintiff introduces evidence, the burden of proving defendant's defense is on the defendant, and the defendant is entitled to open and conclude. United States v. A Certain Tract or Parcel of Land, 47 F. Supp. 30 (S.D. Ga. 1942) (decided under former Code 1933, § 38-103).

Proving a negative. — When one party has the burden of proving a negative, but all the proof on the subject is within the control of the other party, the burden is shifted to the party having the power to produce the proof. Mayo v. Owen, 208 Ga. 483, 67 S.E.2d 709 (1951) (decided under former Code 1933, § 38-103).

Propounder who offered a will for probate assumed the non-shifting burden of persuasion as to the validity of that document, including the requirement of showing by a preponderance of the evidence that the signature was that of decedent. Heard v. Lovett, 273 Ga. 111, 538 S.E.2d 434 (2000) (decided under former O.C.G.A. § 24-4-1).

Prima facie case on life insurance contract. — Plaintiff's right to recover a life insurance contract is established prima facie, without proof of payment of the required premiums, on proof of possession of the policy by the plaintiff and its introduction in evidence, and proof of all other essentials to a recovery under the policy. Masonic Relief Ass'n v. Hicks, 47 Ga. App. 499, 171 S.E. 215 (1933) (decided under former Code 1933, § 38-103).

Second marriages. — For a brief discussion of the presumption of validity or

General Considerations (Cont'd)

invalidity of second marriage, see Scott v. Jefferson, 174 Ga. App. 651, 331 S.E.2d 1 (1985) (decided under former O.C.G.A. § 24-4-1).

Specific Actions

Contributory negligence. — When the evidence is sufficient to raise an issue for the jury, and such issue is in fact submitted to the jury upon the question of the defendant's negligence, then, in order for the defendant to avail oneself of the affirmative defense of contributory negligence, it is incumbent upon defendant to prove the defense, and this is true even though defendant does not in defendant's own pleadings confess defendant's negligence as charged. McCrackin v. McKinney, 52 Ga. App. 519, 183 S.E. 831 (1936) (decided under former Code 1933, § 38-103).

Comparative negligence. — While comparative negligence is available as an affirmative defense in Georgia, the burden of proving the defense remains with the party relying upon the defense and not upon the party making the original negligence claim to disprove the defense. Glenridge Unit Owners Ass'n v. Felton, 183 Ga. App. 858, 360 S.E.2d 418 (1987) (decided under former O.C.G.A. § 24-4-1).

Defense of alternative proximate causation. — Trial court did not err when the court declined to give the customer and spouse's jury instruction directing that the pharmacy and pharmacist had the burden of proving their defense of alternative proximate causation in the customer and spouse's pharmaceutical malpractice action against them as the trial court's given instruction covered the same principle as that contained in the customer and spouse's requested charge and the charge given was a correct statement of the law. Moresi v. Evans, 257 Ga. App. 670, 572 S.E.2d 327 (2002) (decided under former O.C.G.A. § 24-4-1).

Denial of contract not affirmative defense. — When a plaintiff is suing on an alleged express contract by which plaintiff claims defendant agreed to pay a sum certain as rent, and defendant denies there is any such express contract, defendant's answer is not an affirmative defense as to which defendant is required to carry the burden of proof. Willis v. Kemp, 130 Ga. App. 758, 204 S.E.2d 486 (1974) (decided under former Code 1933, § 38-103).

Legitimacy. — Existence of the presumption of legitimacy arising from the birth of a child requires the production of contrary evidence from the husband, but it does not relieve the wife of her burden of proof to establish legitimacy in the first place. Miller v. Miller, 258 Ga. 168, 366 S.E.2d 682 (1988) (decided under former O.C.G.A. § 24-4-1).

Medical malpractice. — Defense counsel's claim that the conduct of the patient and the midwife was an intervening cause of the fetal death, and that the patient had the burden of proof under former O.C.G.A. § 24-4-1 to show that there was no such intervening cause, was error which the trial court should have corrected. Steele v. Atlanta Maternal-Fetal Med., P.C., 271 Ga. App. 622, 610 S.E.2d 546 (2005), overruled on other grounds, Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009) (decided under former O.C.G.A. § 24-4-1).

Party asserting an accord and satisfaction bears the burden of proof on that issue. Carpet Transp., Inc. v. TMS Ins. Agency, Inc., 165 Ga. App. 734, 302 S.E.2d 421 (1983) (decided under former O.C.G.A. § 24-4-1).

Status as hospital charity patient. — When a nonpaying patient, who in the end was the recipient of a hospital's charity, claims the patient was able to pay and was not a charity patient so that the hospital would be subject to a negligence claim, the trial court abused the court's discretion in refusing to put the burden of proof on the patient or the patient's personal representative. Fulton-DeKalb Hosp. Auth. v. Fanning, 196 Ga. App. 556, 396 S.E.2d 534 (1990) (decided under former O.C.G.A. § 24-4-1).

Specific issues. — For burden of proof on specific civil issues, see the following cases: Lanier v. Hughley, 91 Ga. 719, 18 S.E. 39 (1893) (payment) (decided under former Code 1882, § 3758); Pyron & Son v. Ruohs, 120 Ga. 1060, 48 S.E. 434 (1904) (jurisdiction) (decided under former Civil

Code 1895, § 5160); Gaskins v. Touchton, 151 Ga. 458, 107 S.E. 38 (1921) (payment) (decided under former Civil Code 1910, § 5746); Bankers Trust & Audit Co. v. Hanover Nat'l Bank, 35 Ga. App. 619, 134 S.E. 195 (1926) (lack of consideration) (decided under former Civil Code 1910, § 5746); Paulk v. Roberts, 42 Ga. App. 79, 155 S.E. 55 (1930) (legality of administrator's investments) (decided under former Civil Code 1910, § 5746); Branon v. Ellbee Pictures Corp., 42 Ga. App. 293, 155 S.E. 923 (1930) (mitigation of damages) (decided under former Civil Code 1910, § 5746); Supreme Kingdom, Inc. v. Fourth Nat'l Bank, 174 Ga. 779, 164 S.E. 204 (1932) (forgery) (decided under former Civil Code 1910, § 5746); State Hwy. Bd. v. Lewis, 46 Ga. App. 162, 167 S.E. 219 (1932) (invalidity of marriage) (decided under former Civil Code 1910, § 5746); Masonic Relief Ass'n v. Hicks, 47 Ga. App. 499, 171 S.E. 215 (1933) (invalidity of insurance contract) (decided under former Code 1933, § 38-103); Hill v. City of Calhoun, 47 Ga. App. 753, 171 S.E. 459 (1933) (affidavit of illegality) (decided under former Code 1933, § 38-103); Bell v. City of Valdosta, 47 Ga. App. 808, 171 S.E. 572 (1933) (invalidity of municipal ordinance) (decided under former Code 1933, § 38-103); Thomas v. Southern Ry., 92 F.2d 445 (5th Cir. 1937) (contributory negligence) (decided under former Code 1933, § 38-103); Heaton v. Hayes, 188 Ga. 632, 4 S.E.2d 570 (1939) (payment in suit to foreclose security deed) (decided under former Code 1933, § 38-103); Marion County v. First Nat'l Bank, 193 Ga. 263, 18 S.E.2d 475 (1942) (unconstitutional county debt) (decided under former Code 1933, § 38-103); Hamilton v. North Ga. Elec. Membership Corp., 201 Ga. 689, 40 S.E.2d 750 (1946) (invalidity of municipal ordinance) (decided under former Code 1933, § 38-103); Palatine Ins. Co. v. Gilleland, 79 Ga. App. 18, 52 S.E.2d 537 (1949) (lack of notice of application by insured for appointment of umpire) (decided under former Code 1933, § 38-103); Estridge v. Janko, 96 Ga. App. 246, 99 S.E.2d 682 (1957) (set off and counterclaim) (decided under former Code 1933, § 38-103); Polk v. Fulton County, 96 Ga. App. 733, 101 S.E.2d 736 (1957) (value of condemned property) (decided under former Code 1933, § 38-103); Cobb v. Dutton, 222 Ga. 11, 148 S.E.2d 399 (1966) (lack of counsel) (decided under former Code 1933, § 38-103); Smith v. Morgan, 113 Ga. App. 865, 150 S.E.2d 164 (1966) (title to land) (decided under former Code 1933, § 38-103); First Pentecostal Church v. City of Atlanta, 144 Ga. App. 718, 242 S.E.2d 357 (1978) (unreasonableness of tax) (decided under former Code 1933, § 38-103); Forehand v. Pace, 146 Ga. App. 682, 247 S.E.2d 192 (1978) (negligence) (decided under former Code 1933, § 38-103); Brown v. Minter, 243 Ga. 397, 254 S.E.2d 326 (1979) (access to public records) (decided under former Code 1933, § 38-103); A & N Inv., Inc. v. Cronic, 151 Ga. App. 738, 261 S.E.2d 469 (1979) (signing of note) (decided under former Code 1933, § 38-103); Anderson v. Poythress, 246 Ga. 435, 271 S.E.2d 834 (1980) (action of public official) (decided under former Code 1933, § 38-103); Carter v. Kim, 157 Ga. App. 418, 277 S.E.2d 776 (1981) (existence of contract and agency) (decided under former O.C.G.A. § 24-4-1); Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653 (1981) (hypersensitivity to x-rays) (decided under former O.C.G.A. § 24-4-1).

Workers' compensation proceeding. — When claimant proved that claimant's injury arose out of and in the scope of claimant's employment, the burden shifted to the employer to prove that either claimant's injuries were intentionally self-inflicted or the injuries were caused by an attack for reasons personal to claimant. Hulbert v. Domino's Pizza, Inc., 239 Ga. App. 370, 521 S.E.2d 43 (1999) (decided under former O.C.G.A. § 24-4-1).

Burden of persuasion on propounders in "will contest". — Trial court did not err in finding that a codicil to a testator's will was invalid because it properly charged the jury that the caveators had no burden to prove the grounds of their caveats to the propounders' petition to probate codicils; because testamentary capacity and voluntary execution were necessary elements of the propounders' case, the burden of persuasion remained on the propounders to prove their assertions by a preponderance of the evidence, and in the

Specific Actions (Cont'd)

absence of an asserted affirmative defense, the caveators had no duty to affirmatively prove anything but were required only to come forward with evidence to rebut the propounders' prima facie case as to essential elements. Parker v. Melican, 286 Ga. 185, 684 S.E.2d 654 (2009) (decided under former O.C.G.A. § 24-4-1).

Jury Instructions

Instructions generally. — In the absence of a timely and appropriate request to charge, it is not reversible error for the judge to omit to instruct the jury upon the burden of proof. Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S.E. 391 (1917) (decided under former Penal Code 1910, § 1012).

Instruction must be correct if the judge does charge the jury upon the burden of proof. Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S.E. 391 (1917) (decided under former Penal Code 1910, § 1012).

Instruction on shifting burden. — When the judge correctly charges in regard to the general burden of proof, the judge is not required, as an essential part of the judge's charge (in the absence of a proper request), to discuss the shifting of the burden as to the particular points of contest made by the evidence. Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S.E. 391 (1917) (decided under former Penal Code 1910, § 1012); Haugabrooks v. Metropolitan Life Ins. Co., 63 Ga. App. 829, 12 S.E.2d 163 (1940) (decided under former Code 1933, § 38-103).

In action by bank to collect on promissory note, when prima facie case had been admitted by defendant, it was misleading and confusing to jury to instruct the jury that burden still remained upon plaintiff to prove plaintiff's case to the jury's satisfaction by a preponderance of the evidence; the court should have instructed the jury that in view of defendant's admission as to prima facie right of plaintiff to recover, burden was upon defendant to meet this prima facie right by establishing defendant's affirmative defense of partial accord and satisfaction by a preponderance of the evidence. Citizens Bank v. Ansley, 164 Ga. App. 437, 296 S.E.2d 370 (1982) (decided under former O.C.G.A. § 24-4-1).

Request for instructions. — If a party is not satisfied with the general charge on the subject of the burden of proof, it is incumbent upon the party to make timely written request to charge on the shifting of the burden if the party desires such charge. Hyde v. Chappell, 194 Ga. 536, 22 S.E.2d 313 (1942) (decided under former Code 1933, § 38-103).

Instruction in murder case. — On trial of one charged with murder, it is not error to charge the jury: "The law puts upon the defendant, where he admits the killing, the burden to satisfy the jury that he was justified under some rule of law, unless the admissions, together with the evidence in the case against him, or the statement of the defendant, shows justification or mitigation." Gay v. State, 173 Ga. 793, 161 S.E. 603 (1931) (decided under former Penal Code 1910, § 1020).

Condemnation suit instruction in language of former statute was a correct abstract principle of law and was not confusing or misleading to the jury. Georgia Power Co. v. Smith, 94 Ga. App. 166, 94 S.E.2d 48 (1956) (decided under former Code 1933, § 38-105).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 1, 171.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 94.

C.J.S. — 31A C.J.S., Evidence, § 165 et seq.

ALR. — Burden of proof as regards discharge in bankruptcy, 2 ALR 1672.

Duty to charge as to reasonable doubt as between different degrees of crime or included offenses, 20 ALR 1258.

Presumption and burden of proof as to loss from failure of pledgee to sell or collect choses in action pledged, 53 ALR 1075.

Effect of fraud in the inception of a bill or note to throw upon the subsequent

holder the burden of proving that he is a holder in due course, 57 ALR 1083.

Res ipsa loquitur in its relation to burden of proof and burden of evidence, 59 ALR 486; 92 ALR 653.

Burden of proof as to consideration for bill or note, when plaintiff not protected as a holder in due course, 65 ALR 904; 127 ALR 1003.

Burden and degree of proof as to alibi, 67 ALR 138; 124 ALR 471.

Prima facie case for proponent in will contest as shifting burden of proof, 76 ALR 373.

Governing law as regards presumption and burden of proof, 78 ALR 883; 168 ALR 191.

Pleading want of contributory negligence as waiver of right to presumption of freedom from negligence, 96 ALR 1116.

Presumption and burden of proof of settlement in action by one town or poor district against another for support of pauper, 99 ALR 457.

Burden of proof as to outlawry by limitation or otherwise of criminal prosecution when relied upon to defeat claim of privilege against self-incrimination, 101 ALR 389.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 ALR 1510.

Necessity and sufficiency of proof, in prosecution for perjury during trial, that oath was administered, 132 ALR 1311.

Presumption and burden of proof regarding mitigation of damages, 134 ALR 242.

Statute which places burden of proof as to contributory negligence on defendant or creates a presumption against contributory negligence as applicable to actions by one person for consequential damages resulting from injury to another, 147 ALR 726.

Distinction between burden of proof and burden of evidence as related to statutory provisions regarding presumption and burden of proof in respect of commercial paper, 152 ALR 1331.

Burden of proof as to doctrine of last clear chance, 159 ALR 724.

Burden of proof in partition suit as regards alleged prior voluntary partition of property, 1 ALR2d 473.

Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case, 1 ALR2d 1291.

Burden of proving value of relief from performing contract in suit based on defendant's breach preventing or excusing full performance, 17 ALR2d 968.

Presumption and burden of proof of accuracy of scientific and mechanical instruments for measuring speed, temperature, time, and the like, 21 ALR2d 1200.

Burden of proof in actions under general declaratory judgment acts, 23 ALR2d 1243.

Reference by counsel for prosecution in opening statement to matters which he does not later attempt to prove as ground for new trial, reversal, or modification, 28 ALR2d 972.

Sufficiency of evidence, in absence of survivors or of eyewitnesses competent to testify, as to place or point of impact of motor vehicles going in opposite directions and involved in collision, 77 ALR2d 580.

Conviction of criminal offense without evidence as denial of due process of law, 80 ALR2d 1362.

Res ipsa loquitur with respect to personal injuries or death on or about ship, 1 ALR3d 642.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Zoning as a factor in determination of damages in eminent domain, 9 ALR3d 291.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 ALR3d 146.

Conflict of laws as to presumptions and burden of proof concerning facts of civil case, 35 ALR3d 289.

Burden of proof of defendant's age, in prosecution where attainment of particular age is statutory requisite of guilt, 49 ALR3d 526.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment, 52 ALR3d 1084.

Setting aside arbitration award on ground of interest or bias of arbitrators, 56 ALR3d 697.

Homicide: burden of proof on defense that killing was accidental, 63 ALR3d 936.

Burden of proof as to lack of license in criminal prosecution for carrying or possession of weapon without license, 69 ALR3d 1054.

Answers to interrogatories as limiting answering party's proof at state trial, 86 ALR3d 1089.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief, 16 ALR4th 810.

Burden of proof as to entrapment defense — state cases, 52 ALR4th 775.

Setting aside arbitration award on ground of interest or bias of arbitrators — commercial, business, or real estate transactions, 67 ALR5th 179.

24-14-2. Change of burden in discretion of court.

What amount of evidence will change the onus or burden of proof shall be a question to be decided in each case by the sound discretion of the court. (Code 1981, § 24-14-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For note discussing shifting burden of persuasion in will contests involving undue influence in Georgia, see 22 Ga. B.J. 555 (1960).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Civil Code 1910, § 5747, former Code 1933, § 38-104, and former O.C.G.A. § 24-4-2 are included in the annotations for this Code section.

In general. — Term, "burden of proof," is used in two senses: one, the burden of proof thrust upon the party by the pleadings which remains upon the party throughout the trial and, two, the burden of the evidence which may and does shift during the progress of the trial as to facts or issues from one party to the other. Hawkins v. Davie, 136 Ga. 550, 71 S.E. 873 (1911) (decided under former Civil Code 1910, § 5747); Atlantic Coast Line R.R. v. Thomas, 83 Ga. App. 477, 64 S.E.2d 301 (1951) (decided under former Code 1933, § 38-104). Deloach v. Automatic Transmission & Brake Shop, Inc., 106 Ga. App. 797, 128 S.E.2d 512 (1962) (decided under former Code 1933, § 38-104).

Burden of proof. — Former statute had no application to the burden of proof placed by the pleadings; the former statute applied only to the burden of evidence which may, as to any particular fact or issue, shift from one party to the other. Department of Revenue v. Stewart, 67 Ga. App. 281, 20 S.E.2d 40 (1942) (decided under former Code 1933, § 38-104); Davison Chem. Corp. v. Hart, 68 Ga. App. 413, 23 S.E.2d 107 (1942) (decided under former Code 1933, § 38-104); Atlantic Coast Line R.R. v. Thomas, 83 Ga. App. 477, 64 S.E.2d 301 (1951) (decided under former Code 1933, § 38-104); Deloach v. Automatic Transmission & Brake Shop, Inc., 106 Ga. App. 797, 128 S.E.2d 512 (1962) (decided under former Code 1933, § 38-104); Richards v. Wilkinson Shaving Co., 198 Ga. App. 45, 400 S.E.2d 344 (1990) (decided under former O.C.G.A. § 24-4-2).

Discretion of judge. — As to the burden of proof placed by the pleadings, the trial judge has no discretion — it is a matter of law; but as to the shifting of the burden of the evidence, the judge has discretion to determine whether the evidence produced, together with any applicable rules of presumption and procedure, in the particular case has shifted the burden. Deloach v. Automatic Transmission & Brake Shop, Inc., 106 Ga. App. 797, 128 S.E.2d 512 (1962) (decided under former Code 1933, § 38-104).

Application not always discretionary. — Former statute did not intend to lay down the rule that whether under an affirmation and denial in pleadings upon the case one party or the other carried the burden of establishing that party's allega-

tion was a matter of discretion in every case. Atlantic Coast Line R.R. v. Thomas, 83 Ga. App. 477, 64 S.E.2d 301 (1951) (decided under former Code 1933, § 38-104).

Exercise of discretion. — As to the discretion which the law invests in the trial judge, the judge may call to the judges's assistance in reaching a correct decision other well-recognized and fundamental principles of procedure and practice which are so well recognized that they take the form of substantive evidence. The judge may consider the question of peculiar knowledge. Department of Revenue v. Stewart, 67 Ga. App. 281, 20 S.E.2d 40 (1942) (decided under former Code 1933, § 38-104).

Burden shifted to defendant. — When the plaintiff makes out a prima facie case, the burden is shifted to the defendant. Equitable Life Assurance Soc'y v. Florence, 47 Ga. App. 711, 171 S.E. 317 (1933) (decided under former Code 1933, § 38-104).

Effect of failure to carry burden. — If the burden of proof has shifted and the party to whom the burden has shifted has not successfully carried this burden of evidence, the trial judge has authority to withdraw the case from the jury by directing a verdict. Deloach v. Automatic Transmission & Brake Shop, Inc., 106 Ga. App. 797, 128 S.E.2d 512 (1962) (decided under former Code 1933, § 38-104).

Instructions. — Charge of the court should state what testimony would shift the onus, rather than when the onus would be changed, because the latter expression would intimate an opinion as to the sufficiency of the proof. Clark v. Cassidy, 64 Ga. 662 (1880) (decided under former Code 1873, § 3759); Lazenby v. Citizens Bank, 20 Ga. App. 53, 92 S.E. 391 (1917) (decided under former Civil Code 1910, § 5747).

When state filed for condemnation of a DC-3 airplane, a truck, a trailer, and the contents of the vehicles which had been used previously to transport contraband drugs, the trial court did not err in charging the jury that the defendant had to prove that the defendant had no knowledge that the vehicles were used in violation of controlled substances laws after the state had made out a prima facie case that the vehicles had been used to transport drugs. Morgan v. State, 172 Ga. App. 375, 323 S.E.2d 620 (1984) (decided under former O.C.G.A. § 24-4-2).

Proving a negative. — If a negation or negative affirmation is essential to prove a party's case, the burden of proof of such negative lies on the party so affirming it. Supreme Kingdom, Inc. v. Fourth Nat'l Bank, 174 Ga. 779, 164 S.E. 204 (1932) (decided under former Civil Code 1910, § 5747).

Proving status as hospital charity patient. — When a nonpaying patient, who in the end was the recipient of a hospital's charity, claims the patient was able to pay and was not a charity patient so that the hospital would be subject to a negligence claim, the trial court abused the court's discretion in refusing to put the burden of proof on the patient or the patient's personal representative. Fulton-DeKalb Hosp. Auth. v. Fanning, 196 Ga. App. 556, 396 S.E.2d 534 (1990) (decided under former O.C.G.A. § 24-4-2).

Mitigation. — When the lessor under an exclusive rights contract brought an action for damages against the lessee for a breach of the contract, and alleged that the lessor's damages were the total of the fixed amounts to be paid under the contract for the pictures and proved upon the trial the execution of the contract and a breach thereof by the lessee, a prima facie case in favor of the plaintiff for the full amount sued for was made out, and the burden was then upon the defendant to prove that the plaintiff could have lessened plaintiff's damages, and such proof should have included sufficient data to allow the jury to reasonably estimate how much the damages could have been mitigated. Branon v. Ellbee Pictures Corp., 42 Ga. App. 293, 155 S.E. 923 (1930) (decided under former Civil Code 1910, § 5747).

Partnership accounting. — When the pleadings and the evidence in a partnership accounting showed that the defendant partner was in possession of the farm, that the defendant kept the books and records, and that the defendant admitted the receipt of the gross amount of money charged to the defendant by the plaintiff, from the sale of the farm and the

equipment and cattle thereon, it was not error to charge that the burden was on the defendant of proving a proper disposition of the assets that came into the defendant's hands as a member of the partnership in charge of the partnership's business and assets. Brosnan v. Long, 75 Ga. 837, 44 S.E.2d 809 (1947) (decided under former Code 1933, § 38-104).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 172, 183.

ALR. — Res ipsa loquitur in its relation to burden of proof and burden of evidence, 59 ALR 486; 92 ALR 653.

Burden and degree of proof as to alibi, 67 ALR 138; 124 ALR 471.

Prima facie case for proponent in will contest as shifting burden of proof, 76 ALR 373.

Governing law as regards presumption and burden of proof, 78 ALR 883; 168 ALR 191.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 ALR 1510.

Exception to principle of pari delicto where refusal of relief would involve harmful effect on persons for whose protection the law made the transaction illegal, 120 ALR 1461.

Use of the word "satisfaction" or a derivative in instructions in civil case relating to degree or amount or proof, 147 ALR 380.

Sufficiency of evidence, in absence of survivors or of eyewitness competent to testify, as to place or point of impact of motor vehicles going in opposite directions and involved in collision, 77 ALR2d 580.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment, 52 ALR3d 1084.

Homicide: burden of proof on defense that killing was accidental, 63 ALR3d 936.

Burden of proof as to lack of license in criminal prosecution for carrying or possession of weapon without license, 69 ALR3d 1054.

Answers to interrogatories as limitating answering party's proof at state trial, 86 ALR3d 1089.

24-14-3. Amount of mental conviction required; preponderance of evidence in civil cases.

Moral and reasonable certainty is all that can be expected in legal investigation. Except as provided in Code Section 51-1-29.5 or Code Section 51-12-5.1, in all civil proceedings, a preponderance of evidence shall be considered sufficient to produce mental conviction. In criminal proceedings, a greater strength of mental conviction shall be held necessary to justify a verdict of guilty. (Code 1981, § 24-14-3, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-4-3, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in John v. State, 33 Ga. 257 (1862) and Lucas v. State, 48 Ga. App. 42, 171 S.E. 850 (1933).

Law reviews. — For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1873, § 3749, former Code 1882, § 3749, former Civil Code 1895, § 5144, former Penal Code 1895, § 986, former Civil Code 1910, § 5730, former Penal Code 1910, § 1012, former Code 1933, § 38-105, and former O.C.G.A. § 24-4-3 are included in the annotations for this Code section.

Civil Cases

Degree of proof. — Proof should be satisfactory, but the proof need not be perfectly clear or wholly unimpeached. M.J. Atkins & Co. v. Cobb, 56 Ga. 86 (1876) (decided under former Code 1873, § 3749); City Bank v. Kent, 57 Ga. 283 (1876) (decided under former Code 1873, § 3749); Poullain v. Poullain, 76 Ga. 420, 4 S.E. 92 (1886) (decided under former Code 1882, § 3749); Patton v. State, 117 Ga. 230, 43 S.E. 533 (1903) (decided under former Penal Code 1895, § 986).

Conviction as prima facie evidence of murder. — In a case in which a husband had been convicted of killing his wife, the estate executors were entitled to summary judgment for an order of distribution of life insurance proceeds under O.C.G.A. § 33-25-13. The husband's criminal conviction was prima facie evidence under former O.C.G.A. § 24-4-3 (see now O.C.G.A. §24-14-3) that he was guilty of his wife's murder for the purpose of determining that he could not receive proceeds of an insurance policy on her life. Cont'l Cas. Co. v. Adamo, No. 08-10130, 2008 U.S. App. LEXIS 13979 (11th Cir. July 1, 2008) (Unpublished) (decided under former O.C.G.A. § 24-4-3).

Preponderance of evidence. — It is improper to charge in a civil case that proof must establish the contention to a reasonable and moral certainty; a preponderance or superior weight of evidence is sufficient. Supreme Conclave Knights of Damon v. Woods, 120 Ga. 328, 47 S.E. 940 (1904) (decided under former Civil Code 1895, § 5144); Youmans v. Moore, 11 Ga. App. 66, 74 S.E. 710 (1912) (decided under former Civil Code 1910, § 5730); Masonic Relief Ass'n v. Hicks, 47 Ga. App. 499, 171 S.E. 215 (1933) (decided under former Code 1933, § 38-105); Life Ins. Co. v. Lawler, 211 Ga. 246, 85 S.E.2d 1 (1954) (decided under former Code 1933, § 38-105); Hospital Auth. v. Eason, 113 Ga. App. 401, 148 S.E.2d 499, rev'd on other grounds, 222 Ga. 536, 150 S.E.2d 812 (1966) (decided under former Code 1933, § 38-105).

In a civil action under the Georgia RICO Act, given the similarities in the purpose and language of the federal and Georgia RICO statutes, together with the General Assembly's mandate to liberally construe the Act to effectuate the Act's remedial purposes, under O.C.G.A. § 16-14-2(b), the applicable standard of proof in state civil RICO actions was held to be a preponderance of the evidence; thus, the Supreme Court of Georgia overruled Simpson Consulting, Inc. v. Barclays Bank PLC, 227 Ga. App. 648 (1997), and those other cases holding to the contrary, specifically, Blanton v. Bank of America, 256 Ga. App. 103 (2002), In re Copelan, 250 Ga. App. 856 (2001) and Tronitec, Inc. v. Shealy, 249 Ga. App. 442 (2001). Williams Gen. Corp. v. Stone, 279 Ga. 428, 614 S.E.2d 758 (2005) (decided under former O.C.G.A. § 24-4-3).

Charging entire former statute was not injuriously inapplicable to a civil case. Central of Ga. Ry. v. McGuire, 10 Ga. App. 483, 73 S.E. 702 (1912) (decided under former Civil Code 1910, § 5730).

Charge ignoring former statute in an action for debt was erroneous. Central of Ga. Ry. v. Swann, 144 Ga. 11, 85 S.E. 1001 (1915) (decided under former Civil Code 1910, § 5730).

Question for jury. — Preponderance is a question for the jury and should be

Civil Cases (Cont'd)

decided not from mere number of witnesses, but from interest, opportunity, and general deportment and manner of testifying. Clark v. Cassidy, 62 Ga. 607 (1879) (decided under former Code 1873, § 3749).

Question of law. — When the evidence as a whole, with all reasonable inferences and deductions to be drawn therefrom, presents no conflict in any material particular, and points only to one result, and in that sense there is no question of fact to be determined, then it becomes a question of law, when the evidence is properly presented, to decide whether the verdict is supported by the evidence. Dyal v. Sanders, 194 Ga. 228, 21 S.E.2d 596 (1942) (decided under former Code 1933, § 38-105).

In res ipsa loquitur case the plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that the plaintiff must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable men can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not. It is enough that the court cannot say that the jury could not reasonably come to that conclusion. Hospital Auth. v. Eason, 113 Ga. App. 401, 148 S.E.2d 499, rev'd on other grounds, 222 Ga. 536, 150 S.E.2d 812 (1966) (decided under former Code 1933, § 38-105).

Specific performance. — Notwithstanding the former statute, to authorize specific performance of a parol contract for the sale of land or to authorize reformation of a written contract for such sale, the evidence must be so clear, strong, and satisfactory as to leave no reasonable doubt as to the agreement. Redman Bros. v. Mays, 129 Ga. 435, 59 S.E. 212 (1907) (decided under former Civil Code 1895, § 5144); Williams v. Segers, 147 Ga. 219, 93 S.E. 215 (1918) (decided under former Civil Code 1910, § 5730); Gordon v. Spellman, 148 Ga. 394, 96 S.E. 1006 (1918) (decided under former Civil Code 1910, § 5730); Lloyd v. Redford, 148 Ga. 575, 97 S.E. 523 (1918) (decided under former Civil Code 1910, § 5730); Allen v. Allen, 151 Ga. 278, 106 S.E. 81 (1921) (decided under former Civil Code 1910, § 5730); Ezell v. Mobley, 160 Ga. 872, 129 S.E. 532 (1925) (decided under former Civil Code 1910, § 5730).

Administrative hearings. — Preponderance of evidence standard was applicable in a disciplinary proceeding conducted by the Board of Dentistry. Georgia Bd. of Dentistry v. Pence, 223 Ga. App. 603, 478 S.E.2d 437 (1996) (decided under former O.C.G.A. § 24-4-3).

Instances when preponderance of evidence was sufficient. — In the following cases the preponderance was sufficient to satisfy the jury: Berry v. Mathewes, 7 Ga. 457 (1849) (whether a party has waived lien given by contract) (decided under former law); M.J. Atkins & Co. v. Cobb, 56 Ga. 86 (1876) (proving that goods purchased were inferior) (decided under former Code 1873, § 3749); Crockett v. Crockett, 73 Ga. 647 (1884) (to correct a mistake in a voluntary deed) (decided under former Code 1882, § 3749); Poullain v. Poullain, 76 Ga. 420, 4 S.E. 92 (1886) (to overcome findings of fact by an auditor or master) (decided under former Code 1882, § 3749); Atlanta Journal v. Mayson, 92 Ga. 640, 18 S.E. 1010, 44 Am. St. R. 104 (1893) (in an action for libel although a plea of justification, imputes crime to the plaintiff) (decided under former Code 1882, § 3749); Drakeford v. Adams, 98 Ga. 722, 25 S.E. 833 (1896) (action by receiver to recover money to prove that the respondent had such money) (decided under former Civil Code 1895, § 5144); Brothers v. Horne, 140 Ga. 617, 79 S.E. 468 (1913) (to authorize a recovery in trover) (decided under former Civil Code 1910, § 5730); Harp v. Adams, 142 Ga. 5, 82 S.E. 246 (1914) (to prove the material allegations in a probate of a nuncupative will) (decided under former Civil Code 1910, § 5730); Cowart v. Strickland, 149 Ga. 397, 100 S.E. 447, 7 A.L.R. 1110 (1919) (to prove forgery of a deed in an action of ejectment) (decided under former Civil Code 1910, § 5730); Carter v. Norton, 25 Ga. App. 79, 102 S.E. 648 (1920) (in a plea of justification, in an action for slander) (decided under former Civil Code 1910,

§ 5730); Currie v. State, 153 Ga. 178, 111 S.E. 727 (1922) (defense of insanity on a trial for murder must be proved by a preponderance) (decided under former Civil Code 1910, § 5730); Goosby v. State, 153 Ga. 496, 112 S.E. 467 (1922) (insanity by preponderance of evidence in murder trial) (decided under former Civil Code 1910, § 5730); Mansor v. Opelinsky, 30 Ga. App. 158, 117 S.E. 113 (1923) (purchase price of goods) (decided under former Civil Code 1910, § 5730).

Criminal Cases

Proof required. — Burden of proof is on the state to show that defendant's guilt to a moral and reasonable certainty and beyond a moral and reasonable doubt. Blakeley v. State, 78 Ga. App. 516, 51 S.E.2d 598 (1949) (decided under former Code 1933, § 38-105); Life Ins. Co. v. Lawler, 211 Ga. 246, 85 S.E.2d 1 (1954) (decided under former Code 1933, § 38-105).

Degree of certainty required. — Mathematical certainty is not required and cannot be attained in a legal investigation; moral and reasonable certainty is all the law requires. McNaughton v. State, 136 Ga. 600, 71 S.E. 1038 (1911), appeal dismissed, 223 U.S. 744, 32 S. Ct. 532, 56 L. Ed. 639 (1912) (decided under former Penal Code 1910, § 1012).

"Moral and reasonable certainty." — Better practice in charging the jury on reasonable doubt is to omit the phrase "moral and reasonable certainty", since "what is perceived as 'moral' may differ from group to group, from class to class, and from individual to individual," and the equivocal nature of the term "reasonable" might conceivably lead a juror to apply to the evidence a lesser standard of proof than beyond a reasonable doubt. Gearin v. State, 208 Ga. App. 878, 432 S.E.2d 818 (1993) (decided under former O.C.G.A. § 24-4-3).

Court's instruction that "No person shall be convicted of any crime unless and until each element of the crime is proven beyond a reasonable doubt and to a moral and reasonable certainty..." was not reasonably likely to be interpreted by the jury to allow conviction on proof not meeting the standard of beyond a reasonable doubt or on factors other than the government's proof when, in defining reasonable doubt, the court did not equate it with anything else and repeated the "beyond a reasonable doubt" standard many times. Nevertheless, the "moral certainty" terminology should not be used in jury instructions. Lloyd v. State, 214 Ga. App. 564, 448 S.E.2d 729 (1994) (decided under former O.C.G.A. § 24-4-3).

Charging entire former statute not prejudicial. — While it is the better practice in criminal cases to omit from the charge the portion of the former statute relating to preponderance of the evidence, no prejudicial error is shown when the entire former statute was charged. Howell v. State, 124 Ga. 698, 52 S.E. 649 (1906) (decided under former Penal Code 1895, § 986); Williams v. State, 125 Ga. 302, 54 S.E. 108 (1906) (decided under former Penal Code 1895, § 986); Holmes v. State, 131 Ga. 806, 63 S.E. 347 (1909) (decided under former Penal Code 1895, § 986); Brundage v. State, 7 Ga. App. 726, 67 S.E. 1051 (1910) (decided under former Penal Code 1910, § 1012); Fowler v. State, 187 Ga. 472, 1 S.E.2d 18 (1939) (decided under former Code 1933, § 38-105).

Failure to charge former statute not prejudicial. — When the court properly instructs the jury as to the law of reasonable doubt, the failure to charge the provisions of the former statute afforded no cause for a new trial. Skinner v. State, 98 Ga. 126, 26 S.E. 475 (1896) (decided under former Penal Code 1895, § 986); Middleton v. State, 7 Ga. App. 1, 66 S.E. 22 (1909) (decided under former Penal Code 1895, § 986); Fort v. State, 31 Ga. App. 525, 121 S.E. 128 (1924) (decided under former Penal Code 1910, § 1012); Albritton v. State, 175 Ga. 891, 166 S.E. 643 (1932) (decided under former Penal Code 1910, § 1012).

Province of jury. — When evidence is adduced to authorize a conviction in a criminal case, it is the province of the jury to decide the weight and credit to be given the evidence and whether the state's proof when considered together with that submitted on behalf of the defendant meets the standard of removing every reasonable doubt as to the guilt of the accused. Whitus v. State, 222 Ga. 103, 149 S.E.2d

Criminal Cases (Cont'd)

130 (1966), rev'd on other grounds, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967) (decided under former Code 1933, § 38-105).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 173, 185.

C.J.S. — 32A C.J.S., Evidence, §§ 1272, 1274, 1277.

ALR. — Admissibility and probative force on issue as to mental condition, of evidence that one had been adjudged incompetent or insane, or had been confined in insane asylum, 7 ALR 568; 68 ALR 1309.

Quantum of proof in civil case on issue involving fraudulent, dishonest, or criminal misappropriation of property, 62 ALR 1449.

Rule of reasonable doubt as applicable to proof of previous conviction for purpose of enhancing punishment, 79 ALR 1337.

Degree or quantum of evidence required to establish oral rescission or modification of written contract, 94 ALR 1278.

Reasonable doubt rule as applicable to evidence in civil case of facts amounting to felony or misdemeanor, 124 ALR 1378.

Conviction of criminal offense without evidence as denial of due process of law, 80 ALR2d 1362.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence, 88 ALR2d 852.

Admissibility of expert medical testimony as to future consequences of injury as affected by expression in terms of probability a possibility, 75 ALR3d 9.

24-14-4. Determining where preponderance of evidence lies.

In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, the probability or improbability of their testimony, their interest or want of interest, and their personal credibility so far as the same may legitimately appear from the trial. The jury may also consider the number of the witnesses, though the preponderance is not necessarily with the greater number. (Code 1981, § 24-14-4, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-4-4 which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Clark v. Cassidy, 62 Ga. 407 (1879); Head v. Bridges, 67 Ga. 227 (1881); Cleghorn v. Jones, 68 Ga. 87 (1881); and Kinnebrew v. State, 80 Ga. 232, 5 S.E. 26 (1887).

Law reviews. — For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5146, former Civil Code 1910, § 5732, former Code 1933, § 38-107, and former O.C.G.A. § 24-4-4 are included in the annotations for this Code section.

Former statute not mandatory as to jury. — Directions in the former statute were for the jury only and not mandatory as to the jury but merely addressed to the jury's discretion. Alexander v. State, 1 Ga. App. 289, 57 S.E. 996 (1907) (decided under former Civil Code 1895, § 5146).

Jury "may" consider rules. — It was not error to charge that jury "may" consider the rules of the former statute. Louisville & N.R.R. v. Rodgers, 21 Ga. App. 324, 94 S.E. 321 (1917) (decided under former Civil Code 1910, § 5732); Hatcher v. Bray, 88 Ga. App. 344, 77 S.E.2d 64 (1953) (decided under former Code 1933, § 38-107).

Jury "will" consider rules. — There was no error in using the word "will" instead of the word "may" in connection with the former statute. Robinson v. State, 158 Ga. 47, 122 S.E. 886 (1924) (decided under former Civil Code 1910, § 5732).

Province of jury. — It is the province of the jury to determine the credibility of witnesses. Caldwell v. Caldwell, 59 Ga. App. 637, 1 S.E.2d 764 (1939) (interest of witness) (decided under former Code 1933, § 38-107); Couch v. State, 73 Ga. App. 153, 35 S.E.2d 708 (1945) (bias of witness) (decided under former Code 1933, § 38-107); Pantone v. Pantone, 206 Ga. 305, 57 S.E.2d 77 (1950) (weight and credit of testimony) (decided under former Code 1933, § 38-107); Harrison v. Regents of Univ. Sys., 99 Ga. App. 762, 109 S.E.2d 854 (1959) (interest of witness) (decided under former Code 1933, § 38-107); Freedman v. Housing Auth., 108 Ga. App. 418, 136 S.E.2d 544 (1963) (bias of witness) (decided under former Code 1933, § 38-107); Brown v. Nutter, 125 Ga. App. 449, 188 S.E.2d 133 (1972) (credibility of party) (decided under former Code 1933, § 38-107); Brown Transp. Co. v. Parker, 129 Ga. App. 737, 201 S.E.2d 17 (1973) (party at interest) (decided under former Code 1933, § 38-107).

Within the closing argument presented by the state, the probability or improbability of a police officer's testimony, as well as an interest or want of interest and personal credibility, could properly be considered by the jury. Cantrell v. State, 290 Ga. App. 651, 660 S.E.2d 468 (2008) (decided under former O.C.G.A. § 24-4-4).

Equal credibility of witnesses. — Personal credibility of the witnesses in conflict must first be equal before the other contingencies named in the former statute will apply equally. Nashville, C. & S.L. Ry. v. Hubble, 139 Ga. 300, 76 S.E. 1009 (1913) (decided under former Civil Code 1910, § 5732); Georgia Power Co. v. Burger, 63 Ga. App. 784, 11 S.E.2d 834 (1940) (decided under former Code 1933, § 38-107).

Unimpeached witnesses. — Rule that the uncontradicted testimony of unimpeached witnesses cannot be arbitrarily disregarded does not mean that the jury are obliged to believe testimony which the jury in fact discredits, but means that the jury are to consider the testimony of every witness who is sworn, and not arbitrarily disregard the testimony of any witness. Caldwell v. Caldwell, 59 Ga. App. 637, 1 S.E.2d 764 (1939) (decided under former Code 1933, § 38-107); American Cas. Co. v. Windham, 26 F. Supp. 261 (M.D. Ga.), aff'd, 107 F.2d 88 (5th Cir. 1939), cert. denied, 309 U.S. 674, 60 S. Ct. 714, 84 L. Ed. 1019 (1940) (decided under former Code 1933, § 38-107); Pantone v. Pantone, 206 Ga. 305, 57 S.E.2d 77 (1950) (decided under former Code 1933, § 38-107); Brown v. Nutter, 125 Ga. App. 449, 188 S.E.2d 133 (1972) (decided under former Code 1933, § 38-107); Brown Transp. Co. v. Parker, 129 Ga. App. 737, 201 S.E.2d 17 (1973) (decided under former Code 1933, § 38-107).

Testimony of party who offers oneself as a witness in one's own behalf is to be

General Consideration (Cont'd)

construed most strongly against that party. Western & Atl. R.R. v. Michael, 42 Ga. App. 603, 157 S.E. 226 (1931) (decided under former Civil Code 1910, § 5732).

Equivocal testimony of party. — Testimony of a party who offers oneself as a witness in one's own behalf is to be construed most strongly against that party when it is self-contradictory, vague, or equivocal. Brooks v. Douglas, 154 Ga. App. 54, 267 S.E.2d 495 (1980) (decided under former Code 1933, § 38-107).

Court's charge to jury that equivocal testimony of a party is to be construed most strongly against that party and that there should not be a finding in that party's favor if that version would support a verdict against that party is reversible error when other competent evidence supports the equivocal testimony of that witness, because such a charge unjustly prejudices the jury. Weathers v. Cowan, 176 Ga. App. 19, 335 S.E.2d 392 (1985) (decided under former O.C.G.A. § 24-4-4).

Testimony of principal witness. — Instruction that "when the testimony of a party or a principal witness is vague, equivocal or self-contradictory, it should be construed most strongly against the cause for which he is testifying" violates the former statute unless the party is the sole witness testifying in that party's behalf. Slaton Mach. Sales, Inc. v. Owens-Illinois, Inc., 138 Ga. App. 80, 225 S.E.2d 473 (1976) (decided under former Code 1933, § 38-107).

Unwillingness of witness to commit oneself. — Testimony of a witness is not to be excluded merely because the witness prefaces the witness's statement by an expression of unwillingness to commit oneself absolutely and positively to the accuracy of what one says. Holcombe v. State, 5 Ga. App. 47, 62 S.E. 647 (1908) (decided under former Civil Code 1895, § 5146).

Number of witnesses. — While a plaintiff may sustain plaintiff's case by the greater number of witnesses, this does not necessarily mean that the preponderance of the testimony is in the plaintiff's favor. Sometimes, in the minds of jurors, the testimony of one witness is of more weight and credit than that of a host of witnesses. McGriff v. McGriff, 154 Ga. 560, 115 S.E. 21 (1922) (decided under former Civil Code 1910, § 5732).

When number of witnesses equal. — Ruling that it might amount to reversible error, in charging the provisions of the former statute, to fail to include in the charge the provision that "the jury may also consider the number of witnesses, though the preponderance is not necessary with the greater number," does not apply to a case if the number of witnesses on both sides are the same. Atlanta Gas-Light Co. v. Cook, 35 Ga. App. 622, 134 S.E. 198 (1926) (decided under former Civil Code 1910, § 5732).

Argument to jury concerning credibility. — While it is the right of counsel for the defendant in counsel's argument to the jury to comment on the credibility of a witness for the state, and to accuse the witness of having committed perjury, counsel has no absolute right while doing so to point the witness out to the jury as the witness sits in the courtroom. Corley v. State, 64 Ga. App. 841, 14 S.E.2d 121 (1941) (decided under former Code 1933, § 38-107).

Argument to jury concerning deposition testimony. — Counsel may by argument call attention to the fact that the opponent relied on written depositions, and that this manner of the witnesses in testifying cannot in this way be observed, although the witnesses themselves were in court. Georgia, Fla. & Ala. Ry. v. Sasser, 4 Ga. App. 276, 61 S.E. 505 (1908) (decided under former Civil Code 1895, § 5146).

Personal knowledge of juror. — Juror must not consider any personal knowledge that the juror might have in reference to the plaintiff's character. Georgia Ry. & Elec. Co. v. Dougherty, 4 Ga. App. 614, 62 S.E. 158 (1908) (decided under former Civil Code 1895, § 5146).

Appellate court considers only the sufficiency of the evidence; the weight of the evidence is within the sole province of the jury. Sherman v. Stephens, 30 Ga. App. 509, 118 S.E. 567 (1923) (decided under former Civil Code 1910, § 5732); Reaves v. Columbus Elec. & Power Co., 32 Ga. App. 140, 122 S.E. 824, cert. denied,

32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5732); Crawley v. Marta, 147 Ga. App. 293, 248 S.E.2d 555 (1978) (decided under former Code 1933, § 38-107); Coleman v. State, 150 Ga. App. 380, 258 S.E.2d 12 (1979) (decided under former Code 1933, § 38-107).

Instructions

1. Civil Cases

Failure to charge on preponderance of the evidence is not error in the absence of a special request. — See Freeman v. Coleman Ray & Co., 88 Ga. 421, 14 S.E. 551 (1892) (decided under former law); Rome Ry. & Light Co. v. King, 33 Ga. App. 383, 126 S.E. 294 (1925) (decided under former Civil Code 1910, § 5732); Loftin v. Carroll County Bd. of Educ., 70 Ga. App. 315, 28 S.E.2d 372 (1943) (decided under former Code 1933, § 38-107); Flatauer v. Goodman, 84 Ga. App. 881, 67 S.E.2d 794 (1951) (decided under former Code 1933, § 38-107).

Instruction must be full and complete. — If the court undertakes to charge the jury on the preponderance of the evidence as laid down in the former statute, it is the court's duty to instruct the jury fully and completely with respect thereto and not merely to charge certain portions of that statute. A.F. Gossett & Sons v. Wilder, 46 Ga. App. 651, 168 S.E. 903 (1933) (decided under former Code 1933, § 38-107); Travelers Indem. Co. v. Paramount Publix Corp., 52 Ga. App. 239, 182 S.E. 923 (1935) (decided under former Code 1933, § 38-107); Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504 (1942) (decided under former Code 1933, § 38-107); Fountain v. McCallum, 194 Ga. 269, 21 S.E.2d 610 (1942) (decided under former Code 1933, § 38-107); Smaha v. George, 195 Ga. 412, 24 S.E.2d 385 (1943) (decided under former Code 1933, § 38-107); Turner v. Joiner, 77 Ga. App. 603, 48 S.E.2d 907 (1948) (decided under former Code 1933, § 38-107); Southern Ry. v. Florence, 81 Ga. App. 1, 57 S.E.2d 856 (1950) (decided under former Code 1933, § 38-107); Georgia Power Co. v. Pittman, 92 Ga. App. 673, 89 S.E.2d 577 (1955) (decided under former Code 1933, § 38-107); Bell v. Proctor, 212 Ga. 325, 92 S.E.2d 514 (1956) (decided under former Code 1933, § 38-107); Williams v. Southern Ry., 99 Ga. App. 503, 109 S.E.2d 343 (1959) (decided under former Code 1933, § 38-107).

Incomplete charge not necessarily reversible. — If the language in A.F. Gossett & Sons v. Wilder, 46 Ga. App. 651, 168 S.E. 903 (1933), is so construed that it is always reversible error for a trial judge, in charging the provisions of the former statute, to omit any of the provisions therein, such language is expressly disapproved. Georgia Power Co. v. Burger, 63 Ga. App. 784, 11 S.E.2d 834 (1940) (decided under former Code 1933, § 38-107).

Existence of reversible error depends on particular facts. — In charging to the jury the provisions of the former statute, the better practice is to charge the former statute in its entirety, but the omission of some of the provisions, may or may not be error, depending on the facts of the case. Georgia Power Co. v. Burger, 63 Ga. App. 784, 11 S.E.2d 834 (1940) (decided under former Code 1933, § 38-107); Callaway v. Fischer, 69 Ga. App. 251, 25 S.E.2d 131 (1943) (decided under former Code 1933, § 38-107); Cedrone v. Beck, 74 Ga. App. 488, 40 S.E.2d 388 (1946) (decided under former Code 1933, § 38-107); City of Louisville v. Clark, 108 Ga. App. 389, 133 S.E.2d 45 (1963) (decided under former Code 1933, § 38-107); Carter v. Wyatt, 113 Ga. App. 235, 148 S.E.2d 74 (1966) (decided under former Code 1933, § 38-107).

Former statute as means for determining credibility. — It was not error to charge that the language of the former statute is also a means for determining the credibility of witnesses. Andrews Taxi & U-Drive It Co. v. McEver, 101 Ga. App. 383, 114 S.E.2d 145 (1960) (decided under former Code 1933, § 38-107); Collins v. Porterfield, 102 Ga. App. 294, 116 S.E.2d 105 (1960) (decided under former Code 1933, § 38-107); Chandler v. Alabama Power Co., 104 Ga. App. 521, 122 S.E.2d 317 (1961), rev'd on other grounds, 217 Ga. 550, 123 S.E.2d 767 (1962) (decided under former Code 1933, § 38-107).

Detailed charge unauthorized. — Trial court is not authorized to charge a jury in specific detail as to certain testi-

Instructions (Cont'd)
1. Civil Cases (Cont'd)

mony neutralizing other testimony because what has been proven is solely and exclusively to be determined by the jury. Fules, Inc. v. Rutland, 123 Ga. App. 23, 179 S.E.2d 290 (1970) (decided under former Code 1933, § 38-107).

Error must be shown. — Even if the court has not instructed in the terms of the former statute, error must be shown for a reversal. Southern Ry. v. Wessinger, 32 Ga. App. 551, 124 S.E. 100, cert. denied, 32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5732).

Specific exceptions. — In order to take advantage of an omission to charge a specific part of the former statute, it is necessary to make specific exception. Harris v. Central of Ga. Ry., 30 Ga. App. 720, 119 S.E. 349 (1923) (decided under former Civil Code 1910, § 5732).

2. Criminal Cases

Applicability to credibility. — Insofar as the former statute relates to matters pertinent to the consideration of the credibility of witnesses, the former statute may be given in a charge to the jury in a criminal case. Bell v. State, 47 Ga. App. 216, 169 S.E. 732 (1933) (decided under former Code 1933, § 38-107); Campbell v. State, 53 Ga. App. 380, 186 S.E. 137 (1935) (decided under former Code 1933, § 38-107); Moore v. State, 57 Ga. App. 287, 195 S.E. 320 (1938) (decided under former Code 1933, § 38-107); Couch v. State, 73 Ga. App. 153, 35 S.E.2d 708 (1945) (decided under former Code 1933, § 38-107); Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955) (decided under former Code 1933, § 38-107); McDonald v. State, 104 Ga. App. 578, 122 S.E.2d 145 (1961) (decided under former Code 1933, § 38-107).

Inapplicability to quantum of proof. — This statute, insofar as it relates to the determination of where the preponderance of the evidence lies has no application to a criminal case and should not be charged. Baker v. State, 47 Ga. App. 205, 170 S.E. 209 (1933) (decided under former Code 1933, § 38-107); Eller v. State, 48 Ga. App. 163, 172 S.E. 592 (1934) (decided under former Code 1933, § 38-107); Sconyers v. State, 67 Ga. App. 902, 21 S.E.2d 504 (1942) (decided under former Code 1933, § 38-107); Couch v. State, 73 Ga. App. 153, 35 S.E.2d 708 (1945) (decided under former Code 1933, § 38-107); McDonald v. State, 104 Ga. App. 578, 122 S.E.2d 145 (1961) (decided under former Code 1933, § 38-107).

Harmless error. — While it is ordinarily inapt to charge the former statute in a criminal case, doing so is not reversible error if the instruction appears to be harmless. Eller v. State, 48 Ga. App. 163, 172 S.E. 592 (1934) (decided under former Code 1933, § 38-107); Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955) (decided under former Code 1933, § 38-107); Harper v. State, 201 Ga. 10, 39 S.E.2d 45 (1946) (decided under former Code 1933, § 38-107); Fountain v. State, 207 Ga. 144, 60 S.E.2d 433 (1950), overruled on other grounds, Lavender v. State, 234 Ga. 608, 216 S.E.2d 855 (1975) (decided under former Code 1933, § 38-107).

Examples

1. Civil Cases

Failure to charge certain portions of statute harmful error in the following cases: Hinson v. Hooks, 27 Ga. App. 430, 108 S.E. 822 (1921) (number of witnesses) (decided under former Civil Code 1910, § 5732); Farmers State Bank v. Kelley, 166 Ga. 683, 144 S.E. 258 (1928) (number of witnesses) (decided under former Civil Code 1910, § 5732); Shankle v. Crowder, 174 Ga. 399, 163 S.E. 180 (1932) (credibility) (decided under former Civil Code 1910, § 5732); Tucker v. Talmadge, 186 Ga. 798, 198 S.E. 726 (1938) (number of witnesses) (decided under former Code 1933, § 38-107); Garner v. Wood, 188 Ga. 463, 4 S.E.2d 137 (1939) (number of witnesses) (decided under former Code 1933, § 38-107); Fountain v. McCallum, 194 Ga. 269, 21 S.E.2d 610 (1942) (intelligence of witnesses and nature of facts to which the

witnesses testified) (decided under former Code 1933, § 38-107); Edge v. Dorsey, 78 Ga. App. 70, 50 S.E.2d 227 (1948) (number of witnesses) (decided under former Code 1933, § 38-107); Bank of Loganville v. Briscoe, 93 Ga. App. 558, 92 S.E.2d 326 (1956) (probability of testimony) (decided under former Code 1933, § 38-107); Bell v. Proctor, 93 Ga. App. 816, 92 S.E.2d 807 (1956) (interest of witnesses) (decided under former Code 1933, § 38-107); Sheridan v. Haggard, 95 Ga. App. 792, 99 S.E.2d 163 (1957) (witnesses' means of knowing facts) (decided under former Code 1933, § 38-107); Mitchell v. United States, 214 Ga. 473, 105 S.E.2d 337 (1958) (credibility) (decided under former Code 1933, § 38-107); Willard v. Willard, 221 Ga. 2, 142 S.E.2d 849 (1965) (number of witnesses) (decided under former Code 1933, § 38-107).

Failure to charge entire statute harmless error in the following cases. — See Palmer-Murphey Co. v. Barnett, 32 Ga. App. 635, 124 S.E. 538, cert. denied, 32 Ga. App. 807 (1924) (decided under former Civil Code 1910, § 5732); Travelers Ins. Co. v. Anderson, 53 Ga. App. 1, 184 S.E. 813 (1936) (decided under former Code 1933, § 38-107); Georgia Power Co. v. Burger, 63 Ga. App. 784, 11 S.E.2d 834 (1940) (decided under former Code 1933, § 38-107); Rushing v. Akins, 210 Ga. 450, 80 S.E.2d 813 (1954) (decided under former Code 1933, § 38-107); Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955) (decided under former Code 1933, § 38-107); Bank of Loganville v. Briscoe, 93 Ga. App. 558, 92 S.E.2d 326 (1956) (intelligence of witnesses and probability of the witnesses' testimony) (decided under former Code 1933, § 38-107); Bell v. Proctor, 212 Ga. 325, 92 S.E.2d 514 (1956); Williams v. Southern Ry., 99 Ga. App. 503, 109 S.E.2d 343 (1959) (decided under former Code 1933, § 38-107); (nature of facts to which witnesses testified) (decided under former Code 1933, § 38-107); Southern Ry. Sys. v. Yancey, 102 Ga. App. 159, 115 S.E.2d 693 (1960); Chandler v. Alabama Power Co., 140 Ga. App. 521, 122 S.E.2d 317 (1961), rev'd on other grounds, 217 Ga. 550, 123 S.E.2d 767 (1962) (decided under former Code 1933, § 38-107); City of Louisville v. Clark, 108 Ga. App. 389, 133 S.E.2d 45 (1963) (decided under former Code 1933, § 38-107); (nature of facts to which witnesses testified, incidental issues) (decided under former Code 1933, § 38-107).

Instructions proper in the following cases. — See Western & Atlantic R.R. v. Henderson, 6 Ga. App. 385, 65 S.E. 48 (1909) (credibility) (decided under former Civil Code 1895, § 5146); Rome Ry. & Light Co. v. King, 33 Ga. App. 383, 126 S.E. 294 (1925) (credibility) (decided under former Civil Code 1910, § 5732); Daughtry v. Georgia Power Co., 61 Ga. App. 505, 6 S.E.2d 454 (1939) (action for damages) (decided under former Code 1933, § 38-107); Jackson v. Moultrie Prod. Credit Ass'n., 76 Ga. App. 768, 47 S.E.2d 127 (1948) (credibility) (decided under former Code 1933, § 38-107); Georgia Automatic Gas Co. v. Fowler, 77 Ga. App. 675, 49 S.E.2d 550 (1948) (nature of witnesses' testimony) (decided under former Code 1933, § 38-107); Ludwig v. J.J. Newberry Co., 78 Ga. App. 871, 52 S.E.2d 485 (1949) (action for damages) (decided under former Code 1933, § 38-107); Hughes v. Al Grider, Inc., 97 Ga. App. 599, 103 S.E.2d 627 (1958) (number of witnesses) (decided under former Code 1933, § 38-107); Andrews Taxi & U-Drive It Co. v. McEver, 101 Ga. App. 383, 114 S.E.2d 145 (1960) (credibility of witnesses) (decided under former Code 1933, § 38-107); King v. Faries, 120 Ga. App. 393, 170 S.E.2d 747 (1969) (number of witnesses) (decided under former Code 1933, § 38-107).

2. Criminal Cases

Instructions harmless error in the following cases. — See Howard v. State, 60 Ga. App. 229, 4 S.E.2d 418 (1939) (manner of testifying) (decided under former Code 1933, § 38-107); Couch v. State, 73 Ga. App. 153, 35 S.E.2d 708 (1945) (number of witnesses, inapplicability of preponderance standard in criminal case) (decided under former Code 1933, § 38-107); Smith v. State, 85 Ga. App. 129, 68 S.E.2d 393 (1951) (error which party invited) (decided under former Code 1933, § 38-107); Morris v. State, 97 Ga. App. 762, 104 S.E.2d 483 (1958) (credibility of witnesses) (decided under former Code 1933, § 38-107).

Examples (Cont'd)
2. Criminal Cases (Cont'd)

Instructions proper in the following cases. — See Andrews v. State, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955) (credibility) (decided under former Code 1933, § 38-107); Carter v. State, 69 Ga. App. 570, 26 S.E.2d 374 (1943) (reasonable doubt) (decided under former Code 1933, § 38-107); Couch v. State, 73 Ga. App. 153, 35 S.E.2d 708 (1945) (credibility) (decided under former Code 1933, § 38-107).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 1275.
ALR. — Right to cross-examine accused as to previous prosecution for, or conviction of, crime, for purpose of affecting his credibility, 6 ALR 1608; 25 ALR 339; 103 ALR 350; 161 ALR 233.

Instructions on sudden emergency in motor vehicle cases, 80 ALR2d 5.

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169.

Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238.

24-14-5. Reasonable doubt in criminal cases.

Whether dependent upon direct or circumstantial evidence, the true question in criminal cases is not whether it is possible that the conclusion at which the evidence points may be false, but whether there is sufficient evidence to satisfy the mind and conscience beyond a reasonable doubt. (Code 1981, § 24-14-5, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-4-5, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decision in John v. State, 33 Ga. 257 (1862).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1895, § 987, former Penal Code 1910, § 1013, former Code 1933, § 38-110, and former O.C.G.A. § 24-4-5 are included in the annotations for this Code section.

Statute applies to recorder's courts. Scott v. Mayor of Athens, 111 Ga. App. 173, 140 S.E.2d 922 (1965) (decided under former Code 1933, § 38-110).

Preponderance of evidence standard inapplicable. — Law of the preponderance of evidence is not applicable in criminal cases. McDonald v. State, 104 Ga. App. 578, 122 S.E.2d 145 (1961) (decided under former Code 1933, § 38-110).

Reasonable and moral certainty. — Reasonable doubt is such as leaves the mind in an uncertain and wavering condition where it is impossible to say with reasonable and moral certainty that the accused is guilty. Dumas v. State, 63 Ga. 600 (1879) (decided under former law); Davis v. State, 114 Ga. 104, 39 S.E. 906 (1901) (decided under former Penal Code 1895, § 987).

Mathematical certainty not required and cannot be attained in a legal investigation; moral and reasonable certainty is all that the law requires. McNaughton v. State, 136 Ga. 600, 71 S.E. 1038 (1911), appeal dismissed, 223 U.S. 744, 32 S. Ct. 532, 56 L. Ed. 639 (1912) (decided under former Penal Code 1910, § 1013).

Mere doubt insufficient. — Reasonable doubt is not a vague or conjectural

doubt on a mere guess. Giles v. State, 6 Ga. 276 (1849) (decided under former law); Bone v. State, 102 Ga. 387, 390 S.E. 845 (1897) (decided under former Penal Code 1895, § 987); Brantley v. State, 133 Ga. 264, 65 S.E. 426 (1909) (decided under former Penal Code 1895, § 987).

Bare suspicion not sufficient. — Bare suspicion of guilt is not sufficient to authorize a conviction. Oneil v. State, 48 Ga. 66 (1873) (decided under former law); Hammond v. State, 2 Ga. App. 384, 58 S.E. 509 (1907) (decided under former Penal Code 1895, § 987); Diggs v. State, 90 Ga. App. 853, 84 S.E.2d 611 (1954) (decided under former Code 1933, § 38-110); Scott v. Mayor of Athens, 111 Ga. App. 173, 140 S.E.2d 922 (1965) (decided under former Code 1933, § 38-110); Muckle v. State, 165 Ga. App. 873, 303 S.E.2d 54 (1983) (decided under former O.C.G.A. § 24-4-5).

Reason for doubt. — In the charge of the court on the subject of reasonable doubt, it was not error to include the phrase, "a doubt for which you can give a reason." Vann v. State, 83 Ga. 44, 9 S.E. 945 (1889) (decided under former law); Bryant v. State, 197 Ga. 641, 30 S.E.2d 259 (1944) (decided under former Code 1933, § 38-110); Carter v. State, 71 Ga. App. 626, 31 S.E.2d 666 (1944) (decided under former Code 1933, § 38-110).

Moral certainty equated with reasonable doubt. — Phrases, "to a moral and reasonable certainty" and "beyond a reasonable doubt," and applied to the quality of proof in a case, are identical in meaning. Austin v. State, 6 Ga. App. 211, 64 S.E. 670 (1909) (decided under former Penal Code 1895, § 987); Dicks v. State, 155 Ga. App. 591, 271 S.E.2d 727 (1980) (decided under former Code 1933, § 38-110).

Moral certainty equated with absolute certainty. — Statute requires proof to a moral certainty, as distinguished from an absolute certainty. As applied to a judicial trial for a crime, the two phrases are synonymous and equivalent; each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible. Bone v. State, 102 Ga. 387, 30 S.E. 845 (1897) (decided under former Penal Code 1895, § 987).

Reversible error despite defendant's failure to object to the charge. — After trial court gave the jury the suggested pattern charge on reasonable doubt the court summarized the charge by saying "In other words, if you honestly believe he's guilty, convict him. If you honestly believe he is not guilty, find him not guilty." Jones v. State, 252 Ga. App. 332, 556 S.E.2d 238 (2001) (decided under former O.C.G.A. § 24-4-5).

Trial court's instruction that "neither does :reasonable doubt] mean a possibility that the defendant may be innocent" violates defendant's state and federal due process rights. Mangum v. State, 274 Ga. 573, 555 S.E.2d 451 (2001) (decided under former O.C.G.A. § 24-4-5).

Conflicts in testimony do not preclude finding of guilt. — While there may be conflicts in the testimony of witnesses at trial, a rational trier of fact, in certain cases, may still reasonably find from the evidence adduced at trial proof of defendant's guilt beyond a reasonable doubt. Hammonds v. State, 157 Ga. App. 393, 277 S.E.2d 762 (1981) (decided under former Code 1933, 38-110).

Quantum of proof. — Burden of proof is on the state in all criminal cases to show the defendant's guilt to a moral and reasonable certainty and beyond a moral and reasonable doubt. Walker v. State, 137 Ga. 398, 73 S.E. 368 (1912) (decided under former Penal Code 1910, § 1013); Montgomery v. State, 202 Ga. 678, 44 S.E.2d 242 (1947) (decided under former Code 1933, § 38-110); Blakeley v. State, 78 Ga. App. 516, 51 S.E.2d 598 (1949) (decided under former Code 1933, § 38-110); Life Ins. Co. v. Lawler, 211 Ga. 246, 85 S.E.2d 1 (1954) (decided under former Code 1933, § 38-110).

Proof beyond reasonable doubt required in criminal contempt prosecution. — It is a denial of a defendant's right of due process of law under the federal and state constitutions and former O.C.G.A. § 24-4-5 to fail to require proof beyond a reasonable doubt in a criminal contempt prosecution because the result

of such a conviction is to deny the defendant's liberty and the levy of a penal fine. In re Crane, 253 Ga. 667, 324 S.E.2d 443 (1985) (decided under former O.C.G.A. § 24-4-5).

It is not necessary for state to prove that it was impossible for offenses charged to have been committed by anybody else. Perry v. State, 158 Ga. App. 349, 280 S.E.2d 390 (1981) (decided under former O.C.G.A. § 24-4-5).

Every element of crime must be proved beyond a reasonable doubt. Gosha v. State, 56 Ga. 36 (1876) (venue) (decided under former law); Bell v. State, 91 Ga. 15, 16 S.E. 207 (1892) (capacity to commit crime) (decided under former law); Barnes v. State, 113 Ga. 716, 39 S.E. 488 (1901) (grade of offense) (decided under former Penal Code 1895, § 987); Glover v. State, 114 Ga. 828, 40 S.E. 998 (1902) (identity of defendant) (decided under former Penal Code 1895, § 987); Green v. State, 4 Ga. App. 260, 61 S.E. 234 (1908) (venue) (decided under former Penal Code 1895, § 987); Simpson v. State, 12 Ga. App. 292, 77 S.E. 105 (1913) (grade of offense) (decided under former Penal Code 1910, § 1013); Davis v. State, 46 Ga. App. 174, 167 S.E. 205 (1932) (possession of stolen article) (decided under former Penal Code 1910, § 1013).

Circumstantial evidence sufficient to convict if the evidence is consistent with the hypothesis of the guilt of the defendant and excludes every other reasonable hypothesis. Graham v. State, 183 Ga. 881, 189 S.E. 910 (1937) (decided under former Code 1933, § 38-110); Carter v. State, 57 Ga. App. 180, 194 S.E. 842 (1938) (decided under former Code 1933, § 38-110); Dominick v. State, 66 Ga. App. 531, 18 S.E.2d 502 (1942) (decided under former Code 1933, § 38-110); Diggs v. State, 90 Ga. App. 853, 84 S.E.2d 611 (1954) (decided under former Code 1933, § 38-110); Crane v. State, 123 Ga. App. 226, 180 S.E.2d 289 (1971) (decided under former Code 1933, § 38-110); Lewis v. State, 149 Ga. App. 181, 254 S.E.2d 142 (1979) (decided under former Code 1933, § 38-110); Barfield v. State, 160 Ga. App. 228, 286 S.E.2d 516 (1981) (decided under former O.C.G.A. § 24-4-5).

To sustain a conviction on circumstantial evidence only, the state must prove facts that are not only consistent with the hypothesis of the guilt of the accused, but the facts proved must exclude every other reasonable hypothesis. Johnson v. State, 159 Ga. App. 497, 283 S.E.2d 711 (1981) (decided under former O.C.G.A. § 24-4-5).

Circumstantial evidence may outweigh positive evidence in probative value. Stephens v. State, 127 Ga. App. 416, 193 S.E.2d 870 (1972) (decided under former Code 1933, § 38-110).

Two theories presented. — When the facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, the justice and humanity of the law compel the acceptance of the theory which is consistent with innocence. Davis v. State, 13 Ga. App. 142, 78 S.E. 866 (1913) (decided under former Penal Code 1910, § 1013); Rutland v. State, 46 Ga. App. 417, 167 S.E. 705 (1933) (decided under former Code 1933, § 38-110); Barnett v. State, 153 Ga. App. 430, 265 S.E.2d 348 (1980) (decided under former Code 1933, § 38-110); Johnson v. State, 159 Ga. App. 497, 283 S.E.2d 711 (1981) (decided under former Code 1933, § 38-107).

An instruction that the existence of two equal theories, guilt or innocence, requires acquittal is not error unless the evidence relied on by the state is wholly circumstantial, in which case the word "equal" should not appear in the instruction. Carpenter v. State, 167 Ga. App. 634, 307 S.E.2d 19 (1983), aff'd, 252 Ga. 79, 310 S.E.2d 912 (1984) (decided under former O.C.G.A. § 24-4-5).

Presumption of innocence. — Every accused person has a presumption of innocence in the accused's favor, and the accused cannot be convicted until this evidence is overcome and the accused's guilt established beyond all reasonable doubt. Smith v. State, 63 Ga. 168 (1879) (decided under former law); Campbell v. State, 100 Ga. 267, 28 S.E. 71 (1897) (decided under former Penal Code 1895, § 987); Wimberly v. State, 12 Ga. App. 540, 77 S.E. 879 (1913) (decided under former Penal Code 1910, § 1013).

Reasonable doubt must be charged. — In every criminal case the court should

charge the jury that to authorize conviction, guilt must be proved "beyond a reasonable doubt"; and, unless the evidence demands the verdict rendered, the failure to do so will be reversible error. Norman v. State, 10 Ga. App. 802, 74 S.E. 428 (1912) (decided under former Penal Code 1910, § 1013).

Not error to charge this statute. — It is never error for the trial court to charge the jury on the subject of reasonable doubt in the language of this statute. Thomas v. State, 33 Ga. App. 680, 127 S.E. 891 (1925) (decided under former Penal Code 1910, § 1013); McDowell v. State, 78 Ga. App. 116, 50 S.E.2d 633 (1948) (decided under former Code 1933, § 38-110).

Charging entire statute unnecessary. — When the charge given was not the entire charge on reasonable doubt as found in this statute, if the charge was fair and did not shift any burden to the defendant the charge is approved. Jones v. State, 139 Ga. App. 366, 228 S.E.2d 387 (1976) (decided under former Code 1933, § 38-110).

Definition of reasonable doubt unnecessary. — Court need not attempt to define reasonable doubt. Jordan v. State, 16 Ga. App. 393, 85 S.E. 455 (1915) (decided under former Penal Code 1910, § 1013); Bell v. State, 148 Ga. 352, 96 S.E. 861 (1918) (decided under former Penal Code 1910, § 1013); Floyd v. State, 58 Ga. App. 867, 200 S.E. 207 (1938) (decided under former Code 1933, § 38-110); Fountain v. State, 71 Ga. App. 191, 30 S.E.2d 359 (1944) (decided under former Code 1933, § 38-110); Brock v. State, 91 Ga. App. 141, 85 S.E.2d 177 (1954) (decided under former Code 1933, § 38-110); Lingo v. State, 96 Ga. App. 379, 100 S.E.2d 116 (1957) (decided under former Code 1933, § 38-110).

Province of jury. — It is the province of the jury to decide the weight and credit to be given the evidence. Fortson v. State, 69 Ga. App. 378, 25 S.E.2d 820 (1943) (decided under former Code 1933, § 38-110); Whitus v. State, 222 Ga. 103, 149 S.E.2d 130 (1966) (decided under former Code 1933, § 38-110); Armour v. State, 154 Ga. App. 740, 270 S.E.2d 22 (1980) (decided under former Code 1933, § 38-110); Mosley v. State, 157 Ga. App. 578, 278 S.E.2d 154 (1981) (decided under former O.C.G.A. § 24-4-5); Davis v. State, 159 Ga. App. 197, 283 S.E.2d 17 (1981) (decided under former O.C.G.A. § 24-4-5); Painter v. State, 159 Ga. App. 479, 283 S.E.2d 695 (1981) (decided under former O.C.G.A. § 24-4-5).

Whether every reasonable hypothesis except that of guilt of the defendant has been excluded is question for jury, when the jury is properly instructed. Barfield v. State, 160 Ga. App. 228, 286 S.E.2d 516 (1981) (decided under former O.C.G.A. § 24-4-5).

Instructions not error in the following cases. — See Smith v. State, 34 Ga. App. 779, 131 S.E. 923 (1926) (decided under former Penal Code 1910, § 1013); Lucas v. State, 48 Ga. App. 42, 171 S.E. 850 (1933) (decided under former Code 1933, § 38-110); Pound v. State, 180 Ga. 83, 178 S.E. 291 (1935) (decided under former Code 1933, § 38-110); Stowe v. State, 51 Ga. App. 726, 181 S.E. 419 (1935) (decided under former Code 1933, § 38-110); Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139 (1943) (decided under former Code 1933, § 38-110); Rogers v. State, 72 Ga. App. 791, 35 S.E.2d 473 (1945) (decided under former Code 1933, § 38-110); Johnson v. State, 209 Ga. 333, 72 S.E.2d 291 (1952) (decided under former Code 1933, § 38-110); Dicks v. State, 155 Ga. App. 591, 271 S.E.2d 727 (1980) (decided under former Code 1933, § 38-110); Jackson v. State, 157 Ga. App. 581, 278 S.E.2d 156 (1981) (decided under former O.C.G.A. § 24-4-5).

Erroneous charge. — Following charge was held inaccurate: "Whether dependent upon positive or circumstantial evidence, the true question in all criminal cases is not that the conclusion to which the evidence points may be false, but whether or not the state has satisfied the minds and consciences of the jury beyond a reasonable doubt of the guilt of the accused." King v. State, 163 Ga. 313, 136 S.E. 154 (1926) (decided under former Penal Code 1910, § 1013).

Evidence found sufficient to support conviction in the following cases. — See Johnson v. State, 79 Ga. App. 210, 53 S.E.2d 498 (1949) (illegal possession of whiskey) (decided under for-

mer Code 1933, § 38-110); Gray v. State, 151 Ga. App. 684, 261 S.E.2d 402 (1979) (rape) (decided under former Code 1933, § 38-110); Cosby v. State, 151 Ga. App. 676, 261 S.E.2d 424 (1979) (burglary) (decided under former Code 1933, § 38-110).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions issued under former Code 1933, § 38-110, which was repealed and succeeded by provisions in this Code section, are included in the annotations for this Code section.

Statute inapplicable to contempt case. — Criminal contempt is not strictly speaking a "criminal case" and as such does not require proof beyond a reasonable doubt as required for other criminal cases. 1979 Op. Att'y Gen. No. 79-36 (decided under former Code 1933, § 38-110).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 185. 29A Am. Jur. 2d, Evidence, § 1414.

ALR. — Admissibility and probative force on issue as to mental condition, of evidence that one had been adjudged incompetent or insane, or had been confined in insane asylum, 7 ALR 568; 68 ALR 1309.

Propriety of instructions as to the significance of evidence concerning the defendant's good character as an element bearing upon the question of reasonable doubt, 10 ALR 8; 68 ALR 1068.

Duty to charge as to reasonable doubt as between different degrees of crime of included offenses, 20 ALR 1258.

Instruction on circumstantial evidence in criminal case, 89 ALR 1379.

Admissibility and weight on question of materiality of misrepresentation, of testimony of officers or employees of insurer to effect that application would not have been accepted but for the misrepresentation, or that there was a rule or policy to reject risks of the kind that would have been shown but for the misrepresentation, 115 ALR 100.

Instruction applying rule of reasonable doubt specifically to particular matter or defense as curing instruction placing burden of proof upon defendant in that regard, 120 ALR 591.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 123 ALR 119; 91 ALR2d 1046.

Reasonable doubt rule as applicable to evidence in civil case of facts amounting to felony or misdemeanor, 124 ALR 1378.

Rule of reasonable doubt as applicable to reasonable doubt on part of individual juror, 137 ALR 394.

Admissibility, in prosecution for burglary, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements, 143 ALR 1199.

Use of term "actual doubt" in instruction on reasonable doubt, 147 ALR 1046.

Conviction of criminal offense without evidence as denial of due process of law, 80 ALR2d 1362.

Construction of statute or ordinance making it an offense to possess or have alcoholic beverages in opened package in motor vehicle, 35 ALR3d 1418.

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 ALR3d 988.

Instructions to jury: sympathy to accused as appropriate factor in jury consideration, 72 ALR3d 842.

Sufficiency of prosecution proof that substance defendant is charged with possessing or selling, or otherwise unlawfully dealing in, is marijuana, 75 ALR3d 717.

Admissibility of DNA identification evidence, 84 ALR4th 313.

24-14-6. When conviction may be had on circumstantial evidence.

To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused. (Code 1981, § 24-14-6, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-4-6, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Martin v. State, 38 Ga. 293 (1868); Carter v. State, 46 Ga. 637 (1872); and Simmons v. State, 85 Ga. 224, 11 S.E. 555 (1890).

Law reviews. — For survey of cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For article, "Criminal Law," see 53 Mercer L. Rev. 209 (2001).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1895, § 984, Penal Code 1910, § 1010, Code 1933, § 38-109, and former O.C.G.A. § 24-4-6 are included in the annotations for this Code section.

Meaning of the former statute was so clear and manifest as not to require explanation. Morris v. State, 176 Ga. 243, 167 S.E. 509 (1933) (decided under former Code 1933, § 38-109).

Statute constitutes standard of proof. — Although former O.C.G.A. § 24-4-6 was designated as a rule of evidence, in substance the former statute was actually a standard of proof required for a conviction based upon circumstantial evidence. Wilcox v. Ford, 813 F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987) (decided under former O.C.G.A. § 24-4-6).

Standard in federal court. — In setting out the federal constitutional standard in Jackson v. Virginia 443 U.S. 307 (1979), the United States Supreme Court expressly rejected the standard of proof now embodied in former O.C.G.A. § 24-4-6, and that state standard has no place in a federal appellate court's sufficiency of the evidence analysis in a habeas corpus case. Wilcox v. Ford, 813 F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987) (decided under former O.C.G.A. § 24-4-6); Bishop v. Kelso, 914 F.2d 1468 (11th Cir. 1990) (decided under former O.C.G.A. § 24-4-6).

Question of admissibility of circumstantial evidence is largely in the discretion of the trial court, and when facts are such that the jury may or may not make an inference pertinent to the issue, it is not error to permit the jury to hear the circumstantial evidence. Bond v. State, 104 Ga. App. 627, 122 S.E.2d 310 (1961) (decided under former Code 1933, § 38-109).

Statute applicable to municipal court sitting as a jury. Hanjaras v. City of Atlanta, 6 Ga. App. 575, 65 S.E. 356

General Consideration (Cont'd)

(1909) (decided under former Penal Code 1895, § 984); Porter v. Mayor of Athens, 18 Ga. App. 232, 89 S.E. 173 (1916) (decided under former Penal Code 1910, § 1010).

Statute applies to circumstantial evidence, not direct evidence. — Defendant's reliance on the circumstantial evidence rule of former O.C.G.A. § 24-4-6 to assert defendant's innocence for the crimes of armed robbery and hijacking a motor vehicle was misplaced as use of that rule presumed that only circumstantial evidence was offered, but, in fact, direct evidence was offered in the form of the victim's positive identification of defendant at the scene of the arrest. Lane v. State, 255 Ga. App. 274, 564 S.E.2d 857 (2002) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in denying defendant's motion for directed verdict of acquittal as direct evidence that defendant fired at the victim and defendant's own admission that defendant fired at the victim was sufficient to submit the question of whether defendant was guilty of aggravated assault to the jury; no error occurred pursuant to former O.C.G.A. § 24-4-6, involving a conviction based solely on circumstantial evidence, as the state offered more than circumstantial evidence to support the state's case against defendant. Cobb v. State, 268 Ga. App. 66, 601 S.E.2d 443 (2004) (decided under former O.C.G.A. § 24-4-6).

Defendant's claim that the evidence was insufficient to disprove alternative hypotheses of innocence necessarily presumed that the evidence was entirely circumstantial, failed in light of the direct evidence of the victim's in-court identification of defendant. Banks v. State, 269 Ga. App. 653, 605 S.E.2d 47 (2004) (decided under former O.C.G.A. § 24-4-6).

In attacking defendant's convictions for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony arising from a shooting death, defendant's reliance on former O.C.G.A. § 24-4-6 was misplaced because there was direct evidence of defendant's guilt in the form of defendant's own statement and eyewitness testimony that defendant approached the victim's car armed with a pistol and that multiple shots were fired. Wallace v. State, 279 Ga. 26, 608 S.E.2d 634 (2005) (decided under former O.C.G.A. § 24-4-6).

When defendant sat in a stolen would-be getaway car while the accomplice murdered a victim, and then defendant and the accomplice abandoned that car and fled the scene, defendant's conviction for the accomplice's crime was not based solely on circumstantial evidence, as a neighbor saw a person leaning into the stolen car who fit defendant's physical appearance, and defendant admitted to being that person. Jackson v. State, 274 Ga. App. 279, 617 S.E.2d 249 (2005) (decided under former O.C.G.A. § 24-4-6).

Evidence supported a defendant's conviction for possession of a firearm by a convicted felon as defendant's possession of the victim's handgun and shotgun on the night of the crimes was shown by the victim's direct testimony since: (1) the victim testified that two men forced their way into the victim's house, hit the victim in the head with a blunt object, recovered a .380 caliber handgun and a 20-gauge single-barrel shotgun, forced the victim to give them thousands of dollars the victim had hidden in the attic; (2) during a consensual search, the police found a .380 caliber handgun hidden in the defendant's bedroom that was identified as the victim's by the victim and that bore the same serial number as the victim's gun; and (3) the victim identified defendant in a photo array and at trial; the evidence authorized the jury to find that the defendant was in actual possession of the handgun on February 21 and that the defendant continued to be in at least constructive possession of the gun when the gun was found in the defendant's bedroom. Tanksley v. State, 281 Ga. App. 61, 635 S.E.2d 353 (2006) (decided under former O.C.G.A. § 24-4-6).

Defendant's argument that the evidence presented by the state failed to exclude every alternative, reasonable hypothesis failed; the reasonable hypothesis rule, under former O.C.G.A. § 24-4-6, had no application to the case as there was direct

evidence of the defendant's guilt in the form of the victim's prior inconsistent statements about being beaten by the defendant. Meeks v. State, 281 Ga. App. 334, 636 S.E.2d 77 (2006) (decided under former O.C.G.A. § 24-4-6).

In a drug possession case, the defendant was not convicted based on circumstantial evidence that, in violation of former O.C.G.A. § 24-4-6, failed to exclude every other hypothesis save that of the defendant's guilt; the passenger's testimony that the defendant handed the passenger drugs and told the passenger to discard the drugs provided direct evidence that the defendant possessed more than an ounce of marijuana in violation of O.C.G.A. § 16-13-30. Curtis v. State, 282 Ga. App. 322, 638 S.E.2d 773 (2006), cert. denied, No. S07C0427, 2007 Ga. LEXIS 203 (Ga. 2007) (decided under former O.C.G.A. § 24-4-6).

Because the victim's testimony provided direct evidence of defendant's guilt, the rule that the facts had to exclude every other reasonable hypothesis save that of the guilt of the accused was not at issue. Mack v. State, 294 Ga. App. 518, 669 S.E.2d 487 (2008) (decided under former O.C.G.A. § 24-4-6).

Because a codefendant's prior inconsistent statements were based on the codefendant's eyewitness account of what occurred, the statements were direct evidence of the defendant's guilt, rendering the reasonable hypothesis rule inapplicable. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348 (2009) (decided under former O.C.G.A. § 24-4-6).

There was no merit to the defendant's argument that the state's evidence failed to exclude every reasonable hypothesis save that of the defendant's guilt because the prior statement of the defendant's father to an investigator provided direct evidence that the defendant had moved and supported the charge that the defendant had changed residences without notifying the local authorities as required by O.C.G.A. § 42-1-12. State v. Canup, 300 Ga. App. 678, 686 S.E.2d 275 (2009) (decided under former O.C.G.A. § 24-4-6).

Venue may be shown by circumstantial evidence. Graham v. State, 16 Ga. App. 221, 84 S.E. 981 (1915) (decided under former Penal Code 1910, § 1010). Dickerson v. State, 186 Ga. 557, 199 S.E. 142 (1938) (decided under former Code 1933, § 38-109).

Evidence was sufficient to prove venue in Effingham County, Georgia beyond a reasonable doubt because the state showed that the crime was committed at the defendant's residence and that Effingham County 9-1-1 dispatchers received the defendant's 9-1-1 call and dispatched Effingham County EMS and police to the defendant's address; the victim's attending physician telephoned the Effingham County sheriff's office to report that a crime was committed at the defendant's address. Brinson v. State, 289 Ga. 150, 709 S.E.2d 789 (2011) (decided under former O.C.G.A. § 24-4-6).

Case involving life or imprisonment. — Statute should never be relaxed in a case involving life or imprisonment. Cook v. State, 114 Ga. 523, 40 S.E. 703 (1902) (decided under former Penal Code 1895, § 984); Creech v. State, 30 Ga. App. 631, 118 S.E. 501 (1923) (decided under former Penal Code 1910, § 1010).

Incriminatory statements. — When the defendant makes incriminatory statements after the victim's death, the case is not one depending entirely upon circumstantial evidence. Phipps v. State, 203 Ga. App. 128, 416 S.E.2d 319, cert. denied, 203 Ga. App. 907, 416 S.E.2d 319 (1992) (decided under former O.C.G.A. § 24-4-6).

Defendant was not convicted of possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131(b) merely based on circumstantial evidence that failed, in violation of former O.C.G.A. § 24-4-6, to exclude every other reasonable hypothesis except that of the defendant's guilt; the defendant made several admissions to officers that constituted direct evidence, including that the defendant had a gun in the defendant's bedroom and that the defendant used the gun to hunt. Parramore v. State, 277 Ga. App. 372, 626 S.E.2d 567 (2006) (decided under former O.C.G.A. § 24-4-6).

Confession was not circumstantial evidence; thus, defendant was not entitled to directed verdict under former O.C.G.A. § 24-4-6 since the defendant failed to prove that defendant's confession

General Consideration (Cont'd)

was unlawfully obtained. Bigham v. State, 222 Ga. App. 353, 474 S.E.2d 254 (1996) (decided under former O.C.G.A. § 24-4-6).

Defendant's admission that the defendant shot the victim but did so in self-defense removed the case from the rule that a conviction based entirely on circumstantial evidence can be affirmed only if every reasonable hypothesis other than guilt is excluded. Wright v. State, 294 Ga. App. 20, 668 S.E.2d 505 (2008) (decided under former O.C.G.A. § 24-4-6).

Proven facts must be inconsistent with innocence to warrant a conviction on circumstantial evidence. Riley v. State, 1 Ga. App. 651, 57 S.E. 1031 (1907) (decided under former Penal Code 1895, § 984); Middleton v. State, 7 Ga. App. 1, 66 S.E. 22 (1909) (decided under former Penal Code 1895, § 984).

When the circumstances authorize a mere conjecture of guilt. Fowler v. State, 32 Ga. App. 361, 123 S.E. 43 (1924) (decided under former Penal Code 1910, § 1010); Vinson v. State, 120 Ga. App. 425, 170 S.E.2d 749 (1969) (decided under former Code 1933, § 38-109); Jackson v. State, 152 Ga. App. 441, 263 S.E.2d 181 (1979) (decided under former Code 1933, § 38-109); Hall v. State, 155 Ga. App. 211, 270 S.E.2d 377 (1980) (decided under former Code 1933, § 38-109).

Cited in Lomax v. State, 319 Ga. App. 693, 738 S.E.2d 152 (2013).

Exclusion of Reasonable Hypothesis

In general. — When the state relies for a conviction on circumstantial evidence alone, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis except that of the guilt of the accused. Amorous v. State, 1 Ga. App. 313, 57 S.E. 999 (1907) (decided under former Penal Code 1895, § 984); Toomer v. State, 130 Ga. 63, 60 S.E. 198 (1908) (decided under former Penal Code 1895, § 984); Carter v. State, 57 Ga. App. 180, 194 S.E. 842 (1938) (decided under former Code 1933, § 38-109); Blakeley v. State, 78 Ga. App. 516, 51 S.E.2d 598 (1949) (decided under former Code 1933, § 38-109); McQuire v. State, 82 Ga. App. 132, 60 S.E.2d 526 (1950) (decided under former Code 1933, § 38-109); Diggs v. State, 90 Ga. App. 853, 84 S.E.2d 611 (1954) (decided under former Code 1933, § 38-109); Crane v. State, 123 Ga. App. 226, 180 S.E.2d 289 (1971) (decided under former Code 1933, § 38-109); Ridley v. State, 232 Ga. 646, 208 S.E.2d 466 (1974) (decided under former Code 1933, § 38-109); Wright v. State, 147 Ga. App. 111, 248 S.E.2d 183 (1978) (decided under former Code 1933, § 38-109); Barnett v. State, 153 Ga. App. 430, 265 S.E.2d 348 (1980) (decided under former Code 1933, § 38-109); Perry v. State, 158 Ga. App. 349, 280 S.E.2d 390 (1981) (decided under former Code 1933, § 38-109); Johnson v. State, 159 Ga. App. 497, 283 S.E.2d 711 (1981) (decided under former Code 1933, § 38-109).

If the state relies upon circumstantial evidence, that evidence must be so strong as to exclude every other reasonable hypothesis save that of the guilt of the accused. It must be inconsistent with the accused's innocence. This court has ruled on several occasions that, in cases involving life or liberty, this rule must not be relaxed. Parks v. State, 202 Ga. 84, 42 S.E.2d 103 (1947) (decided under former Code 1933, § 38-1097).

In a trial for aggravated assault, although there were certain discrepancies in the evidence, and a portion of the evidence was circumstantial rather than direct, the quantum of evidence in the defendant's favor fell far short of that necessary to "demand" a verdict of acquittal; since there was direct evidence pointing to the same conclusion as the circumstantial evidence, the verdict was not disturbed on appeal. Cobb v. State, 195 Ga. App. 429, 393 S.E.2d 723 (1990) (decided under former O.C.G.A. § 24-4-6).

In a prosecution of the offense of terroristic threats, the state's failure to present evidence excluding a reasonable hypothesis of innocence resulted in a failure of proof in regard to several elements of the crime charged and should have precluded the jury's return of a verdict of guilty. Cooley v. State, 219 Ga. App. 176, 464 S.E.2d 619 (1995) (decided under former O.C.G.A. § 24-4-6).

Applicability. — Evidence was sufficient to support a defendant's conviction

for aggravated assault. The reasonable hypothesis rule in former O.C.G.A. § 24-4-6 was not applicable in the case as the evidence was not entirely circumstantial, in that the state presented direct evidence of the defendant's participation in the events at issue, that the defendant carried a shotgun from the scene of the assault, that the defendant rode away with the weapon near the defendant in the car, and that the defendant fled from police, both in the car and on foot. Emerson v. State, 315 Ga. App. 105, 726 S.E.2d 600 (2012) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence is worth nothing if circumstances are reasonably consistent with the hypothesis of innocence as well as the hypothesis of guilt. Johnson v. State, 159 Ga. App. 497, 283 S.E.2d 711 (1981) (decided under former Code 1933, § 38-109).

"Exclusion of reasonable hypothesis" only applied in cases when evidence was purely circumstantial; hence, the defendant could not benefit from the that legal principle when all the state's evidence, including the identification evidence, was direct evidence. Morales v. State, 286 Ga. App. 698, 649 S.E.2d 873 (2007) (decided under former O.C.G.A. § 24-4-6).

Term "hypothesis" refers to such reasonable inferences as are ordinarily drawn by men in the light of their experience in everyday life. White v. State, 18 Ga. App. 214, 89 S.E. 175 (1916) (decided under former Penal Code 1910, § 1010); Wrisper v. State, 193 Ga. 157, 17 S.E.2d 714 (1941) (decided under former Code 1933, § 38-109); Kalb v. State, 195 Ga. 544, 25 S.E.2d 24 (1943), overruled on other grounds, 237 Ga. 471, 228 S.E.2d 860 (1976) (decided under former Code 1933, § 38-109); Hunter v. State, 91 Ga. App. 136, 85 S.E.2d 90 (1954) (decided under former Code 1933, § 38-109); Townsend v. State, 115 Ga. App. 529, 154 S.E.2d 788 (1967) (decided under former Code 1933, § 38-109); Johnson v. State, 126 Ga. App. 93, 189 S.E.2d 900 (1972) (decided under former Code 1933, § 38-109); D.O.D. v. State, 156 Ga. App. 301, 274 S.E.2d 696 (1980) (decided under former Code 1933, § 38-109); McGee v. State, 159 Ga. App. 763, 285 S.E.2d 224 (1981) (decided under former Code 1933, § 38-109); Barnes v. State, 175 Ga. App. 621, 334 S.E.2d 205 (1985), aff'd in part, rev'd in part, 255 Ga. 396, 339 S.E.2d 229 (1986) (decided under former O.C.G.A. § 24-4-6); Holland v. State, 176 Ga. App. 343, 335 S.E.2d 739 (1985) (decided under former O.C.G.A. § 24-4-6); Lewis v. State, 186 Ga. App. 349, 367 S.E.2d 123 (1988) (decided under former O.C.G.A. § 24-4-6); Redwine v. State, 188 Ga. App. 638, 373 S.E.2d 804, cert. denied, 188 Ga. App. 912, 373 S.E.2d 804, 489 U.S. 1069, 109 S. Ct. 1347, 103 L. Ed. 2d 816 (1989) (decided under former O.C.G.A. § 24-4-6); Sanford v. State, 193 Ga. App. 18, 386 S.E.2d 899 (1989) (decided under former O.C.G.A. § 24-4-6).

Reasonableness question for jury. — Whether or not in a given case circumstances are sufficient to exclude every reasonable hypothesis save the guilt of the accused is primarily a question for determination by the jury. Fortson v. State, 69 Ga. App. 378, 25 S.E.2d 820 (1943) (decided under former Code 1933, § 38-109); Townsend v. State, 115 Ga. App. 529, 154 S.E.2d 788 (1967) (decided under former Code 1933, § 38-109); Brown v. State, 125 Ga. App. 300, 187 S.E.2d 301 (1972) (decided under former Code 1933, § 38-109); Jackson v. State, 129 Ga. App. 901, 201 S.E.2d 816 (1973) (decided under former Code 1933, § 38-109); Neal v. State, 130 Ga. App. 708, 204 S.E.2d 451 (1974) (decided under former Code 1933, § 38-109); Murray v. State, 135 Ga. App. 264, 217 S.E.2d 293 (1975) (decided under former Code 1933, § 38-109); Harris v. State, 236 Ga. 242, 223 S.E.2d 643 (1976) (decided under former Code 1933, § 38-109); Parker v. State, 140 Ga. App. 92, 230 S.E.2d 99 (1976) (decided under former Code 1933, § 38-109); Collins v. State, 146 Ga. App. 857, 247 S.E.2d 602 (1978) (decided under former Code 1933, § 38-109); Dowdy v. State, 150 Ga. App. 137, 257 S.E.2d 41 (1979) (decided under former Code 1933, § 38-109); Anglin v. State, 244 Ga. 1, 257 S.E.2d 513 (1979) (decided under former Code 1933, § 38-109); Butler v. State, 150 Ga. App. 751, 258 S.E.2d 691 (1979) (decided under former Code 1933, § 38-109); Baldwin v. State, 153 Ga.

Exclusion of Reasonable Hypothesis (Cont'd)

App. 35, 264 S.E.2d 528 (1980) (decided under former Code 1933, § 38-109); Hendrix v. State, 153 Ga. App. 791, 266 S.E.2d 568 (1980) (decided under former Code 1933, § 38-109); Estep v. State, 154 Ga. App. 1, 267 S.E.2d 314 (1980) (decided under former Code 1933, § 38-109); Smith v. State, 154 Ga. App. 497, 268 S.E.2d 714 (1980) (decided under former Code 1933, § 38-109); Humphries v. State, 154 Ga. App. 596, 269 S.E.2d 90 (1980) (decided under former Code 1933, § 38-109); Brewer v. State, 156 Ga. App. 468, 274 S.E.2d 817 (1980) (decided under former Code 1933, § 38-109); Wood v. State, 156 Ga. App. 810, 275 S.E.2d 694 (1980) (decided under former Code 1933, § 38-109); Walker v. State, 157 Ga. App. 728, 278 S.E.2d 487 (1981) (decided under former O.C.G.A. § 24-4-6); Barfield v. State, 160 Ga. App. 228, 286 S.E.2d 516 (1981) (decided under former Code 1933, § 38-109); In re J.P., 160 Ga. App. 896, 288 S.E.2d 607 (1982) (decided under former O.C.G.A. § 24-4-6).

Question of whether every other reasonable hypothesis has been excluded is generally a question for the jury. Muckle v. State, 165 Ga. App. 873, 303 S.E.2d 54 (1983) (decided under former O.C.G.A. § 24-4-6); Bird v. State, 178 Ga. App. 687, 344 S.E.2d 468 (1986) (decided under former O.C.G.A. § 24-4-6).

What is a reasonable hypothesis is generally a question for the jury, and there is no yardstick to determine what is a "reasonable" hypothesis save the opinion of the jurors. Jenkins v. State, 201 Ga. App. 395, 411 S.E.2d 122 (1991) (decided under former O.C.G.A. § 24-4-6).

Only reasonable hypotheses need be excluded. — To sustain a conviction, it is not required that the evidence exclude every possibility or every inference that may be drawn from proven facts; it is only necessary to exclude reasonable inferences and reasonable hypotheses which may be drawn from the evidence under all the facts and circumstances surrounding the particular case. Reese v. State, 94 Ga. App. 387, 94 S.E.2d 741 (1956) (decided under former Code 1933, § 38-109); Bobo v. State, 100 Ga. App. 643, 112 S.E.2d 205 (1959) (decided under former Code 1933, § 38-109); Samsell v. State, 222 Ga. 235, 149 S.E.2d 367 (1966) (decided under former Code 1933, § 38-109); Alexander v. State, 223 Ga. 34, 153 S.E.2d 431 (1967) (decided under former Code 1933, § 38-109); Townsend v. State, 115 Ga. App. 529, 154 S.E.2d 788 (1967) (decided under former Code 1933, § 38-109); Vinson v. State, 120 Ga. App. 425, 170 S.E.2d 749 (1969) (decided under former Code 1933, § 38-109); Wheeler v. State, 228 Ga. 402, 185 S.E.2d 900 (1971) (decided under former Code 1933, § 38-109); Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474 (1972) (decided under former Code 1933, § 38-109); Murray v. State, 135 Ga. App. 264, 217 S.E.2d 293 (1975) (decided under former Code 1933, § 38-109); McConnell v. State, 235 Ga. 366, 220 S.E.2d 5 (1975) (decided under former Code 1933, § 38-109); Rogers v. State, 139 Ga. App. 656, 229 S.E.2d 132 (1976) (decided under former Code 1933, § 38-109); Weatherington v. State, 139 Ga. App. 795, 229 S.E.2d 676 (1976) (decided under former Code 1933, § 38-109); Parker v. State, 142 Ga. App. 396, 236 S.E.2d 141 (1977) (decided under former Code 1933, § 38-109); Runnels v. State, 146 Ga. App. 75, 245 S.E.2d 475 (1978) (decided under former Code 1933, § 38-109); Lewis v. State, 149 Ga. App. 181, 254 S.E.2d 142 (1979) (decided under former Code 1933, § 38-109); Dowdy v. State, 150 Ga. App. 137, 257 S.E.2d 41 (1979) (decided under former Code 1933, § 38-109); Creamer v. State, 150 Ga. App. 428, 258 S.E.2d 212 (1979) (decided under former Code 1933, § 38-109); Baldwin v. State, 153 Ga. App. 35, 264 S.E.2d 528 (1980) (decided under former Code 1933, § 38-109); Thompson v. State, 154 Ga. App. 704, 269 S.E.2d 474 (1980) (decided under former Code 1933, § 38-109); Brewer v. State, 156 Ga. App. 468, 274 S.E.2d 817 (1980) (decided under former Code 1933, § 38-109); Strickland v. State, 156 Ga. App. 475, 274 S.E.2d 823 (1980) (decided under former Code 1933, § 38-109); Perry v. State, 158 Ga. App. 349, 280 S.E.2d 390 (1981) (decided under former Code 1933, § 38-109); Slack v. State, 159 Ga. App. 185, 283 S.E.2d 64

(1981) (decided under former O.C.G.A. § 24-4-6); In re J.P., 160 Ga. App. 896, 288 S.E.2d 607 (1982) (decided under former O.C.G.A. § 24-4-6).

Rule as to the sufficiency of circumstantial evidence to support a conviction is that the evidence exclude every reasonable hypothesis except that of guilt, not that it remove every possibility of the innocence of the defendant. Barfield v. State, 160 Ga. App. 228, 286 S.E.2d 516 (1981) (decided under former Code 1933, § 38-109).

To sustain the judgment of conviction, the evidence need not exclude every inference or hypothesis except guilt of the accused, but only reasonable inferences and hypotheses so as to justify the inference, beyond reasonable doubt, of guilt. Chambless v. State, 165 Ga. App. 194, 300 S.E.2d 201 (1983) (decided under former O.C.G.A. § 24-4-6); Hulsey v. State, 210 Ga. App. 251, 435 S.E.2d 713 (1993) (decided under former O.C.G.A. § 24-4-6).

Conviction based solely upon circumstantial evidence must be supported by facts which not only are consistent with guilt of the accused, but should exclude every reasonable hypothesis save that of the guilt of the accused. This does not mean that the state must exclude every possible hypothesis showing innocence, but any reasonable hypothesis showing innocence. Robinson v. State, 168 Ga. App. 569, 309 S.E.2d 845 (1983) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence must include only reasonable hypothesis; it need not exclude every inference or hypothesis except that of the defendant's guilt. Smith v. State, 257 Ga. 381, 359 S.E.2d 662 (1987) (decided under former O.C.G.A. § 24-4-6).

When a conviction is based on circumstantial evidence, although the circumstantial evidence must exclude every other reasonable hypothesis save the defendant's guilt, it need not exclude every inference or hypothesis. Mason v. State, 199 Ga. App. 691, 405 S.E.2d 747 (1991) (decided under former O.C.G.A. § 24-4-6).

When the evidence connecting a defendant to the charged crime is circumstantial, to warrant a conviction the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused. Dean v. State, 203 Ga. App. 836, 418 S.E.2d 117 (1992) (decided under former O.C.G.A. § 24-4-6).

Beyond the witnesses' identification of a juvenile's hairstyle and clothing as those worn by one of the burglars, and beyond the burglars' going to the juvenile's home to escape, the juvenile's possession of the stolen items soon after the burglary was sufficient to uphold the court's adjudication of delinquency on that charge; furthermore, any reasonable hypothesis of innocence was undermined by the identification of the juvenile's hairstyle and clothes and by the identification of the juvenile's residence as the place to which the burglars escaped. In the Interest of A.D., 282 Ga. App. 586, 639 S.E.2d 556 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence supporting two theories. — When the circumstantial evidence supports more than one theory, one consistent with guilt and another with innocence, it does not exclude every other reasonable hypothesis except guilt and is not sufficient to prove the defendant's guilt beyond a reasonable doubt. Carr v. State, 119 Ga. App. 540, 167 S.E.2d 707 (1969) (decided under former Code 1933, § 38-109); Roberson v. State, 145 Ga. App. 687, 244 S.E.2d 629 (1978) (decided under former Code 1933, § 38-109); Kreager v. State, 148 Ga. App. 548, 252 S.E.2d 1 (1978) (decided under former Code 1933, § 38-109); Johnson v. State, 159 Ga. App. 497, 283 S.E.2d 711 (1981) (decided under former Code 1933, § 38-109).

When evidence failed to establish whether the defendant first took property and then killed the victim and ransacked the house, or first killed the victim and then took the property and ransacked the house, the evidence was insufficient to meet the standard of former O.C.G.A. § 24-4-6 and, moreover, was insufficient for a rational trier of fact to have found the defendant guilty of armed robbery beyond a reasonable doubt. Miles v. State, 261 Ga. 232, 403 S.E.2d 794 (1991) (decided under former O.C.G.A. § 24-4-6).

Consideration of defendant's explanation. — In making a determination of whether any other reasonable hypothesis

Exclusion of Reasonable Hypothesis (Cont'd)

exists, the defendant's explanation must be taken into consideration insofar as it is consistent with the circumstantial evidence properly admitted. Elam v. State, 125 Ga. App. 427, 187 S.E.2d 920 (1972) (decided under former Code 1933, § 38-109); Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474 (1972) (decided under former Code 1933, § 38-109); Wright v. State, 147 Ga. App. 111, 248 S.E.2d 183 (1978) (decided under former Code 1933, § 38-109); Jackson v. State, 152 Ga. App. 441, 263 S.E.2d 181 (1979) (decided under former Code 1933, § 38-109); Barnett v. State, 153 Ga. App. 430, 265 S.E.2d 348 (1980) (decided under former Code 1933, § 38-109); Bogan v. State, 158 Ga. App. 1, 279 S.E.2d 229 (1981) (decided under former Code 1933, § 38-109); Ragan v. State, 250 Ga. App. 89, 550 S.E.2d 476 (2001) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to support defendant's convictions on four counts of aggravated battery and one count of cruelty to children in the first degree after the 17-month-old daughter of a girlfriend was found with hot-water immersion burns incurred while defendant was watching the daughter for the girlfriend; the jury was free to reject the explanation that defendant had no criminal intent at the time the burns were incurred and that defendant maliciously and intentionally immersed the baby in hot water after the baby soiled a diaper, especially since defendant's explanations were not consistent with the evidence. Lee v. State, 275 Ga. App. 93, 619 S.E.2d 767 (2005) (decided under former O.C.G.A. § 24-4-6).

Because sufficient evidence was presented to support a finding that the defendant was intoxicated to the level that the intoxication caused both the defendant's loss of consciousness and an accident resulting in the defendant's truck straddling a ditch with the truck's nose down at close to a 90-degree angle, and the responding deputies testified that the defendant appeared to be under the influence of alcohol to the extent that it was less safe to drive, the defendant's conviction for violating O.C.G.A. § 40-6-391(a)(1) was supported by sufficient direct evidence of guilt; moreover, based on the evidence, the trial court could reasonably reject as unreasonable the hypothesis that the defendant became intoxicated after the accident occurred. Stewart v. State, 288 Ga. App. 735, 655 S.E.2d 328 (2007) (decided under former O.C.G.A. § 24-4-6).

Sufficient evidence supported defendant's convictions on one count of simple assault and two counts of battery, which arose from a fight with a romantic friend, as it was within the jury's province to consider defendant's self-defense theory and reject the defense; jury heard witnesses and observed testimony and was more capable of determining reasonableness of the hypothesis produced by evidence or lack of evidence than appellate court. Thompson v. State, 291 Ga. App. 355, 662 S.E.2d 135 (2008) (decided under former O.C.G.A. § 24-4-6).

There was sufficient evidence to support the defendant's conviction for the malice murder of the defendant's mother based on the facts adduced at trial that showed that, contrary to the defendant's version of events that the mother died from smoke inhalation from a kitchen fire, or another version that someone else committed the crime, the medical examiner established that the mother died from strangulation by hands, and the fire investigator established that the kitchen fire was insignificant. Nichols v. State, 292 Ga. 290, 736 S.E.2d 407 (2013) (decided under former O.C.G.A. § 24-4-6).

Evidence raising an inference of a defendant's innocence improperly excluded. — During a trial for felony murder while in the commission of cruelty to a child arising from the death of a defendant's child from brain trauma sustained while the child was in the defendant's care, the defendant was improperly prevented from cross-examining a person who was in the apartment at the time about the person's history of inappropriate behavior toward the person's own child, including allegations of child abuse, because it was a crucial element of the defense that the person was a likely suspect, and, under former O.C.G.A. § 24-4-6, the circumstantial evidence did

not exclude the reasonable hypothesis that the person was the likely culprit; the defendant's conviction required reversal because it was not highly improbable that the jury's verdict would have been different if the evidence had been admitted, and the error therefore could not be considered harmless. Scott v. State, 281 Ga. 373, 637 S.E.2d 652 (2006) (decided under former O.C.G.A. § 24-4-6).

Error to charge guilt in less reasonable explanation. — Charge given by trial court in theft case that the jury could have inferred guilt unless there was from the evidence a reasonable explanation of possession consistent with a plea of innocence was not a sufficient restatement of former O.C.G.A. § 24-4-6. The jury was not adequately instructed that the state's circumstantial evidence of guilt should "exclude every other reasonable hypothesis save that of the guilt of the accused." McChargue v. State, 209 Ga. App. 612, 434 S.E.2d 153 (1993) (decided under former O.C.G.A. § 24-4-6).

Proof to moral certainty. — It is not necessary to show that it was impossible for the offense to have been committed by anybody else or that it might not, by bare possibility, have been done by another; it is sufficient to show to a moral certainty that it was the defendant. Johnson v. State, 126 Ga. App. 93, 189 S.E.2d 900 (1972) (decided under former Code 1933, § 38-109); Neal v. State, 130 Ga. App. 708, 204 S.E.2d 451 (1974) (decided under former Code 1933, § 38-109); Harris v. State, 236 Ga. 766, 225 S.E.2d 263 (1976) (decided under former Code 1933, § 38-109); Van Voltenburg v. State, 138 Ga. App. 628, 227 S.E.2d 451 (1976) (decided under former Code 1933, § 38-109); Castleberry v. State, 152 Ga. App. 769, 264 S.E.2d 239 (1979) (decided under former Code 1933, § 38-109); Strickland v. State, 156 Ga. App. 475, 274 S.E.2d 823 (1980) (decided under former Code 1933, § 38-109).

Former O.C.G.A. § 24-4-6 did not mean that the act might by bare possibility have been done by somebody else, but that the state should show to a moral certainty that it was the defendant's act. McGee v. State, 159 Ga. App. 763, 285 S.E.2d 224 (1981) (decided under former Code 1933, § 38-109).

Burden on state. — Defendant does not have the obligation to offer a theory consistent with innocence. Rather, the state has the burden of proving guilt. Howard v. State, 148 Ga. App. 598, 251 S.E.2d 829 (1979) (decided under former Code 1933, § 38-109).

Burden under former O.C.G.A. § 24-4-6 to present evidence excluding every other reasonable hypothesis save that of guilt, was upon the state. Cornish v. State, 187 Ga. App. 140, 369 S.E.2d 515 (1988) (decided under former O.C.G.A. § 24-4-6).

Hypothesis considered by jury. — Questions as to the reasonableness of hypothesis are generally to be decided by the jury and when the jury finds that the evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt, that finding will not be disturbed unless the verdict of guilty is insupportable as a matter of law. Robbins v. State, 269 Ga. 500, 499 S.E.2d 323 (1998) (decided under former O.C.G.A. § 24-4-6); Callahan v. State, 249 Ga. App. 108, 547 S.E.2d 741 (2001) (decided under former O.C.G.A. § 24-4-6).

Evidence did not exclude very reasonable hypothesis. — Circumstantial evidence was insufficient for adjudication as a delinquent for acts that would have constituted cocaine possession if committed by an adult because the circumstantial evidence of defendant's spatial proximity to cocaine found in a car's console and the fact that the defendant did not live near the parking lot where the car was parked did not exclude every reasonable hypothesis other than constructive possession. In the Interest of J.S., 303 Ga. App. 788, 694 S.E.2d 375 (2010) (decided under former O.C.G.A. § 24-4-6).

Instructions

Abstract principles for jury. — In trying a case depending upon circumstantial evidence, very few abstract principles should be given to the jury. Dacus v. State, 56 Ga. App. 439, 193 S.E. 93 (1937) (decided under former Code 1933, § 38-109).

Request to charge not waived when request not in writing. — As the defendant's request to charge the jury on circumstantial evidence as set forth in former O.C.G.A. § 24-4-6 directed the trial

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court to the language in the pattern jury instructions that defendant wished to have the trial court use, and the trial court recognized what was requested, the defendant's request to charge the principle stated in § 24-4-6 was not waived by the failure to properly submit the request in writing under Ga. Unif. Super. Ct. R. 10.3. Davis v. State, 285 Ga. 176, 674 S.E.2d 879 (2009) (decided under former O.C.G.A. § 24-4-6).

When charge required. — When the conviction depends entirely upon circumstantial evidence, the court's failure to charge the law pertaining to circumstantial evidence is reversible error, even in the absence of a timely written request. Harris v. State, 18 Ga. App. 710, 90 S.E. 370 (1916) (decided under former Penal Code 1910, § 1010); Coggin v. State, 41 Ga. App. 659, 154 S.E. 376 (1930) (decided under former Penal Code 1910, § 1010); Towler v. State, 44 Ga. App. 262, 161 S.E. 164 (1931) (decided under former Penal Code 1910, § 1010); Cofer v. State, 178 Ga. 742, 174 S.E. 331 (1934) (decided under former Code 1933, § 38-109); Grooms v. State, 53 Ga. App. 348, 185 S.E. 596 (1936) (decided under former Code 1933, § 38-109); De Loach v. State, 57 Ga. App. 799, 196 S.E. 924 (1938) (decided under former Code 1933, § 38-109); Kinsey v. State, 57 Ga. App. 813, 197 S.E. 61 (1938) (decided under former Code 1933, § 38-109); Williams v. State, 196 Ga. 503, 26 S.E.2d 926 (1943) (decided under former Code 1933, § 38-109); Dyer v. State, 71 Ga. App. 41, 29 S.E.2d 922 (1944) (decided under former Code 1933, § 38-109); Steed v. State, 80 Ga. App. 360, 56 S.E.2d 171 (1949) (decided under former Code 1933, § 38-109); Culver v. State, 80 Ga. App. 438, 56 S.E.2d 197 (1949) (decided under former Code 1933, § 38-109); Jones v. State, 91 Ga. App. 662, 86 S.E.2d 724 (1955) (decided under former Code 1933, § 38-109); McGruder v. State, 213 Ga. 259, 98 S.E.2d 564 (1957) (decided under former Code 1933, § 38-109); Ledford v. State, 215 Ga. 799, 113 S.E.2d 628 (1960) (decided under former Code 1933, § 38-109); Harvey v. State, 111 Ga. App. 279, 141 S.E.2d 604 (1965) (decided under former Code 1933, § 38-109); Campbell v. State, 129 Ga. App. 836, 201 S.E.2d 666 (1973) (decided under former Code 1933, § 38-109); Hethcox v. State, 138 Ga. App. 207, 225 S.E. 764 (1976) (decided under former Code 1933, § 38-109); Williams v. State, 239 Ga. 12, 235 S.E.2d 504 (1977) (decided under former Code 1933, § 38-109); Jones v. State, 243 Ga. 584, 255 S.E.2d 702 (1979) (decided under former Code 1933, § 38-109); Nelms v. State, 150 Ga. App. 720, 258 S.E.2d 531 (1979) (decided under former Code 1933, § 38-109); Russell v. State, 152 Ga. App. 693, 263 S.E.2d 689 (1979) (decided under former Code 1933, § 38-109); Arnett v. State, 245 Ga. 470, 265 S.E.2d 771 (1980) (decided under former Code 1933, § 38-109); Thompson v. State, 154 Ga. App. 704, 269 S.E.2d 474 (1980) (decided under former Code 1933, § 38-109); Caylor v. State, 155 Ga. App. 489, 270 S.E.2d 924 (1980) (decided under former Code 1933, § 38-109); Stephens v. State, 208 Ga. App. 291, 430 S.E.2d 29 (1993) (decided under former O.C.G.A. § 24-4-6); Dunaway v. State, 214 Ga. App. 128, 447 S.E.2d 153 (1994) (decided under former O.C.G.A. § 24-4-6); Stubbs v. State, 265 Ga. 883, 463 S.E.2d 686 (1995) (decided under former O.C.G.A. § 24-4-6).

Charge on circumstantial evidence must be given when the defendant has made a timely written request therefor. Hancock v. State, 158 Ga. App. 829, 282 S.E.2d 401 (1981) (decided under former Code 1933, § 38-109); Dunaway v. State, 214 Ga. App. 128, 447 S.E.2d 153 (1994) (decided under former O.C.G.A. § 24-4-6).

If the state's case depends, in whole or in part, on circumstantial evidence, a charge on the law of circumstantial evidence must be given on request whether or not the jury is authorized to find that the direct evidence presented by witness testimony has been impeached. Gidden v. State, 205 Ga. App. 245, 422 S.E.2d 30, cert. denied, 205 Ga. App. 900, 422 S.E.2d 30 (1992) (decided under former O.C.G.A. § 24-4-6).

When the state's case depends, in whole or in part, on circumstantial evidence, a charge on the law of circumstantial evidence must be given on request. Postell v. State, 261 Ga. 842, 412 S.E.2d 831 (1992) (decided under former O.C.G.A. § 24-4-6).

When the case against the defendant is close or doubtful and is composed solely of circumstantial evidence, it is reversible error for a trial court to fail to charge former O.C.G.A. § 24-4-6 even absent a request. Jenkins v. State, 209 Ga. App. 19, 432 S.E.2d 270 (1993) (decided under former O.C.G.A. § 24-4-6).

Since no drugs were found in the defendant's actual possession, the case was dependent on circumstantial evidence and it was error to refuse to so charge upon written request. Lowe v. State, 208 Ga. App. 49, 430 S.E.2d 169 (1993), overruled on other grounds, Kelly v. State, 212 Ga. App. 278, 442 S.E.2d 462 (1994) (decided under former O.C.G.A. § 24-4-6).

Instruction required in DUI conviction. — In a prosecution for driving under the influence of alcohol, defendant was entitled to defendant's requested instruction on circumstantial evidence based on a reasonable hypothesis from defendant's use of Benadryl that the defendant was not guilty of the crime charged. Cato v. State, 212 Ga. App. 417, 441 S.E.2d 900 (1994) (decided under former O.C.G.A. § 24-4-6).

It is error to fail to charge the substance of former O.C.G.A. § 24-4-6 when the circumstances from which a guilty intent can be inferred are consistent with an innocent intention or an intention different from that charged against the accused. Hathcock v. State, 214 Ga. App. 188, 447 S.E.2d 104 (1994) (decided under former O.C.G.A. § 24-4-6).

In a prosecution for driving under the influence of alcohol, evidence upon which an officer based the officer's opinion that defendant was impaired and a less safe driver was circumstantial, and the failure to give a requested charge on former O.C.G.A. § 24-4-6 was reversible error. Tomko v. State, 233 Ga. App. 20, 503 S.E.2d 300 (1998) (decided under former O.C.G.A. § 24-4-6).

Instruction required in child molestation conviction. — In a prosecution for child molestation, it was reversible error to refuse to give defendant's requested charge on circumstantial evidence, when defendant offered evidence of an intention other than to arouse defendant's or the child's sexual desires and the trial court gave the jury no instructions under which the jury could consider this evidence. Hathcock v. State, 214 Ga. App. 188, 447 S.E.2d 104 (1994) (decided under former O.C.G.A. § 24-4-6).

Two different rules governed when the trial court must instruct the jury on former O.C.G.A. § 24-4-6 were: (1) the charge must be given absent a request if the case against the defendant was wholly circumstantial; and (2) the charge must be given upon request if the case relied to any degree upon circumstantial evidence. Yarn v. State, 215 Ga. App. 883, 452 S.E.2d 537 (1994), aff'd, 265 Ga. 787, 462 S.E.2d 359 (1995) (decided under former O.C.G.A. § 24-4-6).

Whenever the state introduces circumstantial evidence of the defendant's guilt, it is error not to charge under former O.C.G.A. § 24-4-6 if such has been timely requested; however, it is not error to fail to give such a charge in the absence of a timely request when the state's case depends both upon direct and circumstantial evidence. Stubbs v. State, 215 Ga. App. 873, 452 S.E.2d 571 (1994), rev'd in part on other grounds, 265 Ga. 883, 463 S.E.2d 686 (1995), vacated on other grounds, 219 Ga. App. 871, 467 S.E.2d 612 (1996) (decided under former O.C.G.A. § 24-4-6); Davis v. State, 266 Ga. 801, 471 S.E.2d 191 (1996) (decided under former O.C.G.A. § 24-4-6).

Instruction required in DUI conviction and operating unsafe motor vehicle. — In a prosecution for driving under the influence and driving an unsafe motor vehicle with defective equipment, the state was required to prove defendant was driving the car, proof of which was dependent in part on circumstantial evidence requiring the giving of a charge under former O.C.G.A. § 24-4-6. Coates v. State, 216 Ga. App. 93, 453 S.E.2d 35 (1994) (decided under former O.C.G.A. § 24-4-6).

When the state's case is composed solely of circumstantial evidence, a defendant is relieved from the necessity of requesting a charge on former O.C.G.A. § 24-4-6; even in the absence of such a request, it may be reversible error to fail to give the instruction. Yarn v. State, 265 Ga. 787, 462 S.E.2d 359 (1995) (decided under former O.C.G.A. § 24-4-6).

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Trial court must charge on the law of circumstantial evidence, even absent a request, if the case against the defendant is wholly circumstantial, and if the case relies to any degree upon circumstantial evidence, a charge on circumstantial evidence is required upon written request. Massey v. State, 270 Ga. 76, 508 S.E.2d 149 (1998) (decided under former O.C.G.A. § 24-4-6).

Instruction in kidnapping case not required when direct evidence exists. — Trial court's failure to give a charge under former O.C.G.A. § 24-4-6 was not harmful as a matter of law because the state presented direct evidence that the defendant committed the crime of kidnapping. Holden v. State, 287 Ga. App. 472, 651 S.E.2d 552 (2007), cert. denied, No. S08C0189, 2008 Ga. LEXIS 153 (Ga. 2008) (decided under former O.C.G.A. § 24-4-6).

Charge on circumstantial evidence is required, upon request in appropriate cases, pursuant to former O.C.G.A. § 24-4-6. Kelly v. State, 212 Ga. App. 278, 442 S.E.2d 462 (1994) (decided under former O.C.G.A. § 24-4-6).

Only when evidence is wholly circumstantial is substance of former O.C.G.A. § 24-4-6 required to be given in charge, and when there was direct evidence, as well as circumstantial, and when there was no such equality of theories of guilt or innocence as to require such charge it was not error to refuse charge as requested by defendant. Bearden v. State, 163 Ga. App. 434, 294 S.E.2d 667 (1982) (decided under former O.C.G.A. § 24-4-6).

Only when the case is wholly dependent on circumstantial evidence is a charge on circumstantial evidence required. Galloway v. State, 165 Ga. App. 536, 301 S.E.2d 894 (1983) (decided under former O.C.G.A. § 24-4-6).

Jury charge under former O.C.G.A. § 24-4-6, though requested by a defendant, is required only when the evidence relied on for conviction is entirely circumstantial. Griffith v. State, 172 Ga. App. 255, 322 S.E.2d 921 (1984) (decided under former O.C.G.A. § 24-4-6); Todd v. State, 184 Ga. App. 750, 362 S.E.2d 400 (1987) (decided under former O.C.G.A. § 24-4-6).

Instruction not required in DUI trial. — When the defendant was charged with driving under the influence with a blood alcohol percentage of .10, the evidence introduced by the state in support of this charge, the results from the breath test, was characterized as direct evidence, not circumstantial evidence, and the trial court did not err in refusing to give a circumstantial evidence instruction. Cawthon v. State, 235 Ga. App. 791, 510 S.E.2d 586 (1998) (decided under former O.C.G.A. § 24-4-6).

Charge required if possession of stolen goods is only evidence of burglary. — In a burglary prosecution, if the only evidence tending to connect the accused with the alleged offense is the accused's unsatisfactorily explained possession of recently stolen goods, it is error for the trial court to fail to give, with or without request, a charge on the principle contained in former O.C.G.A. § 24-4-6. Price v. State, 180 Ga. App. 215, 348 S.E.2d 740 (1986) (decided under former O.C.G.A. § 24-4-6).

When charge not required. — Unless the evidence relied upon for conviction is entirely circumstantial, it is not error to fail to charge the law of circumstantial evidence in the absence of a request to do so. Wilson v. State, 152 Ga. 337, 110 S.E. 8 (1921) (decided under former Penal Code 1910, § 1010); Chamblee v. State, 50 Ga. App. 251, 177 S.E. 824 (1934) (decided under former Code 1933, § 38-109); Roberts v. State, 50 Ga. App. 307, 177 S.E. 825 (1934) (decided under former Code 1933, § 38-109); Wyatt v. State, 50 Ga. App. 266, 177 S.E. 840 (1934) (decided under former Code 1933, § 38-109); Summers v. State, 63 Ga. App. 445, 11 S.E.2d 409 (1940) (decided under former Code 1933, § 38-109); Hall v. State, 66 Ga. App. 655, 19 S.E.2d 40 (1942) (decided under former Code 1933, § 38-109); Allen v. State, 194 Ga. 430, 22 S.E.2d 65 (1942) (decided under former Code 1933, § 38-109); Miller v. State, 69 Ga. App. 847, 26 S.E.2d 851 (1943) (decided under former Code 1933, § 38-109); Newsome v. State, 69 Ga. App. 445, 26 S.E.2d 113 (1943) (decided under former Code 1933, § 38-109); Dan-

iels v. State, 199 Ga. 818, 35 S.E.2d 362 (1945) (decided under former Code 1933, § 38-109); Johnson v. State, 84 Ga. App. 745, 67 S.E.2d 246 (1951) (decided under former Code 1933, § 38-109); Young v. State, 85 Ga. App. 122, 68 S.E.2d 219 (1951) (decided under former Code 1933, § 38-109); Hicks v. State, 86 Ga. App. 365, 71 S.E.2d 695 (1952) (decided under former Code 1933, § 38-109); Weaver v. State, 86 Ga. App. 699, 71 S.E.2d 901 (1952) (decided under former Code 1933, § 38-109); Johnson v. State, 209 Ga. 333, 72 S.E.2d 291 (1952) (decided under former Code 1933, § 38-109); King v. State, 86 Ga. App. 786, 72 S.E.2d 502 (1952) (decided under former Code 1933, § 38-109); Marshman v. State, 88 Ga. App. 250, 76 S.E.2d 443 (1953) (decided under former Code 1933, § 38-109); Jones v. State, 88 Ga. App. 330, 76 S.E.2d 810 (1953) (decided under former Code 1933, § 38-109); Wiggins v. State, 92 Ga. App. 65, 87 S.E.2d 652 (1955) (decided under former Code 1933, § 38-109); Nelson v. State, 92 Ga. App. 746, 90 S.E.2d 91 (1955) (decided under former Code 1933, § 38-109); Weatherby v. State, 213 Ga. 188, 97 S.E.2d 698 (1957) (decided under former Code 1933, § 38-109); Whiting v. State, 108 Ga. App. 374, 133 S.E.2d 50 (1963) (decided under former Code 1933, § 38-109); Ryder v. State, 121 Ga. App. 796, 175 S.E.2d 882 (1970) (decided under former Code 1933, § 38-109); Bryant v. State, 229 Ga. 60, 189 S.E.2d 435 (1972) (decided under former Code 1933, § 38-109); Johnson v. State, 235 Ga. 486, 220 S.E.2d 448 (1975) (decided under former Code 1933, § 38-109); Jones v. State, 243 Ga. 584, 255 S.E.2d 702 (1979) (decided under former Code 1933, § 38-109); Fuller v. State, 166 Ga. App. 734, 305 S.E.2d 463 (1983) (decided under former O.C.G.A. § 24-4-6); Whittington v. State, 252 Ga. 168, 313 S.E.2d 73 (1984) (decided under former O.C.G.A. § 24-4-6); McGarity v. State, 212 Ga. App. 17, 440 S.E.2d 695 (1994) (decided under former O.C.G.A. § 24-4-6); Sharpe v. State, 272 Ga. 684, 531 S.E.2d 84, cert. denied, 531 U.S. 948, 121 S. Ct. 350, 148 L. Ed. 2d 282 (2000) (decided under former O.C.G.A. § 24-4-6).

Refusal to give a requested instruction on former O.C.G.A. § 24-4-6 is not error except when the case is totally dependent upon circumstantial evidence. Heath v. State, 186 Ga. App. 655, 368 S.E.2d 346 (1988) (decided under former O.C.G.A. § 24-4-6); Lewis v. State, 198 Ga. App. 808, 403 S.E.2d 233, cert. denied, 198 Ga. App. 898, 403 S.E.2d 233 (1991) (decided under former O.C.G.A. § 24-4-6).

When there is some direct evidence against the defendant, it is not error to fail to charge on circumstantial evidence. Terrell v. State, 258 Ga. 722, 373 S.E.2d 751 (1988) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in refusing to give defendant's requested instruction on circumstantial evidence since the evidence in the case was not entirely circumstantial. Ebenezer v. State, 191 Ga. App. 901, 383 S.E.2d 373 (1989) (decided under former O.C.G.A. § 24-4-6); Rainey v. State, 216 Ga. App. 557, 455 S.E.2d 73 (1995), aff'd, 266 Ga. 163, 465 S.E.2d 447 (1996) (decided under former O.C.G.A. § 24-4-6); Carter v. State, 240 Ga. App. 203, 523 S.E.2d 47 (1999) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err by failing to instruct the jury on circumstantial evidence since direct evidence of guilt obviated the requirement of such a charge. Baines v. State, 201 Ga. App. 354, 411 S.E.2d 95 (1991) (decided under former O.C.G.A. § 24-4-6).

In a case involving both direct and circumstantial evidence, it was not reversible error for the trial court to fail to give a charge on circumstantial evidence as contained in former O.C.G.A. § 24-4-6, nor to fail to instruct the jury that a conviction based on circumstantial evidence was permissible only if the offense charged was proved beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis. This type of instruction was required only when the case was totally dependent upon circumstantial evidence. Williams v. State, 199 Ga. App. 566, 405 S.E.2d 716 (1991) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in failing to give a charge on circumstantial evidence, since the requested charge was not adjusted to the principles involved in the case since a

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charge on how the jury should treat a defendant's testimony in the context of a circumstantial evidence case was included but defendant did not testify. Minor v. State, 264 Ga. 195, 442 S.E.2d 754 (1994) (decided under former O.C.G.A. § 24-4-6).

Failure to charge on former O.C.G.A. § 24-4-6 was not reversible error when the case was not close or doubtful, the charge on reasonable doubt was full and fair, and no other reasonable hypothesis save that of guilt was offered. Cato v. State, 212 Ga. App. 417, 441 S.E.2d 900 (1994) (decided under former O.C.G.A. § 24-4-6).

Even if the victims were impeached, a charge on circumstantial evidence was not warranted because there was no other evidence authorizing a verdict of guilty. Miller v. State, 212 Ga. App. 193, 441 S.E.2d 443 (1994) (decided under former O.C.G.A. § 24-4-6).

In a prosecution for trafficking in cocaine involving direct and circumstantial evidence, in the absence of any evidence evincing a plausible explanation or reasonable hypothesis of innocence and, particularly in the context of the entire charge in the case, the omission of a charge reciting the principle in former O.C.G.A. § 24-4-6 was not reversible error. Roura v. State, 214 Ga. App. 43, 447 S.E.2d 52 (1994) (decided under former O.C.G.A. § 24-4-6).

Because there was some direct evidence of defendant's guilt and no request was made for a charge on circumstantial evidence, the trial court's failure to give an instruction in the language of former O.C.G.A. § 24-4-6 was not error. Brooks v. State, 265 Ga. 548, 458 S.E.2d 349 (1995) (decided under former O.C.G.A. § 24-4-6).

When the state's case includes both direct and circumstantial evidence, a defendant is not relieved from the necessity of requesting the charge and, in the absence of such a request, it is not error to fail to give the charge. Yarn v. State, 265 Ga. 787, 462 S.E.2d 359 (1995) (decided under former O.C.G.A. § 24-4-6).

Failure to give a requested circumstantial evidence charge was not error because the evidence was consistent only with defendant's guilt as to the acts alleged in the indictment and was completely inconsistent with a reasonable hypothesis of innocence. Carroll v. State, 224 Ga. App. 543, 481 S.E.2d 562 (1997) (decided under former O.C.G.A. § 24-4-6).

Defendant must request a circumstantial evidence charge within a similar transaction charge since the case against the defendant is not wholly circumstantial. Johnson v. State, 236 Ga. App. 252, 511 S.E.2d 603 (1999), aff'd, 272 Ga. 254, 526 S.E.2d 549 (2000) (decided under former O.C.G.A. § 24-4-6).

In a prosecution for child molestation, a charge under former O.C.G.A. § 24-4-6 was not appropriate since the evidence directly contradicted defendant's contention that inadvertent contact was made with the victim's leg or thigh as a result of a trip and fall. Turner v. State, 245 Ga. App. 294, 536 S.E.2d 814 (2000), overruled on other grounds, Miller v. State, 285 Ga. 285, 676 S.E.2d 173 (2009) (decided under former O.C.G.A. § 24-4-6).

Since there was no request to charge on the circumstantial evidence rule, the charge was needed only if the state's case was based wholly on circumstantial evidence, and no such charge was needed when defendant's cousin testified that the cousin saw defendant rob a store; that was direct evidence, not circumstantial. Moore v. State, 268 Ga. App. 398, 601 S.E.2d 854 (2004) (decided under former O.C.G.A. § 24-4-6).

Defense counsel was not ineffective in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV, for failing to request a charge on circumstantial evidence based on former O.C.G.A. § 24-4-6, which imposed certain requirements for convictions based on circumstantial evidence; the trial court adequately charged the jury on reasonable doubt, and direct evidence for both offenses was presented. Guillen v. State, 275 Ga. App. 316, 620 S.E.2d 518 (2005) (decided under former O.C.G.A. § 24-4-6).

Because the defendant did not request a charge under former O.C.G.A. § 24-4-6, the trial court did not commit reversible error in failing to give the charge. Barrino v. State, 282 Ga. App. 496, 639 S.E.2d 489 (2006) (decided under former O.C.G.A. § 24-4-6).

Prosecution against the defendant on charges of burglary, theft by taking, and criminal trespass included both direct and circumstantial evidence, and convictions on those charges were not subject to being reversed merely because the trial court failed to charge former O.C.G.A. § 24-4-6 as the defendant failed to request that charge. Rodriguez v. State, 283 Ga. App. 752, 642 S.E.2d 705 (2007) (decided under former O.C.G.A. § 24-4-6).

Because the defendant made an oral request that the jury be charged on the law under former O.C.G.A. § 24-4-6, but did not make a written request for that charge, the trial court did not err in failing to charge the jury as the defendant requested. Attaway v. State, 284 Ga. App. 855, 644 S.E.2d 919 (2007) (decided under former O.C.G.A. § 24-4-6).

When the evidence at trial consisted of both direct and circumstantial evidence, the defendant did not request in writing a charge regarding former O.C.G.A. § 24-4-6, and defense counsel stated that the trial court's proposed charges were sufficient, it was not error not to give a charge based on former § 24-4-6. Moore v. State, 286 Ga. App. 313, 649 S.E.2d 337 (2007) (decided under former O.C.G.A. § 24-4-6).

Because the evidence rested largely on the direct evidence provided by the eyewitnesses to the event, and there was no reasonable likelihood that had the circumstantial evidence charge been given to the jury the outcome of the trial would have differed, the defendant's trial counsel could not be found ineffective in failing to request the instruction. Holden v. State, 287 Ga. App. 472, 651 S.E.2d 552 (2007), cert. denied, No. S08C0189, 2008 Ga. LEXIS 153 (Ga. 2008) (decided under former O.C.G.A. § 24-4-6).

Because the testimony from the medical examiner amounted to direct, and not circumstantial, evidence that: (1) the accident the defendant was charged with causing caused the decedent's death; (2) either the defendant's or the other impact caused the blunt force trauma to the decedent's head; and (3) any of the impacts, alone, could have caused the trauma, the defendant's requested circumstantial evidence charge was properly denied by the trial court. Kirk v. State, 289 Ga. App. 125, 656 S.E.2d 251 (2008) (decided under former O.C.G.A. § 24-4-6).

In a defendant's prosecution for, inter alia, felony murder, the trial court did not err by failing to instruct the jury on the law of circumstantial evidence as set forth in former O.C.G.A. § 24-4-6 because both direct and circumstantial evidence were presented by the state and the defendant failed to request a circumstantial evidence instruction. Sumlin v. State, 283 Ga. 264, 658 S.E.2d 596 (2008) (decided under former O.C.G.A. § 24-4-6).

In convictions of aggravated sodomy, kidnapping, burglary, and aggravated assault, a trial court did not err in failing to sua sponte instruct the jury about circumstantial evidence because the victims provided direct evidence of defendant's guilt. Fortune v. State, 300 Ga. App. 550, 685 S.E.2d 466 (2009) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in failing to charge the jury on circumstantial evidence because nothing of record showed that the defendant requested such a charge; nevertheless, the record showed that the trial court properly charged the jury sua sponte on circumstantial evidence, and when trial counsel was asked if counsel objected to the jury charge as given counsel indicated that counsel did not, which resulted in waiver on appeal. Jackson v. State, 303 Ga. App. 149, 692 S.E.2d 758 (2010) (decided under former O.C.G.A. § 24-4-6).

Reasonable hypothesis rule regarding circumstantial evidence under former O.C.G.A. § 24-4-6 did not apply in a defendant's trial for the murder and involuntary manslaughter of defendant's 17-month-old son because the evidence was not entirely circumstantial, given the defendant's direct admissions that the defendant had shaken defendant's son to make the child stop crying. Lewis v. State, 304 Ga. App. 831, 698 S.E.2d 365 (2010) (decided under former O.C.G.A. § 24-4-6).

Trial court failed to give a complete jury charge on circumstantial evidence because the evidence against the defendant was both direct and circumstantial and, thus, the statutory language of former O.C.G.A. § 24-4-6 was not required. Ev-

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ans v. State, 288 Ga. 571, 707 S.E.2d 353 (2011) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in refusing to give a requested jury instruction based on former O.C.G.A. § 24-4-6, concerning a conviction based on circumstantial evidence because such a charge was not warranted since the state's evidence supporting the defendant's conviction was not circumstantial; the state relied on direct evidence in the form of the eyewitness testimony of the two police officers. Crawford v. State, 314 Ga. App. 796, 726 S.E.2d 58 (2012) (decided under former O.C.G.A. § 24-4-6).

Trial court properly denied the defendant's motion for a new trial premised on the defendant's contention that the defendant was rendered ineffective assistance of counsel due to defense counsel failing to request a jury charge because the state adduced both direct eyewitness testimony and circumstantial evidence at trial in the case, thus, the trial court was not required to charge the jury on circumstantial evidence pursuant to former O.C.G.A. § 24-4-6. Russell v. State, 319 Ga. App. 472, 735 S.E.2d 797 (2012) (decided under former O.C.G.A. § 24-4-6).

Charge not required when guilt is the only reasonable hypothesis. — Even in a case which is wholly dependent on circumstantial evidence, if from the proved facts only one reasonable hypothesis presents itself, i.e., that the defendant is guilty of the offense charged, then a failure to charge former O.C.G.A. § 24-4-6 does not furnish cause for a new trial. Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977) (decided under former Code 1933, § 38-109). But see Stewart v. State, 232 Ga. App. 565, 502 S.E.2d 502 (1998) (decided under former O.C.G.A. § 24-4-6).

Better practice to charge statute on circumstantial evidence when the evidence upon which the state depends for conviction is both direct and circumstantial. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-109); Jackson v. State, 92 Ga. App. 774, 90 S.E.2d 29 (1955) (decided under former Code 1933, § 38-109); Ramsey v. State, 212 Ga. 381, 92 S.E.2d 866 (1956) (decided under former Code 1933, § 38-109); Holton v. State, 192 Ga. App. 745, 386 S.E.2d 404 (1989) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence charge should have been given. — When state introduced circumstantial as well as direct evidence in the state's case against defendant, defendant was entitled to have defendant's requested charge on circumstantial evidence given to the jury. Mims v. State, 264 Ga. 271, 443 S.E.2d 845 (1994) (decided under former O.C.G.A. § 24-4-6).

A trial court's failure to give the circumstantial evidence charge under former O.C.G.A. § 24-4-6 constituted reversible error, even though the defendant failed to request such a charge, because the evidence against the defendant in a cocaine trafficking case under O.C.G.A. § 16-13-31(a)(1) was entirely circumstantial based on the defendant's participation in the crime with the defendant's sibling and a third party. Martinez v. State, 303 Ga. App. 71, 692 S.E.2d 737 (2010) (decided under former O.C.G.A. § 24-4-6).

Charging precise language of statute unnecessary. — Failure of the court to charge the law of circumstantial evidence in the exact language of the statute is not error. Sellers v. State, 36 Ga. App. 653, 137 S.E. 912 (1927) (decided under former Penal Code 1910, § 1010); Thompson v. State, 166 Ga. 512, 143 S.E. 896 (1928) (decided under former Penal Code 1910, § 1010); Brent v. State, 44 Ga. App. 777, 163 S.E. 319 (1932) (decided under former Penal Code 1910, § 1010); Pound v. State, 180 Ga. 83, 178 S.E. 291 (1935) (decided under former Code 1933, § 38-109); Rowland v. State, 51 Ga. App. 54, 179 S.E. 585 (1935) (decided under former Code 1933, § 38-109); Sanders v. State, 71 Ga. App. 334, 30 S.E.2d 810 (1944) (decided under former Code 1933, § 38-109); Townsend v. State, 86 Ga. App. 459, 71 S.E.2d 738 (1952) (decided under former Code 1933, § 38-109); Roman v. State, 155 Ga. App. 355, 271 S.E.2d 21 (1980) (decided under former Code 1933, § 38-109).

Trial court need not track the exact language of former O.C.G.A. § 24-4-6 in

order to satisfy the requirement that the jury be instructed on the principle of the sufficiency of circumstantial evidence to warrant a conviction. Price v. State, 180 Ga. App. 215, 348 S.E.2d 740 (1986) (decided under former O.C.G.A. § 24-4-6).

Trial court was not required to give the exact language of former O.C.G.A. § 24-4-6 in the court's charge to the jury. Richards v. State, 189 Ga. App. 146, 375 S.E.2d 278 (1988) (decided under former O.C.G.A. § 24-4-6).

Charge on circumstantial evidence which added the word "alone" to the statutory phrase "to warrant a conviction on circumstantial evidence," was the functional equivalent of the statutory language because the trial court did not have to track the exact language in order to properly instruct the jury on the principle contained therein. Lowe v. State, 267 Ga. 180, 476 S.E.2d 583 (1996) (decided under former O.C.G.A. § 24-4-6); Wynn v. State, 236 Ga. App. 98, 511 S.E.2d 201 (1999) (decided under former O.C.G.A. § 24-4-6); Morris v. State, 239 Ga. App. 100, 520 S.E.2d 485 (1999) (decided under former O.C.G.A. § 24-4-6).

When a circumstantial evidence charge given to the jury added the word "alone" to the phrase "to warrant a conviction on circumstantial evidence," it was the functional equivalent of the rule contained in former O.C.G.A. § 24-4-6 and was not error. Martin v. State, 235 Ga. App. 844, 510 S.E.2d 602 (1998) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in giving a circumstantial evidence charge that was the functional equivalent of former O.C.G.A. § 24-4-6 since the trial court added the word "alone" twice, substituted the word "theory" for "hypothesis," and amplified upon the statutory language. Johnson v. State, 251 Ga. App. 455, 554 S.E.2d 587 (2001) (decided under former O.C.G.A. § 24-4-6).

Failure to track statute's language held to be error. — Even though the trial court instructed the jury on the definitions of direct and circumstantial evidence and the difference between them, its refusal to give defendant's requested charge tracking the language of former O.C.G.A. § 24-4-6 was reversible error. Waits v. State, 232 Ga. App. 357, 501 S.E.2d 870 (1998) (decided under former O.C.G.A. § 24-4-6).

Charge using the statutory language satisfied the requirement that, where the state's case depends, in whole or in part, on circumstantial evidence, a charge on the law of circumstantial evidence must be given on request. Wiley v. State, 238 Ga. App. 334, 519 S.E.2d 10 (1999) (decided under former O.C.G.A. § 24-4-6).

When the defendant makes incriminatory statements after the victim's death, the case is not one depending entirely upon circumstantial evidence. Stewart v. State, 163 Ga. App. 735, 295 S.E.2d 112 (1982) (decided under former O.C.G.A. § 24-4-6); Yarborough v. State, 183 Ga. App. 198, 358 S.E.2d 484 (1987) (decided under former O.C.G.A. § 24-4-6).

Instruction defining circumstantial evidence and its weight approved. — Following instruction was entirely consistent with former O.C.G.A. § 24-4-6: "Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may infer other related or connected facts which are reasonable and justified in the light of your experience. Circumstantial evidence alone will not justify a finding of guilt unless the circumstances are entirely consistent with the defendant's guilt, wholly inconsistent with any reasonable theory of the defendant's innocence, and are so convincing as to exclude a reasonable doubt of the defendant's guilt." Carpenter v. State, 167 Ga. App. 634, 307 S.E.2d 19 (1983), aff'd, 252 Ga. 79, 310 S.E.2d 912 (1984) (decided under former O.C.G.A. § 24-4-6).

Court's instruction was proper which instructed the jury concerning the differences between direct and circumstantial evidence and charged that the comparative weight of circumstantial evidence and direct evidence on any given issue is a question of fact for the jury to decide. Grier v. State, 217 Ga. App. 409, 458 S.E.2d 139 (1995) (decided under former O.C.G.A. § 24-4-6).

Defendant's request that the court give a "two theories" charge did not constitute a request for a charge on circumstantial evidence. Grier v. State, 217

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Ga. App. 409, 458 S.E.2d 139 (1995) (decided under former O.C.G.A. § 24-4-6).

Charge language describing two equal theories. — Charge language describing two equal theories, one of guilt and the other of innocence, did not accurately state the principle addressed. The charge related to the weight of the evidence and therefore was not an accurate statement of the "two theories" principle. Langston v. State, 208 Ga. App. 175, 430 S.E.2d 365 (1993) (decided under former O.C.G.A. § 24-4-6); Blue v. State, 212 Ga. App. 847, 433 S.E.2d 635 (1994) (decided under former O.C.G.A. § 24-4-6).

Defendant was not entitled to an instruction that, when the facts, evidence and all reasonable deductions therefrom present two reasonable theories, one of guilt and the other consistent with innocence, the justice and humanity of the law compels acceptance of the theory which is consistent with innocence; the requested charge was not substantially equivalent to the principle set forth in former O.C.G.A. § 24-4-6. Jones v. State, 213 Ga. App. 11, 444 S.E.2d 89 (1994) (decided under former O.C.G.A. § 24-4-6).

When the trial court properly charged the jury on the law of circumstantial evidence, the presumption of innocence and the need to prove the defendant's guilt beyond a reasonable doubt, it was not error to refuse to give the "two theories" charge. Stephens v. State, 214 Ga. App. 183, 447 S.E.2d 26 (1994) (decided under former O.C.G.A. § 24-4-6).

It is never error to refuse to give a requested "two equal theories" charge when a trial court properly instructs the jury on circumstantial evidence. Smith v. State, 264 Ga. 857, 452 S.E.2d 494 (1995) (decided under former O.C.G.A. § 24-4-6); Mitchell v. State, 233 Ga. App. 92, 503 S.E.2d 293 (1998) (decided under former O.C.G.A. § 24-4-6).

Failure to charge circumstantial evidence harmless error since the case is not close or doubtful and the charge on reasonable doubt is full and fair. Germany v. State, 235 Ga. 836, 221 S.E.2d 817 (1976) (decided under former Code 1933, § 38-109); Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977) (decided under former Code 1933, § 38-109). But see Stewart v. State, 232 Ga. App. 565, 502 S.E.2d 502 (1998) (decided under former Code 1933, § 38-109); Playmate Cinema, Inc. v. State, 154 Ga. App. 871, 269 S.E.2d 883 (1980) (decided under former Code 1933, § 38-109); Hinton v. State, 215 Ga. App. 750, 452 S.E.2d 519 (1994) (decided under former O.C.G.A. § 24-4-6); Livery v. State, 233 Ga. App. 882, 506 S.E.2d 165 (1998) (decided under former O.C.G.A. § 24-4-6); Burks v. State, 246 Ga. App. 22, 538 S.E.2d 769 (2000) (decided under former O.C.G.A. § 24-4-6).

Trial court's failure to instruct a jury on the burden of proof required to convict defendant of armed robbery with circumstantial evidence was harmless error given the overwhelming direct evidence of defendant's guilt, which included a videotape of the robbery, defendant's parent's identification of defendant as the person on the videotape with a gun, and defendant's accomplice's confession and implication of defendant in the crime. Bradwell v. State, 262 Ga. App. 651, 586 S.E.2d 355 (2003) (decided under former O.C.G.A. § 24-4-6).

Although the state's case against the defendant was based on both direct and circumstantial evidence, the trial court's failure to give the requested jury charge on circumstantial evidence under former O.C.G.A. § 24-4-6 was harmless error given the overwhelming evidence of guilt. Gregory v. State, 277 Ga. App. 664, 627 S.E.2d 79 (2006) (decided under former O.C.G.A. § 24-4-6).

With regard to defendant's malice murder conviction, the trial court did not err by refusing to give defendant's requested jury instruction in the language of former O.C.G.A. § 24-4-6, which provided that a conviction based on circumstantial evidence could be affirmed only if every reasonable hypothesis other than guilt was excluded, as defendant's admission to having shot the victim, but claiming self-defense, removed the case from that rule. Even assuming that the state introduced circumstantial evidence to establish some item of proof, and that defendant's requested charge should have been given, any error was harmless in light of

the overwhelming evidence of guilt. Thompson v. State, 283 Ga. 581, 662 S.E.2d 124 (2008) (decided under former O.C.G.A. § 24-4-6).

Failure to charge reversible error. — Failure to give the defendant's requested charge, which tracked former O.C.G.A. § 24-4-6, and instructed the jury that, to warrant a conviction on circumstantial evidence, the facts must exclude every reasonable theory other than guilt of the accused, was reversible error in a driving under the influence case, since the officer's opinion that the defendant was impaired was based on circumstantial evidence. Taylor v. State, 278 Ga. App. 181, 628 S.E.2d 611 (2006) (decided under former O.C.G.A. § 24-4-6).

As the defendant's request to charge directed the trial court to the language in the pattern jury instructions on circumstantial evidence, which was a proper statement of the law as set forth in former O.C.G.A. § 24-4-6, the case largely depended on circumstantial evidence, and evidence of the defendant's guilt was not overwhelming, the failure to give the requested instruction was reversible error. Davis v. State, 285 Ga. 176, 674 S.E.2d 879 (2009) (decided under former O.C.G.A. § 24-4-6).

Defendant's conviction for serving alcohol to a minor, under O.C.G.A. § 3-3-23(a)(1), was reversed because: (1) the state relied on circumstantial evidence to show that defendant knowingly served alcohol to a minor; and (2) the trial court erroneously refused defendant's request for an instruction on circumstantial evidence under former O.C.G.A. § 24-4-6. Butler v. State, 298 Ga. App. 129, 679 S.E.2d 361 (2009) (decided under former O.C.G.A. § 24-4-6).

Effect of jury discrediting direct evidence. — When the only direct evidence comes from a witness who the jury was authorized to find had been impeached, and the trial court properly instructed the jury on the law of impeachment, it is error requiring the grant of a new trial for the trial court to fail to instruct the jury on the law of circumstantial evidence. Horne v. State, 93 Ga. App. 345, 91 S.E.2d 824 (1956) (decided under former Code 1933, § 38-109); Gibson v. State, 150 Ga. App. 718, 258 S.E.2d 537 (1979) (decided under former Code 1933, § 38-109).

It was not erroneous for the court, in the absence of a timely and appropriate request, to omit to charge the law of circumstantial evidence to be applied in the event the jury should not believe that the confession which had been introduced into evidence had been made. Ellis v. State, 51 Ga. App. 557, 181 S.E. 87 (1935) (decided under former Code 1933, § 38-109).

Elaboration unnecessary. — When the judge sufficiently covered the provisions of the former statute in the judge's charge to the jury, refusal of a request to elaborate upon the former statute was not error. Reynolds v. State, 170 Ga. 810, 154 S.E. 229 (1930) (decided under former Penal Code 1910, § 1010); Dacus v. State, 56 Ga. App. 439, 193 S.E. 93 (1937) (decided under former Code 1933, § 38-109); Flynn v. State, 77 Ga. App. 791, 50 S.E.2d 91 (1948) (decided under former Code 1933, § 38-109).

Extraneous charge concerning circumstantial evidence. — Charge relating to circumstantial evidence, if erroneous because of contention that only direct evidence was introduced, was not injurious to the accused, as it gave a rule more favorable than the accused could claim. Latimer v. State, 188 Ga. 775, 4 S.E.2d 631 (1939) (decided under former Code 1933, § 38-109).

Charge invading province of jury. — When in a prosecution for possession of beer for purposes of sale, charge to the jury that frequent presence of quantities of beer was sufficient to meet the circumstantial evidence rule was error in that it constituted an invasion of the province of the jury. Crider v. State, 98 Ga. App. 164, 105 S.E.2d 506 (1958) (decided under former Code 1933, § 38-109).

Charge containing opinion of court. — When in prosecution for larceny the state's evidence was wholly circumstantial, charge that the state had introduced evidence tending to establish the fact that the defendant was guilty of the charge was clearly, though inadvertently, an intimation of the court's opinion as to what had been proved in the case and constituted reversible error. Rowland v. State, 71 Ga. App. 154, 30 S.E.2d 368

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(1944) (decided under former Code 1933, § 38-109).

Failure to recharge not error. — When the court defined direct and circumstantial evidence and then charged when circumstantial evidence was sufficient to convict after a conviction is sought on circumstantial evidence, an omission to recharge the law of circumstantial evidence in immediate connection with the law of reasonable doubt did not amount to an expression of opinion that direct evidence had been introduced, and did not exclude from the consideration of the jury the law that requires the evidence to be sufficient to exclude every reasonable hypothesis save that of the guilt of the accused before a conviction would be authorized in a case depending upon circumstantial evidence only. Lucas v. State, 48 Ga. App. 42, 171 S.E. 850 (1933) (decided under former Code 1933, § 38-109).

Charge using "should" instead of "must", in quoting the former statute, did not require a new trial. Adams v. State, 34 Ga. App. 144, 128 S.E. 924 (1925) (decided under former Penal Code 1910, § 1010); Poulos v. State, 71 Ga. App. 730, 32 S.E.2d 101 (1944) (decided under former Code 1933, § 38-109).

Effect of admission. — Rule of the former statute should not have been omitted from the instructions to the jury since the state relied wholly on circumstantial evidence and on an admission. Harvey v. State, 111 Ga. App. 279, 141 S.E.2d 604 (1965) (decided under former Code 1933, § 38-109).

Instruction held not erroneous. — When the trial court charged the jury that "when the facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, justice and humanity of the law compel the acceptance of the theory that is consistent with innocence," instruction was at least as beneficial to defendant if not more so, than a charge in the exact language of former O.C.G.A. § 24-4-6, and thus was not error. Price v. State, 180 Ga. App. 215, 348 S.E.2d 740 (1986) (decided under former O.C.G.A. § 24-14-6).

In a prosecution for burglary, the trial court did not err in giving an instruction as to recent possession of stolen property after a charge on circumstantial evidence. Martin v. State, 228 Ga. App. 59, 491 S.E.2d 142 (1997) (decided under former O.C.G.A. § 24-14-6).

Direct evidence was presented in the following cases, obviating the need to charge circumstantial evidence. — See Ellis v. State, 51 Ga. App. 557, 181 S.E. 87 (1935) (confession) (decided under former Code 1933, § 38-109); Gilder v. State, 52 Ga. App. 252, 183 S.E. 95 (1935) (presumption derived from direct evidence) (decided under former Code 1933, § 38-109); Kittle v. State, 54 Ga. App. 231, 187 S.E. 611 (1936) (confession) (decided under former Code 1933, § 38-109); Walker v. State, 63 Ga. App. 297, 11 S.E.2d 45 (1940) (confession) (decided under former Code 1933, § 38-109); Summers v. State, 63 Ga. App. 445, 11 S.E.2d 409 (1940) (testimony that contract never existed) (decided under former Code 1933, § 38-109); Wilson v. State, 76 Ga. App. 257, 45 S.E.2d 709 (1947) (admission) (decided under former Code 1933, § 38-109); Lyons v. State, 90 Ga. App. 25, 81 S.E.2d 890 (1954) (statement of guilt) (decided under former Code 1933, § 38-109); Ryals v. State, 193 Ga. App. 68, 387 S.E.2d 33 (1989) (confession) (decided under former O.C.G.A. § 24-4-6); Brown v. State, 214 Ga. App. 481, 448 S.E.2d 259 (1994) (child molestation) (decided under former O.C.G.A. § 24-4-6).

Instruction not warranted when evidence is not entirely circumstantial. — When a case is not entirely based on circumstantial evidence, a requested charge on circumstantial evidence is not warranted. Fuller v. State, 166 Ga. App. 734, 305 S.E.2d 463 (1983) (decided under former O.C.G.A. § 24-4-6).

When there is direct evidence, the trial court does not err by not also charging that the defendant's explanation must be taken into consideration insofar as it is consistent with the circumstantial evidence properly admitted. Brown v. State, 251 Ga. 598, 308 S.E.2d 182 (1983) (decided under former O.C.G.A. § 24-4-6); Preston v. State, 183 Ga. App. 20, 357 S.E.2d 825, cert. denied, 183 Ga. App. 906,

357 S.E.2d 825 (1987) (decided under former O.C.G.A. § 24-4-6).

When the state's case included both direct and circumstantial evidence and the defendant did not request a charge on circumstantial evidence, the failure of the court to give such a charge was not error. Livery v. State, 233 Ga. App. 882, 506 S.E.2d 165 (1998) (decided under former O.C.G.A. § 24-4-6).

No direct evidence presented in the following cases, hence charge on circumstantial evidence was required. — Turner v. State, 40 Ga. App. 662, 151 S.E. 120 (1929) (possession of stolen goods in burglary or larceny case) (decided under former law); Hodges v. State, 52 Ga. App. 378, 183 S.E. 216 (1936) (whiskey on property adjoining defendant's) (decided under former Code 1933, § 38-109); De Loach v. State, 57 Ga. App. 799, 196 S.E. 924 (1938) (possession of stolen goods in larceny case) (decided under former Code 1933, § 38-109).

Sufficiency of Circumstantial Evidence

Sufficiency is for jury even though all evidence is circumstantial. — When, at the close of the state's case, all six defendants move for directed verdicts of acquittal, if there is any evidence of guilt, it is for the jury to decide whether that evidence, circumstantial though it may be, is sufficient to warrant a conviction. Castillo v. State, 166 Ga. App. 817, 305 S.E.2d 629 (1983) (decided under former O.C.G.A. § 24-4-6).

Defendant must be connected with criminal act. Newman v. State, 26 Ga. 633 (1859) (decided under former law); Griffin v. State, 2 Ga. App. 534, 58 S.E. 781 (1907) (decided under former Penal Code 1895, § 984); Dougherty v. State, 7 Ga. App. 91, 66 S.E. 276 (1909) (decided under former Penal Code 1895, § 984).

Despite defendant's assertion that the evidence against the defendant was completely circumstantial and did not exclude every reasonable hypothesis save that of the defendant's guilt, any inconsistencies in the evidence presented were for the jury to resolve, and resolution of such conflicts did not render the evidence insufficient. Sims v. State, 278 Ga. 587, 604 S.E.2d 799 (2004) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for DUI conviction. — When evidence of defendant's intoxication may have been circumstantial in nature, but the defense put up no evidence of a reasonable alternative hypothesis, and the arguments that were offered by the defense were rejected by the jury, the evidence was sufficient to find that defendant was intoxicated so as to support a DUI conviction. Green v. State, 244 Ga. App. 565, 536 S.E.2d 240 (2000) (decided under former O.C.G.A. § 24-4-6).

Sufficient circumstantial evidence existed to support the defendant's convictions given that: (1) the defendant admitted to drinking and driving the vehicle that an officer testified to as having a warm engine; (2) the defendant had slurred speech, bloodshot eyes, and swaying movements; and (3) the surrounding circumstances helped to show that the defendant had been drinking and driving recently enough to satisfy the three-hour requirement under O.C.G.A. § 40-6-391(a)(5). O'Connell v. State, 285 Ga. App. 835, 648 S.E.2d 147 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient to show knowledge that car was unregistered. — Evidence that a defendant received and drove a car following the defendant's father's death was insufficient to prove a violation of O.C.G.A. § 40-6-15 because there was no evidence from which the jury could infer that the defendant knew that the car was not registered. Lawson v. State, 313 Ga. App. 751, 722 S.E.2d 446 (2012) (decided under former O.C.G.A. § 24-4-6).

Defendant's conviction of murder and armed robbery was supported by sufficient evidence; pursuant to former O.C.G.A. § 24-4-6, to sustain a conviction based on circumstantial evidence, the evidence had to exclude all reasonable hypotheses other than the defendant's guilt, and there was sufficient evidence from which a rational trier of fact could have excluded all reasonable hypotheses other than defendant's guilt, based on the facts that defendant was the last person in the victim's store on the night of the murder, the victim's blood was found on defen-

Sufficiency of Circumstantial Evidence (Cont'd)

dant's shoes, and defendant began spending money heavily after the crime even though the defendant did not have a job at the time. Bibbs v. State, 275 Ga. 659, 571 S.E.2d 770 (2002) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for armed robbery conviction. — Although defendant was convicted on circumstantial evidence, the conviction was properly supported by that evidence as the facts that were proven at trial were not only consistent with the hypothesis of guilt, but excluded every other reasonable hypothesis save that of the guilt of defendant since the defendant could not explain the presence of a distinctive boot print on the bathroom floor of the store defendant was accused of burglarizing, the presence of defendant's fingerprints on the bathroom wall seven feet off the ground, or defendant's fingerprints on a drink bottle in a space above the bathroom ceiling where defendant had hidden while defendant waited for the store to close so defendant could commit an armed robbery of the store. Lighten v. State, 259 Ga. App. 280, 576 S.E.2d 658 (2003) (decided under former O.C.G.A. § 24-4-6).

From the defendant's words, demeanor, companionship, and conduct before and after an armed robbery, a jury could have concluded beyond a reasonable doubt that the state established the requisite intent; the evidence authorized the jury to find that before an armed robbery, the defendant had planned to take money from a convenience store, the defendant's accomplice went into the store, took the money from the clerk at gunpoint, and then joined the defendant with the money, and that when the cohorts realized moments later that the police suspected the pair of the armed robbery, the defendant disobeyed police commands to stop, acted as the getaway driver in a high speed chase, and then tried to flee the police on foot. Espinosa v. State, 285 Ga. App. 69, 645 S.E.2d 529 (2007), cert. denied, No. S07C1281, 2007 Ga. LEXIS 760 (Ga. 2007) (decided under former O.C.G.A. § 24-4-6).

Rational trier of fact was authorized to find the defendant guilty beyond a reasonable doubt of being a party to the crime of robbery in violation of O.C.G.A. §§ 16-2-20 and 16-8-40 because the defendant's admission that the defendant was present at the scene of the robbery, in conjunction with the defendant's possession of the recently stolen item, which the jury could find was unsatisfactorily explained by defendant, was sufficient to support the defendant's robbery conviction; the jury was entitled to reject the defendant's version of events because although the defendant contended that the defendant's videotaped police interview and defendant's trial testimony created a reasonable hypothesis of innocence, defendant's interview and trial testimony were not consistent with one another in all material respects, and defendant's statements also were inconsistent with the testimony of the pursuing patrol officers. Boggs v. State, 304 Ga. App. 698, 697 S.E.2d 843 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence of the circumstances was sufficient to establish the defendant's identity as the perpetrator and the defendant's guilt of armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106, because the defendant matched the description of the perpetrator given by both a convenience store clerk and another store employee; when the defendant was apprehended, an officer recovered next to the defendant's person the contraband and instrumentalities used in the commission of the robbery. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for armed robbery conviction. — Evidence was insufficient to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41(a) because the evidence supported two equally reasonable hypotheses, which did not meet the standard of former O.C.G.A. § 24-4-6; there was no direct evidence regarding where the victim was when the defendant entered the victim's kitchen, and there was

no evidence, like signs of forced entry, from which the jury could have reasonably inferred that the victim heard and confronted the defendant before the defendant could take anything or that the victim usually kept the victim's wallet on the victim's person or in the victim's bedroom, which could support an inference that the defendant had to confront the victim before taking the wallet. Fox v. State, 289 Ga. 34, 709 S.E.2d 202 (2011) (decided under former O.C.G.A. § 24-4-6).

Defendant's armed robbery conviction had to be overturned because the evidence failed to establish that the victim's debit card was taken with force before or contemporaneous with the taking, and the evidence failed to establish whether the defendant first took the debit card and then killed the victim or whether the defendant killed the victim and then took the debit card; the evidence incriminating the defendant of armed robbery was wholly circumstantial, and both scenarios were equally reasonable. Johnson v. State, 288 Ga. 771, 707 S.E.2d 92 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for assault and rape conviction. — State presented direct evidence of the defendant's assault and rape of the victim in the form of the victim's testimony, and thus former O.C.G.A. § 24-4-6 did not apply, and the state was not required to exclude every reasonable hypothesis save that of guilt. Tarver v. State, 280 Ga. App. 89, 633 S.E.2d 415 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for aggravated sexual battery conviction. — Circumstantial evidence that a defendant chastised the defendant's two-year-old child for soiling a diaper by poking the child's anus with a stick, resulting in perineal lacerations, was sufficient to support a conviction for aggravated sexual battery in violation of O.C.G.A. § 16-6-22.2(b). Viers v. State, 303 Ga. App. 387, 693 S.E.2d 526 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for conviction of sexual exploitation. — Evidence was sufficient to convict the defendant of five counts of sexual exploitation of children beyond a reasonable doubt because the evidence was more than sufficient to exclude every reasonable hypothesis that someone other than the defendant possessed a USB drive containing explicit sexual images of children, which was found at a hotel; given the testimony of a forensic computer specialist, coupled with the fact that the defendant possessed several computers, a digital camera, and another USB drive in the defendant's home in Arkansas, a rational trier of fact could find that the defendant inadvertently left the USB drive on the fifth floor of the hotel, and the jury could also conclude that the defendant knowingly possessed material depicting minors engaged in sexually explicit conduct in light of evidence that sexually explicit images of children were saved to the USB drive within seconds of the time two photographs of the defendant were saved to that drive. Hunt v. State, 303 Ga. App. 855, 695 S.E.2d 53 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for armed robbery and aggravated assault conviction. — When the testimonies of the victim, a doctor, and other witnesses were a sufficient indication under former O.C.G.A. § 24-4-6 of the severity of the blow to show that a bludgeon device was used as an offensive weapon, there was sufficient competent evidence to find defendant guilty of armed robbery and aggravated assault under O.C.G.A. §§ 16-5-21(a) and 16-8-41(a). Garrett v. State, 263 Ga. App. 310, 587 S.E.2d 794 (2003) (decided under former O.C.G.A. § 24-4-6).

Ample evidence concerning the child victim's condition and expert testimony regarding the child's condition was presented to authorize the jury to find defendant guilty of committing felony murder by holding the child in scalding water, and guilty of committing cruelty to a child by failing to provide medical attention, and to reject the evidence and hypotheses defendant presented in an attempt to refute the charges. Robles v. State, 277 Ga. 415, 589 S.E.2d 566 (2003) (decided under former O.C.G.A. § 24-4-6).

Despite the defendant's claim of innocence, convictions for armed robbery and two counts of aggravated assault were

Sufficiency of Circumstantial Evidence (Cont'd)

upheld on appeal, given sufficient evidence showing that the defendant waited at the scene of the robbery and then assisted the codefendants in an attempted escape; hence, the defendant was not entitled to a directed verdict of acquittal and the state was not required to exclude every reasonable hypothesis except guilt as required by O.C.G.A. § 24-4-6. Jordan v. State, 281 Ga. App. 419, 636 S.E.2d 151 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for kidnapping conviction. — Because the eyewitness testimony showed that the defendant pushed, pulled, and then carried the victim out of a restaurant as the victim yelled for a coworker to call the police, and which was direct, not circumstantial, evidence that the victim did not go with the defendant willingly, sufficient evidence supported the defendant's kidnapping conviction. Holden v. State, 287 Ga. App. 472, 651 S.E.2d 552 (2007), cert. denied, No. S08C0189, 2008 Ga. LEXIS 153 (Ga. 2008) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for shoplifting conviction. — Evidence was sufficient to support the defendant's convictions on three counts of shoplifting following eyewitness testimony that the defendant had concealed cologne bottles under the defendant's shirt at a drugstore and had walked out of a grocery store carrying items that had not been paid for supported two of the counts; also, testimony that video games had been taken from a video store without being purchased, and that the defendant had the games on the defendant's person about 20 minutes after leaving the video store and at the time of the defendant's apprehension for shoplifting at the drug store was sufficient circumstantial evidence to exclude every reasonable hypothesis of the defendant's innocence under former O.C.G.A. § 24-4-6. Crosby v. State, 287 Ga. App. 109, 650 S.E.2d 775 (2007) (decided under former O.C.G.A. § 24-4-6).

To the extent that a defendant's criminal intent to commit a shoplifting could only be shown by circumstantial evidence, based on the uncontroverted direct evidence that the defendant and the defendant's accomplice took a cart with merchandise into a restricted area, lied about their purpose of being in the area, surveyed various emergency exits from the store defendants were in, abandoned the merchandise when an emergency exit jammed, and lacked any means for paying for the merchandise, no reasonable hypothesis for the defendant's innocence existed that was consistent with the evidence. Alford v. State, 292 Ga. App. 514, 664 S.E.2d 870 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for marijuana conviction. — There was sufficient evidence to support a defendant's conviction for possession of more than an ounce of marijuana as although the evidence of the defendant's constructive possession of the marijuana found in a shoebox in the backseat of the car the defendant was operating was circumstantial, it was within the jury's province to exclude every other reasonable hypothesis other than the defendant's guilt. The car owner testified that the owner did not possess the vehicle for over three months and the defendant's passenger testified that the marijuana did not belong to the passenger, thus, the jury was entitled to find that the proved facts excluded the possibility that the car owner left the marijuana on the backseat where the marijuana had gone unnoticed for several months or that the passenger had left the marijuana in the backseat. Prather v. State, 293 Ga. App. 312, 667 S.E.2d 113 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to authorize the defendant's conviction for possessing more than one ounce of marijuana because the defendant was presumed to have exclusive possession and control of the marijuana that a police officer found in the car the defendant was driving; as the factfinder, the jury was entitled to reject the testimony of the defendant's friend that the marijuana was the friend's and to determine that the presumption of the defendant's possession of the marijuana had not been rebutted. Nix v. State, 312 Ga. App. 43, 717 S.E.2d 550 (2011) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in convicting the defendants of felony possession of more than one ounce of marijuana in violation of O.C.G.A. § 16-13-30(j)(1) because the trial court was authorized to conclude that the defendants had equal access to and joint constructive possession of the marijuana that was found in a minivan and that the defendants participated as parties to the drug possession offense; the defendants, who were passengers in the back of the minivan, knew that marijuana was inside the minivan, and the driver informed an officer that the passengers were hiding marijuana inside the minivan. Dennis v. State, 313 Ga. App. 595, 722 S.E.2d 190 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession with intent to distribute. — Evidence of a defendant's unusual behavior in lifting up and kneeling next to the only doghouse in a dog pen that concealed contraband, the defendant's attempt to hide in the bushes when law enforcement officers arrived, and the defendant's previous history of selling drugs to passers-by from the same property, provided sufficient evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that the defendant had knowledge of the presence of the contraband, access to it, and the power and intention to exercise control over it. Price v. State, 303 Ga. App. 859, 694 S.E.2d 712 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to establish the defendant's conviction for possession of marijuana with intent to distribute in violation of O.C.G.A. § 16-13-30(j)(1) because during the execution of a search warrant at the defendant's residence, police officers seized eighteen baggies of marijuana individually packaged in a manner that was indicative of possession with intent to distribute, and the residence belonged to the defendant, which permitted an inference that the defendant controlled the premises and was in constructive possession of the drug contraband; the circumstantial evidence implied the defendant's consciousness of guilt and further supported the defendant's conviction because when the officers approached the residence, the defendant fled inside to the closet area where the drugs were later located, and when the officers searched the closet, the officers discovered that the jacket the defendant had been wearing was placed over the box containing the drugs. Williams v. State, 303 Ga. App. 222, 692 S.E.2d 820 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to support the defendant's conviction for possession with intent to distribute marijuana because the defendant was in possession of clear, plastic baggies, smaller baggies of suspected marijuana, a digital scale, and cash, and a police officer testified that in the officer's capacity as a marijuana tester for the county sheriff's office, the officer tested a total of 11 bags, containing approximately 190 grams of a substance that tested positive for marijuana; possession of a scale, baggies, and large amounts of currency along with drugs can constitute circumstantial evidence of intent to distribute. Hardaway v. State, 309 Ga. App. 432, 710 S.E.2d 634 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient to show substance cocaine. — Trial court did not err in revoking probation on the ground that the probationer committed the felony offense of possession of cocaine with intent to distribute because the trial court did not manifestly abuse the court's discretion when the court found by a preponderance of the evidence that the substance found in the car in which the probationer was riding was cocaine; in addition to an officer's opinion on the identity of the substance, the record contained other circumstantial evidence indicating that the substance was cocaine, and the circumstantial evidence of the substance's identity was not offered to convict the probationer of possession of cocaine, but was offered to show that the probationer had violated a term of probation and, as such, was subject to a different standard of proof. Thurmond v. State, 304 Ga. App. 587, 696 S.E.2d 516 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient to convict defendant of possession of cocaine with intent to distribute. — There was insufficient evidence of intent to convict the defendant of possession of cocaine with

Sufficiency of Circumstantial Evidence (Cont'd)

intent to distribute under O.C.G.A. § 16-13-30 as there was no evidence that the cocaine had been divided and packaged for individual sale or as to a personal use quantity; thus, the circumstantial evidence did not permit a rational trier to exclude the reasonable hypothesis, pursuant to former O.C.G.A. § 24-4-6, that the defendant intended to use the cocaine. Florence v. State, 282 Ga. App. 31, 637 S.E.2d 779 (2006) (decided under former O.C.G.A. § 24-4-6).

While the evidence was sufficient to convict the defendant of possession of cocaine found in a pill bottle in the defendant's vehicle, it was insufficient to prove that the defendant intended to distribute the cocaine under O.C.G.A. § 16-13-30(b) because the state produced no evidence that the defendant had scales, cutting implements, weapons, a large amount of cash, a customer list, or drug packaging materials; there was no evidence of prior convictions of drug possession with intent to distribute, no testimony that the defendant was seen selling or trying to sell drugs, no expert testimony that the amount of drugs seized was inconsistent with personal use, and no evidence as to the amount of cocaine seized. Under former O.C.G.A. § 24-4-6, storing drugs in a pill bottle, and possessing an unidentified number of sales-size pieces of the drug, without more, equally supported the hypothesis that the person found with the drugs was a user rather than a dealer. Hicks v. State, 293 Ga. App. 830, 668 S.E.2d 474 (2008) (decided under former O.C.G.A. § 24-4-6).

Codefendant's convictions for possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), and possession with intent to distribute a controlled substance within 1,000 feet of a housing project, O.C.G.A. § 16-13-32.5(b), was unsupportable as a matter of law, and the trial court erred by denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence and the reasonable inferences derived therefrom were insufficient to connect the codefendant to the cocaine, which was found in an upstairs bedroom occupied by the codefendants; no evidence was introduced to show that the codefendant resided in the apartment where the cocaine was found, which could authorize an inference that the codefendant possessed the property therein. Jackson v. State, 306 Ga. App. 33, 701 S.E.2d 481 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession of dangerous drugs conviction. — Jury was authorized to conclude that the defendant intended to possess a dangerous drug in violation of the Dangerous Drug Act, O.C.G.A. § 16-13-72, even if the defendant was subjectively unaware of the precise chemical compound in the bottle and its regulated nature because there was evidence supporting an inference that the defendant used a dangerous drug to sedate the defendant's sexual battery victim, and that conduct demonstrated the defendant's knowledge of the harmful effect of the compound; the term "dangerous drug" was defined to include alkyl nitrite, which was the compound the defendant possessed. Serna v. State, 308 Ga. App. 518, 707 S.E.2d 904 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for criminal trespass conviction. — Because all the evidence was circumstantial as a defendant was not seen removing anything from the alleged victim's barn, the defendant's conviction for criminal trespass under O.C.G.A. § 16-7-21 was inappropriate pursuant to former O.C.G.A. § 24-4-6 because although the defendant was on the victim's property without permission, it was not proven that the defendant was there for a criminal purpose as the evidence indicated that the defendant was at the barn to drop off a saw that the defendant wanted to sell to the victim. Parker v. State, 297 Ga. App. 384, 677 S.E.2d 345 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for burglary conviction. — Because all the evidence was circumstantial as a defendant was not seen removing anything from the alleged victim's barn, the defendant's conviction for burglary was inappropriate pursuant to former O.C.G.A. § 24-4-6 as the evidence did not exclude the reason-

able hypothesis that the defendant was only at the victim's barn to drop off a saw the defendant wanted to sell to the victim based on a telephone message left by the defendant for the victim and eyewitness testimony. Parker v. State, 297 Ga. App. 384, 677 S.E.2d 345 (2009) (decided under former O.C.G.A. § 24-4-6).

Conspiracy may be shown by circumstantial evidence. Dixon v. State, 116 Ga. 186, 42 S.E. 357 (1902) (decided under former Penal Code 1895, § 984); McLeroy v. State, 125 Ga. 240, 54 S.E. 125 (1906) (decided under former Penal Code 1895, § 984); Cook v. State, 22 Ga. App. 770, 97 S.E. 264 (1918) (decided under former Penal Code 1910, § 1010); Sentell v. State, 227 Ga. 153, 179 S.E.2d 234 (1971) (decided under former Code 1933, § 38-109).

Corpus delicti may be shown by circumstantial evidence. Hutchings v. State, 4 Ga. App. 451, 61 S.E. 837 (1908) (decided under former Penal Code 1895, § 984); Hurt v. State, 18 Ga. App. 110, 88 S.E. 901 (1916) (decided under former Penal Code 1910, § 1010); Wright v. State, 199 Ga. 576, 34 S.E.2d 879 (1945) (decided under former Code 1933, § 38-109); Hilliard v. State, 92 Ga. App. 294, 88 S.E.2d 425 (1955) (decided under former Code 1933, § 38-109); Reese v. State, 94 Ga. App. 387, 94 S.E.2d 741 (1956) (decided under former Code 1933, § 38-109); Brown v. State, 98 Ga. App. 350, 105 S.E.2d 785 (1958) (decided under former Code 1933, § 38-109); Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474 (1972) (decided under former Code 1933, § 38-109).

Fingerprint evidence. — To warrant a conviction based solely on fingerprint evidence, the fingerprints corresponding to those of the defendant must have been found in the place where the crime was committed, and under such circumstances that the fingerprints could only have been impressed at the time when the crime was committed. Jackson v. State, 158 Ga. App. 530, 281 S.E.2d 252 (1981) (decided under former O.C.G.A. § 24-4-6).

Fingerprints of the defendant found on bottles at the crime scene were sufficient to support the defendant's conviction for murder since the condition of the crime scene made it clear that the bottles were left just before the victim's death and the evidence suggested no occasion for the defendant to have left defendant's fingerprints there except during the crime. Leonard v. State, 269 Ga. 867, 506 S.E.2d 853 (1998) (decided under former O.C.G.A. § 24-4-6).

Possession of pistol may be shown by circumstantial evidence. Reese v. State, 3 Ga. App. 532, 60 S.E. 122 (1908) (decided under former Penal Code 1895, § 984); Williams v. State, 12 Ga. App. 84, 76 S.E. 785 (1912) (decided under former Penal Code 1910, § 1010).

Burglary conviction. — Sufficient circumstantial evidence of defendant's intent supported defendant's burglary conviction as defendant admitted entering the victim's home, and the victim testified that medications and cash were missing from the victim's home after the incident and that no one else had been in the victim's home from the time that the victim last saw the items until the victim noticed the items missing; the trial court's comments as to defendant's intent referred to the trial court's reason for finding defendant not guilty of burglary with intent to commit rape, and did not go to defendant's burglary with intent to commit theft. Joyner v. State, 267 Ga. App. 309, 599 S.E.2d 286 (2004) (decided under former O.C.G.A. § 24-4-6).

Regarding defendants' convictions for burglary and theft by receiving stolen property, sufficient evidence authorized the jury's decision to reject one defendant's version of events — that defendants believed that the property involved belonged to an accomplice — because, with regard to one of the burglarized residences, the fact that defendants were unsuccessful in taking anything from the home was irrelevant to the burglary convictions since the crime was completed upon entry into the dwelling. As to the second residence, the fact that property from that residence was found in the vehicle in which defendants were in was sufficient to establish that the property had been stolen. Clark v. State, 289 Ga. App. 612, 658 S.E.2d 190 (2008) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence supported a

Sufficiency of Circumstantial Evidence (Cont'd)

defendant's conviction of burglarizing a garden center. On the morning the garden center burglary was discovered, the defendant was caught burglarizing a car dealership two doors down; gloves that fell from the defendant's pocket at the dealership came from the garden center; a shoe print on another glove from the center matched the defendant's boots; an investigator who drove by the area the previous evening testified that neither building showed signs of forced entry at that time; and the defendant stated that the defendant could have committed the garden center burglary but did not remember doing so. Johnson v. State, 291 Ga. App. 253, 661 S.E.2d 642 (2008) (decided under former O.C.G.A. § 24-4-6).

Defendant's burglary conviction in violation of O.C.G.A. § 16-7-1 was supported by sufficient evidence because the defendant entered the victim's house without permission and there was circumstantial evidence that the defendant intended to commit a theft therein since there was money in the house before the defendant entered, but the money was gone after the defendant left. Hall v. State, 294 Ga. App. 274, 668 S.E.2d 880 (2008) (decided under former O.C.G.A. § 24-4-6).

Although circumstantial, the evidence was sufficient to support the defendant's conviction of burglary under O.C.G.A. § 16-7-1(a). The victim's stolen computer was discovered in the attic area between the victim's side of a duplex and the defendant's side, and an officer noticed a path in the insulation from the defendant's side to the victim's attic access door. Norful v. State, 296 Ga. App. 387, 674 S.E.2d 633 (2009) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in convicting the defendant of burglary in violation of O.C.G.A. § 16-7-1(a) because there was sufficient evidence from which the jury could conclude that the defendant entered the victim's apartment without permission when although the victim, who owned the apartment, did not testify at trial, the evidence was that the victim had changed the locks after the defendant moved out and that the defendant could no longer use the defendant's keys; on the day of the burglary, the defendant attempted unsuccessfully to use the defendant's keys and then went around to the patio, climbed over the railing around the patio, and went, uninvited, into the apartment through the patio door. Ursulita v. State, 307 Ga. App. 735, 706 S.E.2d 123 (2011) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient under former O.C.G.A. § 24-4-6 for defendant's conviction of burglary because: (1) an investigating officer, who responded to a burglary alarm at a townhouse, found the defendant coming from the back of the townhouse; (2) the defendant said that the defendant had just put the defendant's dog away through the back door of the defendant's neighboring townhouse; (3) the defendant's shoe print was found outside the broken window of the townhouse with the alarm, and the defendant had a remote control in the defendant's pocket that operated a television set that had been unplugged and was put on the floor by the front door of the townhouse; and (4) the defendant's fingerprints were found on the television. Reggler v. State, 307 Ga. App. 721, 706 S.E.2d 111 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to convict a defendant of burglarizing a tool supply store because the defendant's blood was found on the smashed-in door and the defendant had two prior convictions for strikingly similar hardware store burglaries. Although the evidence was circumstantial, there was no other evidence of how the defendant's blood could have been at the scene. The trial court's definition of "entry" as entry on to real estate was not error or if error was not harmful, because the charge as a whole required that the defendant enter the building. Roberts v. State, 309 Ga. App. 681, 710 S.E.2d 878 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to convict a defendant of burglary in violation of O.C.G.A. § 16-7-1(a) because the defendant was caught within four minutes of the burglary in a truck matching the victims' description of the truck outside their

home, and the defendant was carrying a crowbar, had the victims' television, and fled from police. Veasley v. State, 312 Ga. App. 728, 719 S.E.2d 585 (2011) (decided under former O.C.G.A. § 24-4-6).

Burglary and aggravated assault. — Defendant's convictions of aggravated assault, O.C.G.A. § 16-5-21, and burglary, O.C.G.A. § 16-7-1, were affirmed as there was sufficient circumstantial evidence under former O.C.G.A. § 24-4-6 to prove that the defendant was the person who committed the acts in question, based on witness testimony and the discovery of clothes and a gun used in the robbery in the defendant's room. Moore v. State, 277 Ga. App. 474, 627 S.E.2d 107 (2006) (decided under former O.C.G.A. § 24-4-6).

Aggravated battery. — Trial court properly denied a motion for a directed verdict of acquittal pursuant to O.C.G.A. § 17-9-1(a) since there was ample circumstantial evidence under former O.C.G.A. § 24-4-6 for the jury to have found that the defendant was guilty of aggravated battery, in violation of O.C.G.A. § 16-5-24(a); defendant's claim that the defendant tripped and fell while carrying the infant son was contradicted by expert testimony that the injury to the infant's brain was caused by Shaken Baby Syndrome. Lindo v. State, 278 Ga. App. 228, 628 S.E.2d 665 (2006) (decided under former O.C.G.A. § 24-4-6).

Victim was struck from behind with a beer bottle; the victim's head was cut, requiring stitches. The circumstantial evidence was sufficient to convict the defendant of aggravated assault because: (1) the victim saw the defendant standing close behind the victim after the blow was struck, and defendant began fighting with the victim; (2) similar transaction evidence showed the defendant's history of making unprovoked attacks on unsuspecting victims; and (3) a bartender's testimony that someone else committed the crime was internally inconsistent and uncorroborated. Maiorano v. State, 294 Ga. App. 726, 669 S.E.2d 678 (2008) (decided under former O.C.G.A. § 24-4-6).

Malice murder. — Defendant's conviction for malice murder was affirmed as it could be concluded that the evidence of malice murder, though circumstantial, was sufficient to exclude every reasonable hypothesis, save that of the guilt of the accused since: (1) the defendant was upset with the victim; (2) the defendant got a rifle and carried the rifle into the bedroom; (3) the victim asked the defendant to put the rifle down twice, but the defendant refused; (4) the defendant then shot the victim in the head; and (5) the defendant gave the police three versions of the events and the first two were refuted by a firearms expert and a supervisor in the criminal investigations division. Yeager v. State, 281 Ga. 1, 635 S.E.2d 704 (2006) (decided under former O.C.G.A. § 24-4-6).

Defendant's conviction for felony murder and related charges was upheld on appeal because the evidence showed that the defendant had admitted to killing the defendant's girlfriend and others and the gun used to shoot the victim was the same that the defendant had shot at a party earlier in the evening; the defendant had asked the victim for a ride home from the party and the evidence indicated that defendant shot the victim twice and dumped the body in a wooded area. Lee v. State, 281 Ga. 511, 640 S.E.2d 287 (2007) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient to support defendant's malice murder conviction of her husband because they had a tumultuous marriage; she was faced that day with explaining her entanglement with the victim's finances; she was in financial difficulty, as she had filed for bankruptcy, and she was the beneficiary of the victim's insurance policies; defendant could not account for 30 minutes of her whereabouts during the relevant time; and defendant's gun, which had recently been used, matched the type used to kill the victim. Merritt v. State, 285 Ga. 778, 683 S.E.2d 855 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of malice murder because the jury was authorized to find that the defendant met with the victim's husband and other codefendants on at least two occasions to discuss the murder of the victim, that the defendant accepted money from the husband prior to the murder, that the defen-

Sufficiency of Circumstantial Evidence (Cont'd)

dant instructed one of the codefendants on how to kill the victim, that the defendant drove to the victim's home with the husband and another codefendant on the morning of the murder, and that the defendant demanded and accepted money from the husband as compensation for the murder. Owens v. State, 286 Ga. 821, 693 S.E.2d 490, cert. denied, 131 S. Ct. 156, 178 L. Ed. 2d 93 (2010) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence the state presented was sufficient to authorize a rational trier of fact to find the codefendant guilty beyond a reasonable doubt of the malice murder of a girlfriend's child; both the girlfriend and the codefendant were with the child during the time period within which the fatal injuries were believed to have been inflicted upon the child. Smith v. State, 290 Ga. 428, 721 S.E.2d 892 (2012) (decided under former O.C.G.A. § 24-4-6).

There was sufficient evidence to support the defendant's murder conviction and the defendant's argument that the state relied solely on circumstantial evidence was belied by the admission of the defendant's statement to police that the defendant hit the victim with the ax handle. Bunnell v. State, 292 Ga. 253, 735 S.E.2d 281 (2013) (decided under former O.C.G.A. § 24-4-6).

Possession of stolen goods may authorize conviction. — Fact that stolen goods were in defendant's possession shortly after commission of the burglary would, in and of itself, authorize the jury to infer that defendant was guilty, unless the defendant explained satisfactorily the defendant's possession of such stolen goods. McGee v. State, 159 Ga. App. 763, 285 S.E.2d 224 (1981) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient to show specific facts in the following cases. — See Johnson v. State, 119 Ga. 446, 46 S.E. 634 (1904) (specific acts of sexual intercourse) (decided under former Penal Code 1895, § 984); Jordan v. State, 119 Ga. 443, 46 S.E. 679 (1904) (bar to statute of limitations) (decided under former Penal Code 1895, § 984); Little v. State, 3 Ga. App. 441, 60 S.E. 113 (1908) (weapon of assault) (decided under former Penal Code 1895, § 984); Glover v. State, 15 Ga. App. 44, 82 S.E. 602 (1914) (intention) (decided under former Penal Code 1910, § 1010); Burke v. State, 183 Ga. 726, 189 S.E. 516 (1937) (identity of defendant) (decided under former Code 1933, § 38-109); Smith v. State, 154 Ga. App. 497, 268 S.E.2d 714 (1980) (prior similar offense) (decided under former Code 1933, § 38-109); Baxter v. State, 160 Ga. App. 181, 286 S.E.2d 460 (1981) (similar modus operandi) (decided under former Code 1933, § 38-109); Shaw v. State, 211 Ga. App. 647, 440 S.E.2d 245 (1994) (burglary) (decided under former O.C.G.A. § 24-4-6); Alford v. State, 224 Ga. App. 451, 480 S.E.2d 893 (1997) (attempted burglary) (decided under former O.C.G.A. § 24-4-6); Gooch v. State, 249 Ga. App. 643, 549 S.E.2d 724 (2001) (possession of methamphetamine) (decided under former O.C.G.A. § 24-4-6); Hill v. State, 276 Ga. 220, 576 S.E.2d 886 (2003) (felony murder, armed robbery, and possession of a firearm) (decided under former O.C.G.A. § 24-4-6).

Robbery. — When a defendant was arrested for one robbery, but connected to three prior robberies by witnesses who identified the mask taken from the defendant's car as being the mask worn in the three prior robberies, and other similarities were shown between the methods used in all of the robberies, there was more than sufficient evidence to convict the defendant. Gamble v. State, 194 Ga. App. 765, 391 S.E.2d 801 (1990) (decided under former O.C.G.A. § 24-4-6).

When the defendant jumped out of defendant's vehicle and began running away upon the approach of officers, narcotics were found in the immediate area of defendant's residence, the defendant was in possession of large amounts of money in small denominations, and no other persons were present in the area, there was more than sufficient evidence to convict the defendant. Jones v. State, 208 Ga. App. 559, 430 S.E.2d 877 (1993) (decided under former O.C.G.A. § 24-4-6).

Even though the evidence that defen-

dant forcibly entered the elderly victims' home, attacked and robbed the victims, inflicted fatal injuries, then later sold or attempted to sell items stolen from the victims, along with similar transaction evidence that defendant was involved in a pattern of conduct of forcing defendant's way into the homes of elderly victims, attacking the victims, and then stealing items from them to trade for crack cocaine, was largely circumstantial, the largely circumstantial evidence was sufficient for the jury to exclude every reasonable hypothesis except defendant's guilt of the armed robbery and murder of the victims. Weston v. State, 276 Ga. 680, 580 S.E.2d 204 (2003) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for robbery by sudden snatching conviction. — Although the victim never saw the defendant with the wallet, there was sufficient evidence to show that at the moment the defendant's companion darted in front of the victim's cart distracting the victim's attention, the defendant snatched the wallet from the victim's purse; despite the victim's detection of the defendant's efforts, nothing more was needed to prove the elements of the crime of robbery by sudden snatching. Andrews v. State, 270 Ga. App. 362, 606 S.E.2d 587 (2004) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession of tools for commission of crime conviction. — Items stolen from victims' vehicles found in the defendant's car, stopped as the vehicle left the area of the thefts were sufficient to sustain convictions of entering an auto with the intent to commit theft, O.C.G.A. § 16-8-18; however, as there was no similar testimony as to items stolen from different victims, insufficient evidence supported other convictions, because the defendant's presence at the scene of the crime, without any other direct evidence, was insufficient to convict the defendant of the crimes that a passenger admitted to committing. Along with the stolen items found in the defendant's vehicle, and the defendant's presence at the crime scene where cars were broken into with the kind of tools found in the defendant's vehicle, the evidence was sufficient to sustain a conviction for possession of tools for the commission of a crime. Walker v. State, 281 Ga. App. 94, 635 S.E.2d 577 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for felony murder and armed robbery convictions. — Given the testimony provided by both the codefendant and the codefendant's former wife, to whom the defendant admitted to firing the fatal shots killing the victim, which netted the victim's cellular phone and pager and evidence describing how the defendant participated in the events that happened before, during, and after the commission of the crimes, sufficient evidence was presented to uphold the defendant's convictions for felony murder and armed robbery as a party to the crimes. Pruitt v. State, 282 Ga. 30, 644 S.E.2d 837 (2007) (decided under former O.C.G.A. § 24-4-6).

Defendant's conviction for felony murder and armed robbery was not based upon insufficient circumstantial evidence because there was directed evidence of the defendant's guilt; the conviction was supported by an eyewitness identification, DNA consistent with the defendant's on the crack in the windshield of the getaway car, the defendant's fingerprint on the handle of the driver's door of the getaway car, and the defendant's birth certificate and mail in the getaway vehicle. Sanders v. State, 290 Ga. 637, 723 S.E.2d 436 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for convictions for aggravated assault, burglary, and possession of a firearm. — Given that the circumstantial evidence presented against the defendant sufficiently showed that: (1) the victim shot one of the intruders who committed the burglary; (2) shortly after the burglary, the defendant was treated for a gunshot wound and arrived at the hospital in a vehicle matching the description of the automobile seen leaving the crime scene; (3) the DNA evidence on ski masks found at the scene matched that of the owner of the car and the other passenger, who was also the defendant's brother; and (4) according to the defendant's brother, the driver of the car admitted to shooting the victim, the defendant's convictions for aggravated as-

Sufficiency of Circumstantial Evidence (Cont'd)

sault, burglary, and possession of a firearm during the commission of a felony were affirmed on appeal. Sherman v. State, 284 Ga. App. 809, 644 S.E.2d 901 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession of drugs. — If the totality of the evidence was sufficient to connect defendant to possession of drugs, even though there was evidence to authorize a contrary finding, the conviction would be sustained. Blair v. State, 216 Ga. App. 545, 455 S.E.2d 97 (1995) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for cocaine possession and possession with intent to distribute conviction. — Defendant's convictions for possessing 28 grams or more of cocaine, possessing cocaine with intent to distribute, and possession of a firearm during the commission of a felony were upheld on appeal as sufficient evidence was presented via the direct testimony of the defendant's live-in girlfriend, which when combined with the evidence showing their joint constructive possession of the drugs and gun tended to connect and identify the defendant with the crimes charged. Allen v. State, 286 Ga. App. 469, 649 S.E.2d 583 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence that cocaine was found in the roof of defendant's vehicle and almost $1,000 in cash was found in defendant's pocket, although circumstantial, was sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt of possession of cocaine with intent to distribute. Johnson v. State, 274 Ga. App. 282, 617 S.E.2d 252 (2005), rev'd on other grounds, 280 Ga. 511, 630 S.E.2d 377 (2006); vacated, in part, 283 Ga. App. 630, 642 S.E.2d 340 (2007) (decided under former O.C.G.A. § 24-4-6).

Given an alternative school's security officer's actual observation of a hand-to-hand exchange from a juvenile to another student at the school and the discovery of marijuana in the recipient's hand immediately thereafter, the only reasonable hypothesis was that the juvenile had just possessed the marijuana satisfying former O.C.G.A. § 24-4-6. In the Interest of T. M., 303 Ga. App. 322, 693 S.E.2d 574 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to sustain the defendant's convictions for trafficking in cocaine, a violation of O.C.G.A. § 16-13-31(a)(1), and possession of ecstasy, a violation of O.C.G.A. § 16-13-30(a), although the defendant was neither in actual possession of the contraband nor in control of the vehicle where the contraband was found because there was slight evidence of access, power, and intention to exercise control or dominion over the contraband and, therefore, excluding every other reasonable hypothesis save that of defendant's guilt, as required under forme O.C.G.A. § 24-4-6, the question of constructive, joint possession was within the jury's discretion. The ecstasy pills were found in a prescription pill bottle belonging to the defendant, and the pill bottle was found in a bag with the cocaine. Ferrell v. State, 312 Ga. App. 122, 717 S.E.2d 705 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for methamphetamine possession conviction. — An officer found methamphetamine in a portion of a truck where the defendant kept personal belongings; the defendant was the sole occupant of the vehicle. The defendant's testimony denying possession of the drugs and stating that others had equal access to the truck did not establish under former O.C.G.A. § 24-4-6 that the circumstantial evidence was insufficient to convict the defendant of possession of methamphetamine. Bryson v. State, 293 Ga. App. 392, 667 S.E.2d 170 (2008) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal after a jury found the defendant guilty of possession of methamphetamine because the totality of the evidence, although circumstantial, was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt and to reject as speculative and unreasonable the hypothesis that someone else discarded the drugs in a patrol car; the defendant possessed a homemade smok-

ing pipe containing methamphetamine residue, there was similar transaction evidence, and the patrol officer testified that the officer had exclusive control of the officer's patrol car, the officer stayed with the officer's car whenever the car was serviced by third parties, the officer searched the backseat immediately after the defendant exited from the car, and the officer discovered the drugs directly up under the seat where the defendant had been sitting. Taylor v. State, 305 Ga. App. 748, 700 S.E.2d 841 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence supporting the defendant's conviction for methamphetamine possession was sufficient because the presumption of possession and control attached since the state presented evidence that the defendant was the sole resident of the house present during the execution of the search warrant when the methamphetamine was found in a common area of the house; the presumption of possession was not the sole evidence connecting the defendant to the crime of possession because the arresting officer testified that the defendant exhibited clear signs of methamphetamine intoxication. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient to support conviction of trafficking in methamphetamine. — Trial court did not err in denying a codefendant's motion for a directed verdict on the charge of trafficking in methamphetamine because based upon the circumstantial evidence presented, the jury was authorized to find that the codefendant was in joint constructive possession of the methamphetamine with the defendant, which was located at the kitchen table where the defendant had been sitting; the defendant lived at the residence with the codefendant, the defendant was present at the time of a controlled buy, and the defendant had access to the drugs that were seized from the kitchen table. Fyfe v. State, 305 Ga. App. 322, 699 S.E.2d 546 (2010) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in convicting the defendant of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(f)(1) because given the evidence, the jury was authorized under former O.C.G.A. § 24-4-6 to find that the defendant was guilty beyond a reasonable doubt as either the actual perpetrator or as a party to the crime of the offense of trafficking in methamphetamine as charged in the indictment; officers executing a search warrant for a house discovered the defendant on a couch with a codefendant and baggies of methamphetamine. Hughes v. State, 309 Ga. App. 150, 709 S.E.2d 900 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for involuntary manslaughter conviction. — There was sufficient evidence to support a defendant's conviction for involuntary manslaughter of the defendant's romantic friend given the evidence of the defendant's admission that the defendant placed the friend in a headlock during a fight, and the medical examiner's findings that the friend was strangled to death. As a result, the jury was authorized to exclude all other reasonable hypotheses and conclude that the defendant unintentionally caused the friend's death while committing simple battery. Lemon v. State, 293 Ga. App. 488, 667 S.E.2d 654 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for armed robbery, burglary, and possession of a firearm conviction. — After two intruders burglarized and robbed a home at gunpoint, a pickup truck near the home fled from a patrol car and crashed, then two people matching the victims' description of the intruders fled from the truck. Since the defendant was trapped behind the steering wheel, and the items stolen from the home and a handgun were found in the truck, the circumstantial evidence was sufficient to convict the defendant as a party to armed robbery, burglary, and possession of a firearm during the commission of a burglary. Olds v. State, 293 Ga. App. 884, 668 S.E.2d 485 (2008) (decided under former O.C.G.A. § 24-4-6).

Flight may be shown by circumstantial evidence. Terry v. State, 15 Ga. App. 108, 82 S.E. 635 (1914) (decided under former Penal Code 1910, § 1010); Blakely v. State, 78 Ga. App. 262, 50 S.E.2d 762 (1948) (decided under former Code 1933, § 38-109).

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Flight of the accused is a circumstance which may be considered by the jury in determining the accused's guilt. Brooks v. State, 63 Ga. App. 575, 11 S.E.2d 688 (1940) (decided under former Code 1933, § 38-109); Kirkland v. State, 67 Ga. App. 256, 19 S.E.2d 787 (1942) (decided under former Code 1933, § 38-109); Tyler v. State, 91 Ga. App. 87, 84 S.E.2d 843 (1954) (decided under former Code 1933, § 38-109).

Flight considered alone. — Mere fact of flight alone is not an incriminatory circumstance of sufficient probative value of itself to authorize a conviction for a crime. Burchfield v. State, 40 Ga. App. 506, 150 S.E. 459 (1929) (decided under former Penal Code 1910, § 1010); Seay v. State, 63 Ga. App. 286, 11 S.E.2d 54 (1940) (decided under former Code 1933, § 38-109).

Flight is generally not sufficient to support a conviction even if the flight was from the scene of the crime. Muckle v. State, 165 Ga. App. 873, 303 S.E.2d 54 (1983) (decided under former O.C.G.A. § 24-4-6).

Flight of concealment considered with other circumstances is sufficient to convict. Diggs v. State, 90 Ga. App. 853, 84 S.E.2d 611 (1954) (decided under former Code 1933, § 38-109).

Inference of participation. — Confession of facts that are matter from which an inference of participation arises are circumstantial. Eberhart v. State, 41 Ga. 598 (1873) (see now O.C.G.A. § 24-14-6); Riley v. State, 1 Ga. App. 651, 57 S.E. 1031 (1907) (decided under former Penal Code 1895, § 984).

Others having access. — Evidence that cocaine was found hidden on the outside of defendant's mobile home, which was parked in an area to which a large number of persons, not only visitors to the unit occupied by defendant but anyone having business in the mobile home park had potential access was insufficient to sustain defendant's conviction for possession of cocaine. Prescott v. State, 164 Ga. App. 671, 297 S.E.2d 362 (1982) (decided under former O.C.G.A. § 24-4-6).

Trial court erred in denying the defendant's motion for new trial after a jury found the defendant guilty of possession of more than one ounce of marijuana in violation of O.C.G.A. § 16-13-30(j) because the evidence adduced at trial was insufficient to show that the defendant was in sole constructive possession of the contraband when the defendant alone was charged with possessing the marijuana although the passenger in his car had equal access to it, and the only legal evidence linking the defendant to the marijuana in the back seat was his spatial proximity to it; an officer's testimony concerning scales that were found in the car, to the extent it suggested some deception on the passenger's part, that deception did not give rise to the sole, reasonable inference that defendant was in sole constructive possession of the marijuana, and because the inference did not exclude every other reasonable hypothesis save the guilt of defendant, it was insufficient to prove beyond a reasonable doubt that he was in sole constructive possession of the marijuana. Rogers v. State, 302 Ga. App. 65, 690 S.E.2d 437 (2010) (decided under former O.C.G.A. § 24-4-6).

Mere presence of contraband on premises occupied by an accused is insufficient to sustain a conviction when there is also evidence of access by others. Shockley v. State, 166 Ga. App. 182, 303 S.E.2d 519 (1983) (decided under former O.C.G.A. § 24-4-6).

Presence, and approval of act, not sufficient. — Presence at the scene of a crime is not sufficient to show that a defendant is a party to the crime under O.C.G.A. § 16-2-20, and even approval of the act, not amounting to encouragement, will not suffice. This is so because of former O.C.G.A. § 24-4-6 as to a conviction on circumstantial evidence. Ridgeway v. State, 187 Ga. App. 381, 370 S.E.2d 216 (1988) (decided under former O.C.G.A. § 24-4-6).

Acquaintance, proximity, and dress insufficient. — Fact that defendant knew a momentarily detained drug suspect, had been seen associating with the suspect in the past, and was dressed in a fashion not uncommon to drug vendors was insufficient circumstantial evidence

to establish beyond a reasonable doubt that defendant had joint constructive possession over controlled substances found in a nearby cache. Brooks v. State, 206 Ga. App. 485, 425 S.E.2d 911 (1992) (decided under former O.C.G.A. § 24-4-6).

Evidence held sufficient to support conviction for arson. — Given evidence of defendant's serious altercation with a woman-resident of the subject arson house prior to the house's burning, defendant's identification at and around the premises minutes prior to, and after the fire, and other circumstantial indicia of motive, opportunity, and inconsistency, the evidence, though wholly circumstantial, was sufficient to sustain a conviction for arson. Jenkins v. State, 207 Ga. App. 500, 428 S.E.2d 410 (1993) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence presented at trial: that the defendant and the defendant's family were to leave a house they bought for failure to make payments, that the defendant was upset about the fact that the defendant was not going to receive the return of the earnest money, that defendant was alone in the house at the time of the fire, and that defendant appeared nervous was sufficient to convict defendant of arson. Burchette v. State, 260 Ga. App. 739, 580 S.E.2d 609 (2003), aff'd, 278 Ga. 1, 596 S.E.2d 162 (2004) (decided under former O.C.G.A. § 24-4-6).

Jury was authorized to find defendant guilty of arson even though the evidence was circumstantial as the proven facts were consistent with the hypothesis of guilt and excluded every other reasonable hypothesis other than defendant's guilt as defendant's burning of three trucks using gasoline at a truck-driving school where defendant failed truck-driving courses, defendant's presence at a gas station around the time of the fire, and defendant's admission that defendant burned the trucks because an instructor "burned" defendant, meant defendant's conviction was supportable as a matter of law. Denson v. State, 259 Ga. App. 342, 577 S.E.2d 29 (2003) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for arson conviction. — Conviction of first degree arson, O.C.G.A. § 16-7-60(a)(2), was not supported by sufficient evidence since there was no showing that a truck allegedly burned by the defendant was designed for use as a dwelling, and there was no showing of a lack of consent to the burning by the lienholder on the truck or by the joint owner, the defendant's wife; neither the wife's insurance claim form stating that she did not procure the loss, nor an insurance payment to the lienholder showed the required lack of consent, and there was no evidence in the entirely circumstantial case from which a jury could have excluded the very reasonable alternate hypothesis that the lien holder consented to the fire so as to recover the insurance proceeds for payment on a loan owed by a financially-troubled debtor, the defendant. Prater v. State, 279 Ga. App. 527, 631 S.E.2d 746 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient for aggravated battery conviction. — Defendant's attempt to invoke the circumstantial evidence rule of former O.C.G.A. § 24-4-6 was rejected and the evidence was sufficient to support defendant's conviction of aggravated battery as the evidence was not entirely circumstantial since there was direct evidence that: (1) defendant said that defendant was going to set the victim on fire; (2) defendant was present and poured the gasoline on the victim; (3) defendant reached in defendant's pocket for something just before the fire started; and (4) the victim questioned why defendant had done it. Miller v. State, 265 Ga. App. 402, 593 S.E.2d 943 (2004) (decided under former O.C.G.A. § 24-4-6).

Convictions of arson, O.C.G.A. § 16-7-60(a), and stalking, O.C.G.A. § 16-5-90, were proper because the circumstantial evidence presented at trial included a kerosene-soaked, partially burned, mailing label addressed to the defendant found at the scene of a fire at the victim's home; the state also presented evidence of the defendant's escalating obsession with the victim and the threatening phone calls the defendant made to the victim shortly before the fire. Although the circumstantial evidence must have excluded every other reasonable hypothesis save defendant's guilt, the evidence need not have excluded every inference or

Sufficiency of Circumstantial Evidence (Cont'd)

hypothesis. Ransom v. State, 297 Ga. App. 902, 678 S.E.2d 574 (2009) (decided under former O.C.G.A. § 24-4-6).

Direct evidence required. — Circumstances relied upon must be proved by direct evidence. Georgia Ry. & Elec. Co. v. Harris, 1 Ga. App. 714, 57 S.E. 1076 (1907) (decided under former Penal Code 1895, § 984).

Evidence sufficient to support conviction of credit card fraud. — Jury was authorized to find that the defendant acted with guilty knowledge and intent to commit credit card theft in violation of O.C.G.A. § 16-9-31(a)(1) because the evidence established that the defendant obtained unauthorized possession of the victim's credit card, and there was circumstantial evidence from which an inference could be drawn that the defendant had knowledge that the defendant was accepting the credit card without authority and as part of an unlawful scheme; when the defendant was confronted by police officers, the defendant fled, and the defendant maintained unauthorized possession of a different credit card, along with additional items that could be used to engage in fraudulent credit transactions. Amaechi v. State, 306 Ga. App. 333, 702 S.E.2d 680 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient. — Evidence sufficient to exclude every reasonable hypothesis except that of defendant's guilt. Brown v. State, 260 Ga. 153, 391 S.E.2d 108 (1990) (decided under former O.C.G.A. § 24-4-6); Grover v. State, 215 Ga. App. 907, 452 S.E.2d 586 (1994) (decided under former O.C.G.A. § 24-4-6).

Evidence adduced at trial was sufficient to authorize a rational jury to find the defendant and the codefendant guilty beyond a reasonable doubt of the malice murder, directly or as a party to the crimes, because questions as to the reasonableness of alternative hypotheses were for the jury to decide, and the evidence was sufficient to enable the jury to reject every alternative hypothesis of the crimes, save that of the guilt of the defendant and the codefendant. Krause v. State, 286 Ga. 745, 691 S.E.2d 211 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence held sufficient to support conviction. — See Griffin v. State, 2 Ga. App. 534, 58 S.E. 781 (1907) (gaming) (decided under former Penal Code 1895, § 984); Perry v. State, 9 Ga. App. 871, 72 S.E. 446 (1911) (larceny) (decided under former Penal Code 1910, § 1010); Brown v. State, 13 Ga. App. 144, 78 S.E. 868 (1913) (larceny) (decided under former Penal Code 1910, § 1010); Smith v. State, 148 Ga. 332, 96 S.E. 632 (1918) (murder) (decided under former Penal Code 1910, § 1010); Shirley v. State, 168 Ga. 344, 148 S.E. 91 (1929) (murder) (decided under former Penal Code 1910, § 1010); Cheatham v. State, 57 Ga. App. 858, 197 S.E. 70 (1938) (larceny) (decided under former Code 1933, § 38-109); Johnson v. State, 79 Ga. App. 210, 53 S.E.2d 498 (1949) (illegal possession whiskey) (decided under former Code 1933, § 38-109); Fouts v. State, 96 Ga. App. 876, 101 S.E.2d 925 (1958) (possession of beer) (decided under former Code 1933, § 38-109); Blackwell v. State, 99 Ga. App. 579, 109 S.E.2d 62 (1959) (larceny) (decided under former Code 1933, § 38-109); Harvey v. State, 111 Ga. App. 279, 141 S.E.2d 604 (1965) (larceny and burglary) (decided under former Code 1933, § 38-109); Anderson v. State, 120 Ga. App. 147, 169 S.E.2d 629 (1969) (burglary) (decided under former Code 1933, § 38-109); Brown v. State, 125 Ga. App. 300, 187 S.E.2d 301 (1972) (larceny or burglary) (decided under former Code 1933, § 38-109); Brown v. State, 133 Ga. App. 56, 209 S.E.2d 721 (1974) (burglary) (decided under former Code 1933, § 38-109); Cosby v. State, 151 Ga. App. 676, 261 S.E.2d 424 (1979) (burglary) (decided under former Code 1933, § 38-109); Prescott v. State, 164 Ga. App. 671, 297 S.E.2d 362 (1982) (no one other than self and wife had access to the bedroom closet) (decided under former O.C.G.A. § 24-4-6); Chambless v. State, 165 Ga. App. 194, 300 S.E.2d 201 (1983) (armed robbery) (decided under former O.C.G.A. § 24-4-6); Smith v. State, 250 Ga. 729, 300 S.E.2d 798 (1983) (murder) (decided under former O.C.G.A. § 24-4-6); Wilcox v. State, 250 Ga. 745, 301 S.E.2d 251 (1983) (murder and unlawful conceal-

ment of death) (decided under former O.C.G.A. § 24-4-6); Fields v. State, 167 Ga. App. 400, 306 S.E.2d 695 (1983) (entering motor vehicle with intent to commit theft) (decided under former O.C.G.A. § 24-4-6); Fredericks v. State, 176 Ga. App. 40, 335 S.E.2d 154 (1985) (driving while under the influence of alcohol) (decided under former O.C.G.A. § 24-4-6); Holland v. State, 176 Ga. App. 343, 335 S.E.2d 739 (1985) (possession of controlled substances; no evidence that anyone other than defendants had access to bedroom where controlled substances were found) (decided under former O.C.G.A. § 24-4-6); Childs v. State, 176 Ga. App. 549, 336 S.E.2d 309 (1985) (burglary) (decided under former O.C.G.A. § 24-4-6); Turner v. State, 176 Ga. App. 785, 338 S.E.2d 37 (1985) (robbery) (decided under former O.C.G.A. § 24-4-6); Wilcox v. Ford, 813 F.2d 1140 (11th Cir.), cert. denied, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987) (murder and concealment of death) (decided under former O.C.G.A. § 24-4-6); Smith v. State, 257 Ga. 381, 359 S.E.2d 662 (1987) (murder) (decided under former O.C.G.A. § 24-4-6); Chews v. State, 187 Ga. App. 600, 371 S.E.2d 124 (1988) (drug violation) (decided under former O.C.G.A. § 24-4-6); Beach v. State, 258 Ga. 700, 373 S.E.2d 210 (1988); Rich v. State, 191 Ga. App. 312, 381 S.E.2d 567 (1989) (decided under former O.C.G.A. § 24-4-6); (burglary) (decided under former O.C.G.A. § 24-4-6); Horton v. State, 194 Ga. App. 797, 392 S.E.2d 259 (1990) (drug violation) (decided under former O.C.G.A. § 24-4-6); Ware v. State, 198 Ga. App. 24, 400 S.E.2d 384 (1990) (attempt to commit burglary) (decided under former O.C.G.A. § 24-4-6); (intent to distribute cocaine) (decided under former O.C.G.A. § 24-4-6); Anderson v. State, 225 Ga. App. 727, 484 S.E.2d 783 (1997); Savage v. State, 229 Ga. App. 560, 494 S.E.2d 359 (1997) (decided under former O.C.G.A. § 24-4-6); (possession of cocaine) (decided under former O.C.G.A. § 24-4-6); Ross v. State, 240 Ga. App. 563, 524 S.E.2d 255 (1999) (malice murder) (decided under former O.C.G.A. § 24-4-6); Lindsey v. State, 271 Ga. 657, 522 S.E.2d 459 (1999) (murder) (decided under former O.C.G.A. § 24-4-6); Foster v. State, 273 Ga. 34, 537 S.E.2d 659 (2000) (burglary) (decided under former O.C.G.A. § 24-4-6); Peek v. State, 247 Ga. App. 364, 542 S.E.2d 517 (2000) (burglary) (decided under former O.C.G.A. § 24-4-6); Gresham v. State, 246 Ga. App. 705, 541 S.E.2d 679 (2000) (entering automobile with intent to commit theft) (decided under former O.C.G.A. § 24-4-6); Withers v. State, 282 Ga. 656, 653 S.E.2d 40 (2007) (felony murder and possession of a firearm) (decided under former O.C.G.A. § 24-4-6); Davis v. State, 285 Ga. App. 315, 645 S.E.2d 753 (2007) (drug violation) (decided under former O.C.G.A. § 24-4-6).

Comparing the child's condition at the time the defendant took the child from the child's mother and shortly thereafter, with the child's condition at the time the child and the defendant appeared at the fire station, and considering the acts of abuse admitted by the defendant, the evidence, when viewed most favorably to the verdict, was sufficient to have authorized a rational trier of fact in finding beyond a reasonable doubt that the defendant caused the child's death. Phipps v. State, 203 Ga. App. 128, 416 S.E.2d 319, cert. denied, 203 Ga. App. 907, 416 S.E.2d 319 (1992) (decided under former O.C.G.A. § 24-4-6).

Trial court did not err in convicting the defendant of possession of cocaine with the intent to distribute, O.C.G.A. § 16-13-30(b), and possession of marijuana, O.C.G.A. § 16-13-2(b), because the circumstantial evidence established a meaningful connection between the defendant and the contraband, evidence which showed the defendant exercising power and dominion over the drugs found inside the wheel well on the front passenger's side of a car; the jury could infer that the drugs had been recently placed in the wheel well, and because the defendant had fled from the police, had been caught within arm's reach of the drugs, and had a large amount of cash in his pockets, the jury could infer that the defendant was a drug dealer and that the defendant had placed the drugs in the wheel well to avoid being prosecuted for possessing them. Wright v. State, 302 Ga. App. 332, 690 S.E.2d 654 (2010) (decided under former O.C.G.A. § 24-4-6).

Sufficiency of Circumstantial Evidence (Cont'd)

Trial court did not err in convicting the defendant of trafficking in methamphetamine because the evidence sufficed to sustain the conviction, and the jury was authorized to conclude that the circumstances excluded the hypothesis that another passenger had placed drugs in the bed of a truck; the passenger testified at trial that the passenger did not place the drugs in the truck bed, and a police officer testified that the passenger, whom the officer had in sight the entire time, never came within five-to-six feet of the truck and that the officer not only saw the defendant place the defendant's arm in the truck bed but heard an accompanying thump. Haggard v. State, 302 Ga. App. 502, 690 S.E.2d 651 (2010) (decided under former O.C.G.A. § 24-4-6).

Any rational trier of fact could have found the defendant guilty of trafficking in cocaine, possession of methylenedioxyamphetamine, and possession of less than one ounce of marijuana beyond a reasonable doubt because based on the evidence, the jury was authorized to conclude that the defendant threw a plastic bag containing drugs out the passenger side window of the defendant's car; the state presented evidence that a deputy saw the defendant actually possessing the bag of illegal narcotics as the defendant held the bag in the car before the defendant threw the bag out the passenger's window, and another deputy assigned to the drug suppression task force testified, without objection, that the amount of cocaine in the bag was more than a user would have in a user's possession and that would be the amount that a mid-level dealer would have in a dealer's possession. McCombs v. State, 306 Ga. App. 64, 701 S.E.2d 496 (2010) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient to support the defendant's convictions for malice murder and theft by taking because: (1) after the victim, who was the defendant's roommate, disappeared, the defendant began driving the victim's car; (2) a witness who lived on a street on which the defendant used to live and that was miles away from the defendant's residence noticed a fire on the side of the road and a person squatting by the road watching the fire; (3) the victim's burned body was later found at the road side; (4) the victim's body had been burned, decapitated, drained of almost all blood, and cut into pieces; (5) the defendant told the police detectives who went to the defendant's apartment that the victim was on vacation and that the defendant did not know where the victim was; (6) the defendant's apartment had been recently cleaned and cleaning supplies were found in the apartment; (7) Luminol testing faintly revealed the presence of blood on the bathtub and surrounding walls of the apartment; (8) the trash which was collected from the apartment's dumpster included the victim's wallet, driver's license, and debit card; and (9) broken furniture, socks, and a sheet with the victim's blood were found in the trash. Adel v. State, 290 Ga. 690, 723 S.E.2d 666 (2012) (decided under former O.C.G.A. § 24-4-6).

Defendant's conviction for possession of drugs by an inmate in violation of O.C.G.A. § 42-5-18(c) was reversed because the state failed to present any evidence to support even an inference that the defendant had any prior knowledge of drugs that were found in a bag or any idea what was in the bag; the state failed to demonstrate that the defendant had the bag in the defendant's possession for any reason other than the performance of the defendant's assigned duties of cleaning the visitation lobby in the prison and, thus, failed to exclude the reasonable hypothesis that the defendant was merely performing the job when the defendant removed the bag from one trash can and placed the bag in the other. Strozier v. State, 313 Ga. App. 804, 723 S.E.2d 39 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for murder conviction. — Physical evidence of signs of struggle at victim's residence, defendant's attempts to remove these, and defendant's subsequent behavior regarding the disposal of victim's body sufficed to permit the jury to exclude every other hypothesis save the guilt of the accused in a prosecution for murder. White v. State, 263 Ga.

94, 428 S.E.2d 789 (1993) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to authorize the jury to find the defendant guilty of armed robbery and malice murder because the victim went missing shortly after coming into a substantial amount of cash, the defendant had access to the victim's home, and the defendant was seen driving around in the victim's two vehicles, selling the victim's property, and with a large amount of cash; the victim died from blunt trauma to the head, a mallet with blood on the mallet was found inside the house, and a witness testified that the defendant confided to the witness that the defendant killed the victim, placed the victim's body in a freezer, and took the victim's money. Cutrer v. State, 287 Ga. 272, 695 S.E.2d 597 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient under former O.C.G.A. § 24-4-6 to support the defendant's convictions for malice murder, felony murder, aggravated assault, possession of a knife during the commission of a crime, financial transaction card fraud, and recidivism because there was evidence placing the defendant at the victim's home during the time of the murder and evidence of the victim's blood on the defendant's shoes, which the defendant intentionally chose not to wear when being questioned by police; the evidence, together with the defendant's own statements regarding his use of the victim's debit card, was sufficient to authorize the jury to determine that the state excluded all reasonable hypotheses save that of the defendant's guilt and to find the defendant guilty beyond a reasonable doubt of the crimes of which he was convicted. Johnson v. State, 288 Ga. 771, 707 S.E.2d 92 (2011) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence presented was sufficient under former O.C.G.A. § 24-4-6 to support the defendant's felony murder conviction because the evidence established that a witness saw the defendant in possession of a gun, that the defendant went to the victim's home, that the defendant used the defendant's gun to coerce the victim into the victim's car and to drive as the defendant instructed, that the victim stopped the victim's car and the victim and the defendant exited and went behind some bushes, that multiple gunshots were heard, that a witness saw the defendant step from behind the bushes and run back toward the car, and that the victim's body was found behind the bushes with 10 gunshots, including five shots to the head. Brown v. State, 288 Ga. 902, 708 S.E.2d 294 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for burglary convictions. — Circumstantial evidence of the burglary was sufficient to exclude every other reasonable hypothesis save defendants' guilt as was required by former O.C.G.A. § 24-4-6 since defendants were seen at the burglarized property at the time that the burglary occurred, defendants fled the scene, and one of the defendants gave the police inconsistent stories as to what defendants were doing on the property. Bollinger v. State, 259 Ga. App. 102, 576 S.E.2d 80 (2003) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence supported defendant's burglary conviction because: (1) defendant drove a truck that exactly matched the truck in the surveillance tape; (2) defendant had a board in defendant's truck with glass particles embedded in the board that were of the same thickness and physical chemical properties as the glass of the window that was broken during the crime; (3) a sweater cap and white gloves found in the truck appeared to match those worn by the perpetrator in the surveillance tape; and (4) the stolen television and videocassette recorder were found approximately 500 yards from the defendant's mother's home. Brooks v. State, 273 Ga. App. 691, 615 S.E.2d 829 (2005), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient for the factfinder to determine beyond a reasonable doubt that the defendant juvenile committed burglary in violation of O.C.G.A. § 16-7-1(a) and possession of a weapon during the commission of a crime in violation of O.C.G.A. § 16-11-106(b)(2) because the defendant was in the vicinity of the victim's apartment shortly after the burglary, wearing a jacket that matched

Sufficiency of Circumstantial Evidence (Cont'd)

the victim's description of the jacket worn by the perpetrator, carrying a loaded pistol, and wearing shoes that matched the tread pattern and size of the muddy footprints found in the victim's apartment. In the Interest of J.D., 305 Ga. App. 519, 699 S.E.2d 827 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for trafficking in cocaine and possession of heroine with intent to distribute. — Defendant's convictions for trafficking in cocaine and possession of heroin with intent to distribute, in violation of O.C.G.A. §§ 16-13-30(b) and 16-13-31(a), were supported by sufficient circumstantial evidence, pursuant to former O.C.G.A. § 24-4-6, since it was shown that a witness stated that defendant was residing in an apartment and selling drugs, a search of the apartment revealed drugs, cash, and photographs and papers with defendant's name on them, as well as a sweater which defendant was seen wearing, and defendant had changed the locks on the apartment; accordingly, the trial court's denial of defendant's motions for a directed verdict pursuant to O.C.G.A. § 17-9-1 and for a new trial pursuant to O.C.G.A. § 5-5-23 were properly denied. Williams v. State, 262 Ga. App. 67, 584 S.E.2d 625 (2003) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for malice murder conviction. — There was sufficient evidence to enable a rational trier of fact to find defendant guilty beyond a reasonable doubt of malice murder after the victim, found in defendant's home, had been beaten and died from a severe blow to the head. Hannah v. State, 278 Ga. 195, 599 S.E.2d 177 (2004) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to support a malice murder conviction since witnesses saw the defendant arguing with the victim, go with the victim into an area behind a motel where the victim lived, heard shots from the area behind the motel, and later the victim's body was found in that area; also, the defendant was seen at a house with an item wrapped in cloth, and later, the defendant's gun, the murder weapon, was found in the yard of that house, wrapped in cloth. Smith v. State, 280 Ga. 161, 625 S.E.2d 766 (2006) (decided under former O.C.G.A. § 24-4-6).

Bloody jogging suit belonging to the defendant found at the defendant's girlfriend's house with the victim's blood on it, witnesses' description of the defendant wearing that same jogging suit after the shooting, and a .380 pistol found hidden in a cinder block at the girlfriend's house that matched the type of gun used to kill the victim were sufficient evidence to support convictions for malice murder and other related crimes with regard to the killing of the girlfriend's neighbor. Hooks v. State, 280 Ga. 164, 626 S.E.2d 114 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence that the defendant threatened to kill the victim on numerous occasions, sometimes while brandishing a knife; that shortly before the victim was fatally stabbed, the defendant was seen in the victim's front yard; and that police matched the boots the defendant was wearing that night to a footprint at the crime scene was sufficient to convict the defendant of malice murder. Smith v. State, 284 Ga. 304, 667 S.E.2d 65 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, armed robbery, and aggravated assault beyond a reasonable doubt because although the defendant denied to police that the defendant had any contact with the silver car that was connected to the robbery, the defendant's fingerprints were found on the outside of the car; an eyewitness's physical description of the second gunman from the robbery matched the defendant. Carter v. State, 289 Ga. 51, 709 S.E.2d 223 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for robbery convictions. — There was sufficient evidence of defendant's intent to participate in the robbery of a delivery man since the evidence showed that defendant was privy to the robbery plan, participated in the robbery, and convened with the codefendants after the robbery. In the Interest of C.L.B.,

267 Ga. App. 456, 600 S.E.2d 407 (2004) (decided under former O.C.G.A. § 24-4-6).

Denial of defendant's motion for a new trial was affirmed as defendant's fingerprint was on the robbery note, the victim eliminated all but the defendant's and one other's photos from a photo lineup, the victim's description matched the defendant's appearance, and the victim in a similar robbery positively identified the defendant as the robber; a defense witness's testimony that the witness saw defendant playing with cards in the hotel lobby a few days before the robbery did not exonerate the defendant as the witness did not see the defendant playing with cards similar to the one on which the robbery note was written. Dailey v. State, 271 Ga. App. 492, 610 S.E.2d 126 (2005) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for criminal attempt to commit armed robbery. — Jury was authorized to conclude that the evidence excluded every reasonable hypothesis except the defendant's guilt of criminal attempt to commit armed robbery because the defendant surreptitiously watched others at a fast food restaurant, wore a mask, and drew a BB handgun that resembled a semi-automatic weapon when the defendant was confronted by a police officer. New v. State, 270 Ga. App. 341, 606 S.E.2d 865 (2004) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession of drugs conviction. — Jury could rationally find from circumstantial evidence that defendant committed the offenses of possession of both amphetamine and GHB because substances found in defendant's gym locker were tested and found to be amphetamine and GHB, the amount of GHB found could be for personal use over a long period of time, and the containers in which the substances were found contained several prints that could not be identified but contained one that matched defendant's finger. Hobbs v. State, 272 Ga. App. 148, 611 S.E.2d 775 (2005) (decided under former O.C.G.A. § 24-4-6).

As the defendant was the driver, owner, and sole occupant of a vehicle, and 250 grams of methamphetamine were found hidden beneath the steering column, within arm's reach of the driver, the circumstantial evidence was sufficient to establish the defendant's "knowing" possession of the drugs as required by O.C.G.A. § 16-13-31(e). The mere possibility that someone other than the defendant committed the crime was not such a reasonable hypothesis as had to be excluded in order for circumstantial evidence to authorize a verdict of guilty under former O.C.G.A. § 24-4-6. Garcia v. State, 293 Ga. App. 422, 667 S.E.2d 205 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession of cocaine conviction. — Circumstantial evidence under former O.C.G.A. § 24-4-6 was sufficient to support defendant's conviction for possession of cocaine, in violation of O.C.G.A. § 16-13-30, as the defendant was approached by two undercover officers and upon seeing that one of the officers had a badge, defendant turned around and made a throwing motion with a clenched fist in the direction of a trash barrel; defendant was in an area known for drug sales, and three pieces of crack cocaine were found in the vicinity of the trash barrel. Woods v. State, 275 Ga. App. 471, 620 S.E.2d 660 (2005) (decided under former O.C.G.A. § 24-4-6).

Police officer testified about searching a patrol car before transporting the defendant in the car, and about the officer's suspicions that the defendant had stuffed something underneath the backseat because the officer saw debris on the back of the defendant's pants and on the backseat. This circumstantial evidence was sufficient under former O.C.G.A. § 24-4-6 to convict the defendant of possessing the cocaine found wedged underneath the backseat. Simmons v. State, 299 Ga. App. 21, 681 S.E.2d 712 (2009) (decided under former O.C.G.A. § 24-4-6).

Trial court was authorized to find a defendant guilty of possession of cocaine on the basis that the evidence excluded every other reasonable hypothesis save that of the defendant's guilt, pursuant to former O.C.G.A. § 24-4-6, as the state presented evidence other than the defendant's mere spatial proximity to the pipe containing cocaine to show that the defendant had constructive possession over it, in that the pipe, which was found on the

Sufficiency of Circumstantial Evidence (Cont'd)

grass where the defendant had been arrested, was dry, although it had been raining and the surrounding area was "soaked"; from this evidence the factfinder could infer that the pipe had been on the ground for a very short period of time. In addition, the state introduced similar transaction evidence that the defendant had been carrying a small crack pipe in the pocket of the defendant's jacket on the occasion of an earlier arrest. Brown v. State, 314 Ga. App. 212, 723 S.E.2d 504 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for rape conviction. — Combination of circumstantial and direct evidence, including the victim's identification of the attacker, DNA evidence, and the testimony of several eyewitnesses who saw a man fitting the defendant's description in the area near the time of the attack, was sufficient to sustain a rape conviction. McKeehan v. State, 274 Ga. App. 14, 616 S.E.2d 489 (2005) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for malice murder and attempted arson convictions. — Malice murder and attempted arson convictions were upheld as: (1) the evidence presented showed that an attempted arson was inextricably linked to the victim's murder, and the jury was authorized to find beyond a reasonable doubt that the defendant was guilty; (2) the admission of two handwritten documents that defendant had penned was proper, as their prejudicial impact did not outweigh their probative value; and (3) the trial court did not abuse the court's discretion in determining that any prejudicial impact of a religious prayer asking for strength, and an expression of uncertainty as to what "makes me tick," did not outweigh the probative value of the evidence. Fortson v. State, 280 Ga. 376, 628 S.E.2d 104 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for felony murder while in commission of cruelty to children conviction. — Evidence that a defendant's 13-month-old child died while in the defendant's care from brain trauma caused by being struck by or against an object or violently shaken at a time when one other person and that person's child were in the defendant's apartment provided sufficient circumstantial evidence under former O.C.G.A. § 24-4-6 to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony murder while in the commission of cruelty to a child; questions as to the reasonableness of hypotheses were to be decided by the jury, and the jury's finding was not to be disturbed unless the guilty verdict was insupportable as a matter of law. Scott v. State, 281 Ga. 373, 637 S.E.2d 652 (2006) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession of cocaine with intent to distribute and proximity to housing project convictions. — Defendant's convictions for possession of cocaine with intent to distribute and possession of a controlled substance within 1,000 feet of a housing project, in violation of O.C.G.A. §§ 16-13-30(b) and 16-13-32.5(b), were based on sufficient evidence since the state proved by circumstantial evidence pursuant to former O.C.G.A. § 24-4-6 that defendant had been walking back and forth to an overturned bucket when people approached from the street in what appeared to be drug transactions, and the drugs were found under the bucket; there was evidence that the amount of drugs recovered were more than one would use for personal use, indicating an intent to distribute, and there was also evidence indicating the proximity of the bucket to a nearby public housing complex. Reason v. State, 283 Ga. App. 608, 642 S.E.2d 236 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence was sufficient to support the defendant's conviction for possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), because the evidence established beyond any reasonable doubt that the defendant had the power and the intent to exercise control over the cocaine, and the state established by overwhelming circumstantial evidence that the defendant was in either constructive or actual possession of the cocaine; the defendant was found kneeling over the

contraband, the jury was authorized to infer that the defendant had been "fidgeting" with a piggy bank in which 37 small bags of cocaine were hidden, and pants with the defendant's driver's license and cash were found in the same corner of the bedroom as the cocaine. Jackson v. State, 306 Ga. App. 33, 701 S.E.2d 481 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for malice murder and armed robbery convictions. — Evidence, which included uncontroverted testimony from an eyewitness who saw the defendant order a store employee into the street shortly before the employee was shot, the testimony of two other eyewitnesses, and the fact that calls had been made from the employee's stolen cellular phone to the defendant's mother, was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of malice murder, armed robbery, and a number of other associated crimes. Horne v. State, 281 Ga. 799, 642 S.E.2d 659 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for felony murder and arson convictions. — Circumstantial evidence was sufficient under former O.C.G.A. § 24-4-6 to support the defendant's arson and felony murder convictions and to exclude the theory that an intruder set the fire in the house since the defendant rented a room from the victim: (1) testimony of neighbors contradicted the defendant's claim that the defendant was asleep and unaware of the fire; (2) there was no evidence of a forced entry other than that of the neighbors who tried to save the victim; (3) the layout of the house authorized the jury to find that the defendant would have noticed an intruder; and (4) a motive could be inferred from the fact that the defendant owed rent to the victim and that the victim was planning to ask the defendant for the rent. Green v. State, 283 Ga. 126, 657 S.E.2d 221 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for trafficking marijuana conviction. — There was sufficient evidence to support the defendant's conviction for trafficking marijuana as the jury was authorized to conclude that it was not reasonable, as the defendant suggested, that someone other than the defendant placed over 21 pounds of marijuana in open view in the back of a trailer of which the defendant had the only key, without the defendant's knowledge. Mora v. State, 292 Ga. App. 860, 666 S.E.2d 412 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for felony murder conviction. — Circumstantial evidence supported the defendant's conviction of the felony murder of the defendant's two-month-old child. The victim's grandparent had not had contact with the victim on the day of the murder, and the evidence that the victim was well when the victim's other parent left the house, combined with a medical examiner's testimony and time line regarding the time of the child's death, excluded the other parent's guilt as well. Nixon v. State, 284 Ga. 800, 671 S.E.2d 503 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence authorized the jury to find the defendant guilty beyond a reasonable doubt of felony murder and possession of a firearm during the commission of a crime because there was substantial corroborating evidence in addition to the accomplice's testimony; the defendant stated that the defendant had killed someone, other witnesses corroborated the accomplice's testimony regarding the arrival and departure of the two men on the night of the shooting, and blood was found on the shirt the defendant wore that night and tried to have destroyed. Gonnella v. State, 286 Ga. 211, 686 S.E.2d 644 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for felony murder and aggravated assault conviction. — Contrary to a defendant's contention that the state presented only circumstantial evidence under former O.C.G.A. § 24-4-6 that did not exclude all reasonable hypotheses except that of the defendant's guilt, the evidence was sufficient to support the conviction for felony murder and aggravated assault; the defendant's infant child died of a massive closed head trauma complicated by blunt force chest trauma, and the defendant had the sole care of the child just before the child suffered rib injuries allegedly due to the defendant pushing on the child's chest

Sufficiency of Circumstantial Evidence (Cont'd)

while the child was choking and just before the child suffered seizure-like symptoms. Berryhill v. State, 285 Ga. 198, 674 S.E.2d 920 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence authorized the jury to find the defendant guilty beyond a reasonable doubt of murder, felony murder, aggravated assault, and possession of a weapon during the commission of a felony because contrary to the defendant's arguments, the evidence showed that the person who was sitting in the back seat of the victim's car was not sitting directly behind the victim, but instead, that person was in the rear seat on the passenger's side of the car; the forensics testing showed that the murderer was located to the left of the victim, not the right, and there was blood spatter on the seat behind the victim from which the jury could have inferred that no one was sitting there at the time of the shooting. Julius v. State, 286 Ga. 413, 687 S.E.2d 828 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for aggravated assault conviction. — Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt as a party to two counts of aggravated assault in violation of O.C.G.A. § 16-5-21 because even though the defendant did not actually use a weapon, there was evidence that an accomplice brandished a handgun and pointed the handgun at both the manager and the clerk of the video store, and the accomplice's use of a weapon could be attributed to the defendant; one who intentionally aids or abets the commission of a crime by another is a party to the crime and equally guilty with the principal, and reasonable apprehension of injury can be proved by circumstantial or indirect evidence as well as by direct or positive evidence since the presence of a gun would normally place a victim in reasonable apprehension of being injured violently. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for aggravated child molestation conviction. — Evidence, including that defendant had access and opportunity to infect a victim at least two weeks prior to the victim exhibiting symptoms, and that the victim's immediate outcry was consistent with the victim's statement to a doctor identifying defendant, and excluding the hypothesis that the victim's father was present prior to the onset of the victim's symptoms, was sufficient to convict defendant of aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). Zuniga v. State, 300 Ga. App. 45, 684 S.E.2d 77 (2009), cert. denied, No. S10C0169, 2010 Ga. LEXIS 125 (Ga. 2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient as there is direct evidence. — Evidence was sufficient to support defendant's conviction for shoplifting, and the state was not required under former O.C.G.A. § 24-4-6 to present evidence excluding every other reasonable hypothesis except defendant's guilt because the state's case was not based on circumstantial evidence, but on the direct testimony of an eyewitness to the shoplifting. Fitzpatrick v. State, 271 Ga. App. 804, 611 S.E.2d 95 (2005) (decided under former O.C.G.A. § 24-4-6).

Defendant's claim that the evidence was insufficient to support defendant's conviction for theft by shoplifting because the evidence was completely circumstantial and did not exclude every reasonable hypothesis save that of the defendant's guilt failed; contrary to the defendant's contention, the testimony from a store's loss prevention employee that the employee observed the defendant remove an item from a shelf, place the item in the defendant's back pocket, and then leave the store without presenting the item to a cashier was direct not circumstantial evidence. Walton v. State, 291 Ga. App. 736, 662 S.E.2d 820 (2008) (decided under former O.C.G.A. § 24-4-6).

Evidence held insufficient to support conviction. — See Park v. State, 123 Ga. 164, 51 S.E. 317 (1905) (murder) (decided under former Penal Code 1895, § 1984); Bush v. State, 7 Ga. App. 607, 67 S.E. 685 (1910) (larceny) (decided under former Penal Code 1910, § 1010); Calhoun v. State, 9 Ga. App. 501, 71 S.E. 765 (1911) (burglary) (decided under for-

mer Penal Code 1910, § 1010); Henderson v. State, 147 Ga. 134, 92 S.E. 871 (1917) (murder) (decided under former Penal Code 1910, § 1010); Haire v. State, 38 Ga. App. 116, 142 S.E. 697 (1928) (cattle stealing) (decided under former Penal Code 1910, § 1010); Wallin v. State, 38 Ga. App. 194, 143 S.E. 597 (1928) (burglary) (decided under former Penal Code 1910, § 1010); Smith v. State, 38 Ga. App. 741, 145 S.E. 500 (1928) (larceny) (decided under former Penal Code 1910, § 1010); Hughie v. State, 52 Ga. App. 73, 182 S.E. 197 (1935) (larceny of automobile) (decided under former Code 1933, § 38-109); Graham v. State, 183 Ga. 881, 189 S.E. 910 (1937) (murder) (decided under former Code 1933, § 38-109); Orr v. State, 62 Ga. App. 774, 9 S.E.2d 917 (1940) (manufacturing whiskey) (decided under former Code 1933, § 38-109); Cheney v. State, 61 Ga. App. 726, 7 S.E.2d 335 (1940) (arson) (decided under former Code 1933, § 38-109); Wells v. State, 75 Ga. App. 588, 44 S.E.2d 66 (1947) (larceny) (decided under former Code 1933, § 38-109); Woody v. State, 99 Ga. App. 857, 109 S.E.2d 896 (1959) (burglary) (decided under former Code 1933, § 38-109); Purser v. State, 104 Ga. App. 728, 122 S.E.2d 749 (1961) (voluntary manslaughter) (decided under former Code 1933, § 38-109); Crane v. State, 123 Ga. App. 226, 180 S.E.2d 289 (1971) (burglary) (decided under former Code 1933, § 38-109); Williams v. State, 126 Ga. App. 350, 190 S.E.2d 785 (1972) (burglary) (decided under former Code 1933, § 38-109); Ennis v. State, 130 Ga. App. 716, 204 S.E.2d 519 (1974) (possession of marijuana) (decided under former Code 1933, § 38-109); Russell v. State, 132 Ga. App. 35, 207 S.E.2d 619 (1974) (possession of marijuana) (decided under former Code 1933, § 38-109); Wright v. State, 147 Ga. App. 111, 248 S.E.2d 183 (1978) (burglary) (decided under former Code 1933, § 38-109); Kametches v. State, 242 Ga. 721, 251 S.E.2d 232 (1978) (possession for sale of obscene materials) (decided under former Code 1933, § 38-109); Hall v. State, 155 Ga. App. 211, 270 S.E.2d 377 (1980) (burglary) (decided under former Code 1933, § 38-109); Smith v. State, 188 Ga. App. 415, 373 S.E.2d 97 (1988) (entering an automobile) (decided under former O.C.G.A. § 24-4-6); Krull v. State, 211 Ga. App. 37, 438 S.E.2d 152 (1993) (DUI, no proof of insurance, driving with suspended license, and failure to maintain lane) (decided under former O.C.G.A. § 24-4-6); Calhoun v. State, 213 Ga. App. 375, 444 S.E.2d 405 (1994) (shoplifting) (decided under former O.C.G.A. § 24-4-6); Jordan v. State, 225 Ga. App. 424, 484 S.E.2d 60 (1997) (trafficking in cocaine) (decided under former O.C.G.A. § 24-4-6); Mitchell v. State, 268 Ga. 592, 492 S.E.2d 204 (1997) (possession with intent to distribute marijuana) (decided under former O.C.G.A. § 24-4-6); In re A.D.C., 228 Ga. App. 829, 493 S.E.2d 38 (1997) (possession with intent to distribute marijuana) (decided under former O.C.G.A. § 24-4-6); Greene v. State, 230 Ga. App. 155, 495 S.E.2d 634 (1998) (drug violation) (decided under former O.C.G.A. § 24-4-6); Johnson v. State, 245 Ga. App. 583, 538 S.E.2d 481 (2000) (possession of cocaine) (decided under former O.C.G.A. § 24-4-6).

When the defendant drove a codefendant away from the crime scene in a subdivision after the codefendant shot the victim, to the extent that the evidence that the defendant's car had been parked at some point with the car's front end facing in the direction going out of the subdivision constituted circumstantial evidence of the defendant's guilt as a party, the evidence did not exclude every other reasonable hypothesis, as required by former O.C.G.A. § 24-4-6. Ratana v. State, 297 Ga. App. 747, 678 S.E.2d 193 (2009) (decided under former O.C.G.A. § 24-4-6).

Except as to one incident, the evidence was insufficient to show that a mother aided and abetted her husband's sexual abuse of their twin daughters when they were between four and eight years old, because the record showed that the mother had no knowledge of seven of the eight incidents until she took the children to therapy, and the prosecution's circumstantial evidence—including the fact of the family's nudist lifestyle, the existence of pornographic movies in the home, and the fact that during therapy, the mother advised the girls to not talk about their father—was insufficient to prove aiding and abetting beyond a reasonable doubt.

Sufficiency of Circumstantial Evidence (Cont'd)

Naylor v. State, 300 Ga. App. 401, 685 S.E.2d 383 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for cocaine possession conviction. — When: (1) defendant's only connection to cocaine that was found in a jacket was that defendant picked up the jacket after the jacket had been lying outside on an air conditioner in close proximity to a juvenile who was suspected in drug transactions and an unidentified woman; and (2) there was no evidence as to who placed the jacket on the air conditioner, the evidence against defendant was entirely circumstantial and did not exclude every other hypothesis except guilt; therefore, the evidence was insufficient under former O.C.G.A. § 24-4-6 to support defendant's conviction of possessing cocaine in violation of the Georgia Controlled Substances Act, O.C.G.A. § 16-13-20 et seq. Stephens v. State, 258 Ga. App. 774, 575 S.E.2d 661 (2002) (decided under former O.C.G.A. § 24-4-6).

State failed to prove the state's case that defendant, a minor, was delinquent under O.C.G.A. § 15-11-2 for trafficking in cocaine in violation of O.C.G.A. § 16-13-31 as the state did not prove the necessary connection between defendant and the drugs, other than spatial proximity, which was insufficient; the fact that defendant was in a house in the middle of the night with non-family members, that a large amount of cocaine and cash were found in the house, although not visible, and that defendant was sitting on a couch where a bag containing crack cocaine was found did not establish the necessary connection, and did not exclude all other possibilities except the guilt of defendant under former O.C.G.A. § 24-4-6. In re E.A.D., 271 Ga. App. 531, 610 S.E.2d 153 (2005) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient to show constructive possession of controlled substance. — Trial court erred in finding that the defendant violated the defendant's probation by committing the new felony of possessing a controlled substance, piperazine or TFMPP, in violation of O.C.G.A. § 16-13-30 because the circumstantial evidence was insufficient to show the defendant's constructive possession of the TFMPP pills; the only evidence linking the defendant to the drugs was spatial proximity, but it was at least equally likely that the pills belonged to the driver of the truck where the pills were found. Scott v. State, 305 Ga. App. 596, 699 S.E.2d 894 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for financial identity fraud. — Because the state's evidence failed to demonstrate that the defendant accessed the resources of another by using identifying information to procure a cell phone, and a service contract for the cell phone, and failed to establish that defendant either knew that a store clerk: (1) could not issue a phone without accessing the resources of a specific individual; (2) would need to use the identifying information of that individual to access such resources; or (3) in fact used such identifying information to access the resources of another for the purpose of providing defendant with a cell phone, the evidence was insufficient to sustain the defendant's conviction of financial identity fraud. Jones v. State, 285 Ga. App. 822, 648 S.E.2d 133 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for theft by taking conviction. — Evidence did not support the finding that a juvenile defendant committed theft by taking. Although there was circumstantial evidence that the defendant had a key to the home from which items were taken and had been in and out of the home at the time of the theft, the defendant testified that the defendant had left the door unlocked and returned to the home to find the home ransacked; the circumstantial evidence supported the defendant's version of the facts as well as the state's and thus did not warrant a finding of guilt under former O.C.G.A. § 24-4-6. In the Interest of M.H., 288 Ga. App. 663, 655 S.E.2d 249 (2007) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for theft by receiving stolen property. — Juvenile court erred by adjudicating the defendant juvenile delinquent for violating O.C.G.A.

§ 16-8-7(a) by committing theft by receiving a stolen motorcycle because the evidence did not support the finding that the defendant should have known that the motorcycle was stolen; the defendant's testimony permitted an inference that only after learning of the theft did the defendant realize that the motorcycle was stolen, the defendant rode the motorcycle on the street in front of the victim's house, and there was no evidence that the defendant tried to conceal the motorcycle; absent evidence of the real value of the motorcycle at the time of the theft, the evidence did not support a finding that the price the defendant offered to pay for the motorcycle was grossly disproportionate to the value. In re J. L., 306 Ga. App. 89, 701 S.E.2d 564 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for theft by taking conviction. — Circumstantial evidence was sufficient to authorize the jury to exclude every reasonable hypothesis except that the defendant was guilty of theft by taking because an ATM was removed from a bank's property without authorization, defendant's vehicle was observed at the bank approximately two hours before the theft was reported and shortly after the alarm was activated; tire tracks at the scene matched the tire prints on the defendant's vehicle, the vehicle had a tow strap with a large metal hook tied to it, scrape marks consistent with a heavy object being drug on the pavement led from the ATM's location in the direction of a nearby grassy lot, where the ATM was later found, and the defendant possessed black electrical tape and gloves upon the defendant's arrest; the jury was authorized to consider the defendant's flight from the scene and police as circumstantial evidence of the defendant's guilt. Tauch v. State, 305 Ga. App. 643, 700 S.E.2d 645 (2010) (decided under former O.C.G.A. § 24-4-6).

Rational trier of fact was authorized to find that the evidence was sufficient to exclude every reasonable hypothesis except that of the defendant's guilt and to conclude beyond a reasonable doubt that the defendant was guilty of theft by taking, O.C.G.A. § 16-8-2, because there was evidence that the defendant was alone for 20 minutes or more on the floor of the house where the money was kept and where no cleaning was to be performed; while there was circumstantial evidence that also implicated another house cleaner, reasonable jurors could have found from the evidence that the hypothesis that the house cleaner took the money was excluded based on testimony that the defendant had been alone in the area of the house where the money was kept, and there was no such evidence regarding the house cleaner. Cookston v. State, 309 Ga. App. 708, 710 S.E.2d 900 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence that a defendant showed an interest in a car that was for sale and took a test drive and returned the car, that the car was stolen the next day, that the defendant was found driving the car hours after the car was stolen using a duplicate key, and that the defendant fled from an officer was sufficient to authorize the defendant's conviction for theft by taking (automobile) in violation of O.C.G.A. § 16-8-2(a). Kelly v. State, 313 Ga. App. 582, 722 S.E.2d 175 (2012) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for methamphetamine possession. — Evidence of a defendant's unconsciousness, possibly due to consumption of alcohol or other legal substances, and the defendant's spatial proximity to methamphetamine and pipes used to smoke it, to which two codefendants had equal access, was insufficient circumstantial evidence under former O.C.G.A. § 24-4-6 to exclude every other reasonable hypothesis save that the defendant possessed methamphetamine. Therefore, the evidence was insufficient to support the defendant's conviction. O'Neill v. State, 285 Ga. 125, 674 S.E.2d 302 (2009) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was insufficient to show constructive possession of methamphetamine found in a car, in which defendant was a passenger, because there was no evidence, besides spatial proximity, connecting the defendant with the contraband since there was no evidence showing that the defendant knew that a baggy found in the car contained contraband or the defendant hid

Sufficiency of Circumstantial Evidence (Cont'd)

the baggy in the car. Millsaps v. State, 300 Ga. App. 383, 685 S.E.2d 371 (2009) (decided under former O.C.G.A. § 24-4-6).

Trial court erred in convicting the defendant of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e)(3) because although the evidence raised grave suspicions of the defendant's guilt, the state failed to establish that the defendant had both the power and the intention at the time of the defendant's arrest to exercise dominion or control over the drugs and failed to show that other men did not have equal access to the house and the items within the house; all of the evidence was circumstantial with regard to the defendant's constructive possession of the contraband, there was nothing in the case linking the defendant to the drugs or manufacturing equipment in the house, and several other people with access to the house were unaccounted for and were not charged. Aquino v. State, 308 Ga. App. 163, 706 S.E.2d 746 (2011) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for aggravated battery, aggravated assault, and firearm possession conviction. — Convictions of aggravated battery, O.C.G.A. § 16-5-24, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106, were not supported by sufficient evidence because, although the defendant's conduct before the crime was suspicious, the circumstantial evidence against the defendant was insufficient under O.C.G.A. § 24-4-6; the state did not show that the defendant was anywhere near the scene at the time of the shooting, did not present evidence connecting a weapon used in the shooting to the defendant, and, although a witness testified that three days before the shooting, the witness saw the defendant's brother hand the defendant a gun, the witness could not identify the type of gun involved, and this testimony did not connect the defendant with the shooting. The state also failed to adduce evidence that the defendant intentionally aided, abetted, or encouraged the commission of the crimes of which the defendant was convicted. Gresham v. State, 298 Ga. App. 136, 679 S.E.2d 344 (2009) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for theft by receiving property conviction. — Circumstantial evidence of a larcenous taking was insufficient to sustain defendant's conviction for theft by receiving beyond a reasonable doubt because the officer's testimony that radio dispatch identified the pistol as stolen was non-probative hearsay and the fact that the weapon was labeled for law enforcement use only and loaded with police-issue ammunition did not exclude the possibility that the weapon may have been given away or sold "on the black market" in violation of the warning. Lopez v. State, 259 Ga. App. 720, 578 S.E.2d 304 (2003) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for malice murder, aggravated assault, and firearm possession convictions. — Evidence did not show that defendant intentionally or knowingly provided handguns to two cousins who used the guns to commit murder and other crimes, and because defendant was not present when the crimes were committed and the evidence did not exclude all possibilities except guilt, the state supreme court reversed defendant's convictions for malice murder, aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. Clyde v. State, 276 Ga. 839, 584 S.E.2d 253 (2003) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for aggravated assault. — Trial court did not err in convicting the defendant and the defendant's codefendant of aggravated assault because based on the circumstantial evidence, the jury was entitled to infer that the defendant and the codefendant accompanied their accomplice to a convenience store knowing that the accomplice intended to assault the victim because of their past differences, that the defendant had specifically served as the getaway driver, and that the codefendant had accompanied the accomplice inside the store as a lookout, making both individuals par-

ties to the aggravated assault. Romero v. State, 307 Ga. App. 348, 705 S.E.2d 195 (2010) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for weapons conviction. — Circumstantial evidence was insufficient under former O.C.G.A. § 24-4-6 to prove that defendant had constructive possession of a gun found in a car in which defendant was riding as a passenger or to support defendant's convictions for carrying a concealed weapon under O.C.G.A. § 16-11-126(a) or possession of a firearm by a convicted felon under O.C.G.A. § 16-11-131(b) since: (1) the car was stopped for a traffic offense, and was searched, revealing the gun; (2) all of the occupants in the car denied possessing the gun; (3) the gun was found under a seat where defendant had been sitting; (4) the arresting officers did not see defendant bend over or appear to put anything under the seat; and (5) because defendant was only a passenger in a car that defendant did not own or control, there was no presumption that defendant possessed the gun. Wofford v. State, 262 Ga. App. 291, 585 S.E.2d 207 (2003) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for marijuana possession conviction. — Evidence did not support defendant's conviction for possession of marijuana with intent to distribute as the mere fact that a package of marijuana was addressed, but not delivered, to an apartment leased by defendant did not tie defendant to the drugs; the evidence was circumstantial and it was equally plausible that the codefendants were independently dealing in marijuana. Patten v. State, 275 Ga. App. 574, 621 S.E.2d 550 (2005) (decided under former O.C.G.A. § 24-4-6).

Trial court erred in revoking the defendant's probation because the evidence was insufficient to support the trial court's finding that the defendant committed the new offense of possession of less than one ounce of marijuana since the state presented no evidence other than the defendant's mere spatial proximity to the marijuana to support a finding that the defendant had the intent to exercise dominion and control over the marijuana; there was no drug paraphernalia, the defendant was cooperative with the police and did not try to flee, there was no evidence that the defendant tried to hide or conceal anything in the vehicle or that the defendant had continuous access and control over the vehicle, and the defendant did not have any marijuana in the defendant's possession and was not under the influence of drugs. Smith v. State, 306 Ga. App. 54, 701 S.E.2d 490 (2010) (decided under former O.C.G.A. § 24-4-6).

Intoxication causing accident. — Circumstantial evidence that defendant's alleged intoxication caused the accident was sufficient under former O.C.G.A. § 24-4-6 to exclude defendant's reasonable hypotheses of innocence due to mechanical failure. Griffin v. State, 242 Ga. App. 878, 531 S.E.2d 752 (2000) (decided under former O.C.G.A. § 24-4-6).

Appeal

Question on appeal is whether there were sufficient circumstances to enable twelve men who found the facts to conclude that the accused was guilty. Brown v. State, 13 Ga. App. 144, 78 S.E. 868 (1913) (decided under former Penal Code 1910, § 1010).

Appellate courts do not undertake to weigh circumstantial evidence, but look only to seek if there is sufficient competent evidence to support the verdict, when viewed in the light most favorable to the verdict. Hopkins v. State, 167 Ga. App. 811, 307 S.E.2d 707 (1983) (decided under former O.C.G.A. § 24-4-6).

Presumption in favor of verdict. — After the verdict, the testimony is construed in the testimony's most favorable light to the prevailing party, which is in this case, the state, for every presumption and inference is in favor of the verdict. This rule has been applied when the evidence is circumstantial. Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474 (1972) (decided under former Code 1933, § 38-109).

Should a trial court decline to direct the verdict and the jury then finds the defendant guilty, the appellate court is obliged to review the evidence in a light most favorable to the jury verdict. Muckle v. State, 165 Ga. App. 873, 303 S.E.2d 54

Appeal (Cont'd)

(1983) (decided under former O.C.G.A. § 24-4-6).

Verdict will not be disturbed when circumstances are aided by direct evidence. McGinnis v. State, 31 Ga. 236 (1860) (decided under former law); Hudson v. State, 92 Ga. 472, 17 S.E. 847 (1893) (decided under former law); Coney v. State, 101 Ga. 582, 28 S.E. 918 (1897) (decided under former Penal Code 1895, § 984).

Verdict not disturbed unless unsupportable as matter of law. — If a jury is authorized to find that the evidence, circumstantial though it may be, is sufficient to exclude every reasonable hypothesis save that of guilt, the verdict of the jury will not be disturbed by the appellate court unless the verdict is insupportable as a matter of law. Brewer v. State, 156 Ga. App. 468, 274 S.E.2d 817 (1980) (decided under former Code 1933, § 38-109); Lawhorn v. State, 200 Ga. App. 451, 408 S.E.2d 425 (1991) (decided under former O.C.G.A. § 24-4-6).

Questions of reasonableness are generally decided by the jury, and the appellate court will not disturb the jury's finding that the evidence was sufficient to exclude every reasonable hypothesis save that of guilt unless the verdict is unsupportable as a matter of law. Shockley v. State, 166 Ga. App. 182, 303 S.E.2d 519 (1983) (decided under former O.C.G.A. § 24-4-6).

Questions as to reasonableness are generally to be decided by the jury which heard the evidence and when the jury is authorized to find that the evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt, the appellate court will not disturb the finding, unless the verdict is unsupportable as a matter of law. Chambless v. State, 165 Ga. App. 194, 300 S.E.2d 201 (1983) (decided under former O.C.G.A. § 24-4-6).

When verdict overturned. — Supreme Court is admittedly without authority to interfere with a verdict supported by direct evidence; it may declare, however, even though the jury has found otherwise, and the trial judge has approved their finding, that the proven circumstances do not sustain by their consistency the claim of the state as to the guilt of the defendant. Willoughby v. City of Atlanta, 50 Ga. App. 180, 177 S.E. 527 (1934) (decided under former Code 1933, § 38-109).

Hypothesis consistent with innocence. — When there appears a hypothesis from the evidence, or from the lack of evidence and the defendant's statement, pointing to the innocence of the accused and which, tested by all human experience, is a reasonable one, an appellate court, may declare it so as a matter of law. Wood v. State, 156 Ga. App. 810, 275 S.E.2d 694 (1980) (decided under former Code 1933, § 38-109); Walker v. State, 157 Ga. App. 728, 278 S.E.2d 487 (1981) (decided under former Code 1933, § 38-109).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1390.

C.J.S. — 32A C.J.S., Evidence, §§ 1604, 1605.

ALR. — May conviction of perjury rest on circumstantial evidence, 15 ALR 634; 27 ALR 857; 42 ALR 1063; 88 ALR2d 852.

Character and sufficiency of evidence to show that letter was mailed, 25 ALR 9; 86 ALR 541.

Instruction on circumstantial evidence in criminal case, 89 ALR 1379.

Evidence of acquisition or possession of money, source of which is not traced, as admissible against defendant in criminal case, 123 ALR 119; 91 ALR2d 1046.

Admissibility, in prosecution for burglary, of evidence that defendant, after alleged burglary, was in possession of burglarious tools and implements, 143 ALR 1199.

Conviction of criminal offense without evidence as denial of due process of law, 80 ALR2d 1362.

Homicide: identification of victim as person named in indictment or information, 86 ALR2d 722.

Conviction of perjury where one or more

of elements is established solely by circumstantial evidence, 88 ALR2d 852.

Construction of statute or ordinance making it an offense to possess or have alcoholic beverages in opened package in motor vehicle, 35 ALR3d 1418.

What amounts to "exclusive" possession of stolen goods to support inference of burglary or other felonious taking, 51 ALR3d 727.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 ALR3d 948.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 ALR3d 1319.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 ALR3d 1128.

Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial — state cases, 36 ALR4th 1046.

24-14-7. Positive testimony preferred over negative; exception.

The existence of a fact testified to by one positive witness is to be believed, rather than that such fact did not exist because many other witnesses who had the same opportunity of observation swear that they did not see or know of its having existed. This rule shall not apply when two parties have equal facilities for seeing or hearing a thing and one swears that it occurred while the other swears that it did not. (Code 1981, § 24-14-7, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-4-7, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Cobb v. State, 27 Ga. 648 (1859) and Atlanta & W.P.R.R. v. Johnson, 66 Ga. 260 (1881).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5165, former Penal Code 1895, § 985, former Civil Code 1910, § 5751, former Penal Code 1910, § 1011, former Code 1933, § 38-111, and former O.C.G.A. § 24-4-7 are included in the annotations for this Code section.

Reason for the former statute was probably that the law would not care to attribute perjury to a witness unless necessary, and negative testimony as a result may be taken as an oversight on the part of a witness to observe the fact in question. The last provision of the former statute provided for those cases where a witness could swear positively to the nonoccurrence of a fact. Such testimony was of as much weight as positive testimony. Skinner v. State, 108 Ga. 747, 32 S.E. 844 (1899) (decided under former Penal Code 1895, § 985); Nelms v. State, 123 Ga. 575, 51 S.E. 588 (1905) (decided under former Penal Code 1895, § 985); Hunter v. State, 4 Ga. App. 761, 62 S.E. 466 (1908) (decided under former Penal Code 1895, § 985).

Rule of the former statute was so inaptly stated that to instruct the jury in the language of the former statute was ordinarily error. Warrick v. State, 125 Ga. 133, 53 S.E. 1027 (1906) (decided under former Penal Code 1895, § 985); Moore v. State, 57 Ga. App. 287, 195 S.E. 320 (1938) (decided under former Code 1933, § 38-111); Great Am. Indem. Co. v. Oxford, 68 Ga. App. 884, 24 S.E.2d 726 (1943) (decided under former Code 1933, § 38-111).

Failure to charge not error in absence of request. — In the absence of a

request, it was not error for the court to fail to charge the former statute as to positive and negative testimony. Grice v. State, 224 Ga. 376, 162 S.E.2d 432 (1968) (decided under former Code 1933, § 38-111).

Witnesses of equal credibility. — Former statute applied only if the witnesses were of equal credibility. Great Am. Indem. Co. v. Oxford, 68 Ga. App. 844, 24 S.E.2d 726 (1943) (decided under former Code 1933, § 38-111); Rider v. State, 196 Ga. 767, 27 S.E.2d 667 (1943) (decided under former Code 1933, § 38-111); Kaylor v. Kaylor, 199 Ga. 516, 35 S.E.2d 1 (1945) (decided under former Code 1933, § 38-111).

Qualification of rule. — Former statute did not apply when two parties had equal facilities for seeing or hearing a thing and one swears that it occurred and the other that it did not. Weeks v. State, 79 Ga. 36, 3 S.E. 323 (1887) (decided under former law); Skinner v. State, 108 Ga. 747, 32 S.E. 844 (1899) (decided under former Penal Code 1895, § 985); Nelms v. State, 123 Ga. 575, 51 S.E. 588 (1905) (decided under former Penal Code 1895, § 985); Wood v. State, 1 Ga. App. 684, 58 S.E. 271 (1907) (decided under former Penal Code 1895, § 985); Benton v. State, 3 Ga. App. 453, 60 S.E. 116 (1908) (decided under former Penal Code 1895, § 985).

Credibility of witnesses. — When the former statute was applicable, it is error for the court to give the statute in charge to the jury without further instructing the jury that in weighing such testimony the jury should take into consideration the credibility of the witnesses. Central of Ga. Ry. v. Sowell, 3 Ga. App. 142, 59 S.E. 323 (1907) (decided under former Civil Code 1895, § 5165); Georgia R.R. & Banking Co. v. Radford, 144 Ga. 22, 85 S.E. 1006 (1915) (decided under former Civil Code 1910, § 5751); Georgia Ry. & Power Co. v. Pounds, 20 Ga. App. 201, 92 S.E. 1026 (1917) (decided under former Civil Code 1910, § 5751); McDuffie v. State, 24 Ga. App. 653, 101 S.E. 812 (1920) (decided under former Penal Code 1910, § 1011); Green v. State, 26 Ga. App. 109, 105 S.E. 634 (1920) (decided under former Penal Code 1910, § 1011); Carter v. State, 34 Ga. App. 230, 129 S.E. 10 (1925) (decided under former Penal Code 1910, § 1011); Moore v. State, 57 Ga. App. 287, 195 S.E. 320 (1938) (decided under former Code 1933, § 38-111); Progressive Life Ins. Co. v. Archer, 73 Ga. App. 639, 37 S.E.2d 713 (1946) (decided under former Code 1933, § 38-111); Goodyear Clearwater Mills v. Wheeler, 77 Ga. App. 570, 49 S.E.2d 184 (1948) (decided under former Code 1933, § 38-111).

Jurors not obliged to discard negative evidence merely because of the existence of positive evidence in conflict with it. Innis v. State, 42 Ga. 473 (1871) (decided under former law); Hunter v. State, 4 Ga. App. 761, 62 S.E. 466 (1908) (decided under former Penal Code 1895, § 985); Pendergrast v. Greeson, 6 Ga. App. 47, 64 S.E. 282 (1909) (decided under former Civil Code 1895, § 5165); Pollard v. Gorman, 52 Ga. App. 127, 182 S.E. 678 (1935) (decided under former Code 1933, § 38-111); Jefferson Std. Life Ins. Co. v. Bentley, 55 Ga. App. 272, 190 S.E. 50 (1937) (decided under former Code 1933, § 38-111); Progressive Life Ins. Co. v. Smith, 71 Ga. App. 157, 30 S.E.2d 411 (1944) (decided under former Code 1933, § 38-111); Abbot Inv. Co. v. Jefferson County, 77 Ga. App. 76, 49 S.E.2d 918 (1948) (decided under former Code 1933, § 38-111); Ellis v. Southern Ry., 96 Ga. App. 687, 101 S.E.2d 230 (1957) (decided under former Code 1933, § 38-111); Allison v. Cobb County, 97 Ga. App. 331, 103 S.E.2d 195 (1958) (decided under former Code 1933, § 38-111).

Reconciliation of testimony. — When the testimony of witnesses who testified positively may be true without it being necessary to reject any of the negative testimony as untrue, and the testimony can be harmonized without discrediting any witness, it is the duty of the jury to prefer the positive testimony. Gamblin v. State, 33 Ga. App. 51, 125 S.E. 517 (1924) (decided under former Penal Code 1910, § 1011).

Types of evidence. — Law and logic both recognize the fact that testimony as to a thing may be positive, negative, or contradictory. Hughes v. Etheridge, 39 Ga. App. 730, 148 S.E. 358 (1929) (decided under former Civil Code 1910, § 5751).

Failure to explain meaning of positive and negative evidence is not error

in the absence of a special request. Southern Ry. v. Maddox, 63 Ga. App. 508, 11 S.E.2d 501 (1940) (decided under former Code 1933, § 38-111).

Instruction on latter part of statute is usually necessary to fully explain to the jury the distinction between testimony which is negative in character and that which is contradictory of positive testimony, and which otherwise might be thought to be negative. Benton v. State, 3 Ga. App. 453, 60 S.E. 116 (1908) (decided under former Penal Code 1895, § 985).

Positive and negative evidence defined in the following cases: McConnell v. State, 67 Ga. 633 (1881) (decided under former law); Hunter v. State, 4 Ga. App. 761, 62 S.E. 466 (1908) (decided under former Penal Code 1895, § 985); Heywood v. State, 12 Ga. App. 643, 77 S.E. 1130 (1913) (decided under former Penal Code 1910, § 1011); Progressive Life Ins. Co. v. Archer, 73 Ga. App. 639, 37 S.E.2d 713 (1946) (decided under former Code 1933, § 38-111).

Charge favorable to losing party. — If the positive evidence in regard to the facts under consideration was introduced by the losing party, and the negative evidence in regard to such facts was introduced by the successful party, a charge to the effect that positive testimony should outweigh that which is negative without qualification, would be more favorable to the losing party than the losing party would have a right to ask; and such error in favor of the unsuccessful litigant would not furnish ground for a reversal on the losing party's motion. Rider v. State, 196 Ga. 767, 27 S.E.2d 667 (1943) (decided under former Code 1933, § 38-111).

Testimony sufficient to charge on positive and negative evidence as to whether automobile turned over in accident. Progressive Life Ins. Co. v. Archer, 73 Ga. App. 639, 37 S.E.2d 713 (1946) (decided under former Code 1933, § 38-111).

Issue properly submitted to jury. — When the existence of a fact was affirmed by positive evidence and denied by negative evidence, an issue was raised, and the trial judge committed no error in properly submitting such issue to the jury. Pollard v. Gorman, 52 Ga. App. 127, 182 S.E. 678 (1935) (decided under former Code 1933, § 38-111); Abbot Inv. Co. v. Jefferson County, 77 Ga. App. 761, 49 S.E.2d 918 (1948) (decided under former Code 1933, § 38-111).

Positive and negative testimony at play. — When there was testimony that immediately before plaintiff's mule was struck by a train, a horse and colt crossed the track in front of the train and this testimony, by a section hand was corroborated by the section foreman, but the engineer of the train testified that the engineer did not see such a horse or colt cross the track in front of the train, although there was nothing which could have obstructed the engineer's view of them, the rule relative to positive and negative testimony is called into play, and, under a proper instruction from the court, the jury was authorized to believe the positive testimony of the section hand and section foreman rather than that of the engineer. Atlantic Coast Line R.R. v. Hodges, 90 Ga. App. 870, 84 S.E.2d 711 (1954) (decided under former Code 1933, § 38-111).

Refusal to charge former O.C.G.A. § 24-4-7 was not error. — See Green v. State, 253 Ga. 693, 324 S.E.2d 181 (1985) (decided under former O.C.G.A. § 24-4-7).

On appeal. — Former statute would not justify the setting aside of the jury's verdict on appeal when there was evidence to support the verdict. Kelly v. Gaskins, 238 Ga. 730, 235 S.E.2d 386 (1977) (decided under former Code 1933, § 38-111).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1368.

C.J.S. — 32A C.J.S., Evidence, § 1602.

ALR. — Conclusiveness of uncontradicted testimony of interested witness where opposed to presumption, 72 ALR 94.

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Refusal to charge former O.C.G.A. § 24-4-7 was not error. — See Green v. State, 253 Ga. 693, 324 S.E.2d 181 (1985) (decided under former O.C.G.A. § 24-4-7).

On appeal. — Former statute would not justify the setting aside of the jury's verdict on appeal when there was evidence to support the verdict. Kelly v. Gaskins, 238 Ga. 730, 235 S.E.2d 386 (1977) (decided under former Code 1933, § 38-111).

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ALR. — Conclusiveness of uncontradicted testimony of interested witness where opposed to presumption, 72 ALR 94.

Comparative value of positive and negative testimony, 98 ALR 161.

Relative weight of testimony of attest-

ing witnesses in support of mental competency of testator, 123 ALR 88.

Admissibility, in support of general credibility of an accomplice-witness who has not been impeached of evidence from nonaccomplice witness not otherwise relevant or of probative value as against defendant, 138 ALR 1266.

Distinction between positive and negative evidence, 140 ALR 530.

Probative force of testimony offered to show that crossing signals were not given on approach of train, 162 ALR 9.

24-14-8. Number of witnesses required generally; exceptions; effect of corroboration.

The testimony of a single witness is generally sufficient to establish a fact. However, in certain cases, including prosecutions for treason, prosecutions for perjury, and felony cases where the only witness is an accomplice, the testimony of a single witness shall not be sufficient. Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness, except in prosecutions for treason. (Code 1981, § 24-14-8, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article, "The Demise of the Corroboration Requirement — Its History in Georgia Rape Law," see 26 Emory L.J. 805 (1977).

For comment on Drummond v. State, 87 Ga. App. 105, 73 S.E.2d 43 (1952), see 16 Ga. B.J. 226 (1953).

JUDICIAL DECISIONS

Analysis

General Consideration
Who Is an Accomplice
Sufficiency of Corroborating Evidence
Evidence Constituting Corroboration
Perjury
Jury

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3702, former Code 1873, § 3755, former Code 1882, § 3755, former Penal Code 1895, § 991, former Penal Code 1910, § 1017, former Code 1933, § 38-121, and former O.C.G.A. § 24-4-8 are included in the annotations for this Code section.

Former statute inapplicable. — Exception stated in the former statute did not apply when the state does not rely solely on the testimony of a single accomplice. Ross v. State, 245 Ga. 173, 263 S.E.2d 913 (1980) (decided under former Code 1933, § 38-121).

Admissibility of other crimes evidence is not governed by former O.C.G.A. § 24-4-8. Turner v. State, 268 Ga. 213, 486 S.E.2d 839 (1997) (decided under former O.C.G.A. § 24-4-8).

Failure to charge on accomplice testimony and corroboration was not error as the prosecution largely relied on other evidence, not accomplice testimony, to prove defendant's guilt. Dillard v. State, 272 Ga. App. 523, 612 S.E.2d 804 (2005) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony that the victim knew both robbers and recognized the robbers

during the robbery and the next day, even without the accomplice's pretrial statement implicating the defendant, was direct and circumstantial evidence of the defendant's participation in the crime and former O.C.G.A. § 24-4-8 was inapplicable. Jordan v. State, 278 Ga. App. 126, 628 S.E.2d 221 (2006) (decided under former O.C.G.A. § 24-4-8).

Testimony of a single witness was sufficient to establish venue. — See Moreno v. State, 255 Ga. App. 88, 564 S.E.2d 505 (2002) (decided under former O.C.G.A. § 24-4-8).

When a victim of an aggravated assault and battery testified that the incident, wherein her former boyfriend was following her closely in his car and then shot her, occurred in a particular county at a stated location, such was sufficient to establish venue for those crimes. Morris v. State, 263 Ga. App. 115, 587 S.E.2d 272 (2003) (decided under former O.C.G.A. § 24-4-8).

Testimony of single witness to establish fact. — Testimony of a single witness is generally sufficient to establish a fact, and an officer's testimony that the officer saw defendant's hands on a plastic bag containing cocaine was sufficient to authorize a rational trier of fact to find that defendant possessed the cocaine. Lester v. State, 226 Ga. App. 373, 487 S.E.2d 25 (1997) (decided under former O.C.G.A. § 24-4-8).

Testimony of a single witness was sufficient to authorize a jury's verdict that defendant was guilty beyond a reasonable doubt of committing aggravated assault with a deadly weapon and that the defendant committed simple battery by intentionally kicking the victim on the ankle, causing a bruise. Ringo v. State, 236 Ga. App. 38, 510 S.E.2d 893 (1999) (decided under former O.C.G.A. § 24-4-8).

Where the 14-year-old victim allegedly consented to having sex with defendant, the sexual molestation conviction under O.C.G.A. § 16-6-4(a) was supported by sufficient evidence; under O.C.G.A. § 16-2-1, consent by the victim was irrelevant due to the inability of the victim to legally consent to intercourse, and it was for the jury to determine, in accordance with the testimony of at least a single witness pursuant to former O.C.G.A. § 24-4-8, whether defendant's conduct was immoral or indecent under O.C.G.A. § 16-6-4(a). Slack v. State, 265 Ga. App. 306, 593 S.E.2d 664 (2004) (decided under former O.C.G.A. § 24-4-8).

When an eye-witness identified defendant as the individual the witness saw leave the witness's storage shed with the witness's goods, the evidence sufficed to sustain a verdict of guilty on the charge of burglary under O.C.G.A. § 16-7-1(a). Pursuant to former O.C.G.A. § 24-4-8, a single witness is generally sufficient to establish a fact. Gibson v. State, 268 Ga. App. 696, 603 S.E.2d 319 (2004) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support defendant's burglary conviction after an employee of the burglarized store testified that the employee encountered defendant between 3:30 and 4:30 a.m. in the store, while defendant was trying to pry open the lock on a jewelry counter with a knife, the employee identified defendant from a photographic lineup and at trial, and under former O.C.G.A. § 24-4-8, the testimony of one witness is sufficient to establish a fact. Standfill v. State, 267 Ga. App. 612, 600 S.E.2d 695 (2004) (decided under former O.C.G.A. § 24-4-8).

Defendant's multiple convictions for armed robbery, aggravated assault, kidnapping, possessing a firearm during the commission of a felony, burglary, and kidnapping with bodily injury, were supported by sufficient evidence because defendant and another robbed a store while holding the two owners at gunpoint, defendant led police on a high-speed car chase, and the defendant broke into and robbed two homes, one of which had an occupant that defendant beat; only one store owner's testimony was needed to establish the facts to support the aggravated assault conviction. Owens v. State, 271 Ga. App. 365, 609 S.E.2d 670 (2005) (decided under former O.C.G.A. § 24-4-8).

There was sufficient evidence to support defendant's convictions for child molestation, aggravated child molestation, statutory rape. and incest, in violation of O.C.G.A. §§ 16-6-3, 16-6-4, 16-6-4(c), and 16-6-22, because defendant's step-daughter gave detailed testimony as

General Consideration (Cont'd)

police that the victim was 16-years-old at the time defendant gave the victim marijuana and alcohol was sufficient to support defendant's conviction for contributing to the delinquency of a minor as the testimony of a single witness was generally sufficient to establish a fact, such as the fact that the victim was a minor at the time the acts giving rise to the charge occurred. Little v. State, 262 Ga. App. 377, 585 S.E.2d 677 (2003) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support convictions against defendant for aggravated assault in violation of O.C.G.A. § 16-5-21 and aggravated battery in violation of O.C.G.A. § 16-5-24 since the victim identified defendant from a pre-trial photograph and from an in-court identification, a codefendant and a witness testified against defendant, and the gun that was used to shoot the victim was found near the car with shell casings in the car; it was noted that the testimony of just the victim was sufficient to establish a fact pursuant to former O.C.G.A. § 24-4-8. Dunn v. State, 262 Ga. App. 643, 586 S.E.2d 352 (2003) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony, alone, was sufficient to establish the time frame for the charged offenses. Henry v. State, 274 Ga. App. 139, 616 S.E.2d 883 (2005) (decided under former O.C.G.A. § 24-4-8).

Evidence supported convictions for armed robbery and aggravated assault since after using defendant's mother's telephone number, defendant contacted the victim and arranged a meeting to buy shoes, the victim identified the car defendant was driving, which was registered to defendant's mother, the victim identified defendant from a pretrial police photo array and at trial, and where, at the meeting arranged by the victim was shot in the face and defendant then rummaged through the victim's car where the victim kept the shoes. Waddell v. State, 277 Ga. App. 772, 627 S.E.2d 840 (2006), cert. denied, 127 S. Ct. 731, 2006 U.S. LEXIS 9304, 166 L.Ed.2d 567 (2006) (decided under former O.C.G.A. § 24-4-8).

In a case in which the victim was allegedly bound and beaten by the defendant and thrown into a camper, which the defendant towed to a motel, the victim's testimony was sufficient to support a conviction for kidnapping with bodily injury under O.C.G.A. § 16-5-40 as the testimony of a single witness was all that was necessary under former O.C.G.A. § 24-4-8. Johnson v. State, 281 Ga. App. 7, 635 S.E.2d 278 (2006) (decided under former O.C.G.A. § 24-4-8).

Trial court properly denied the defendant's motion for a directed verdict of acquittal, and the defendant's rape conviction was upheld on appeal, as the victim's testimony at trial that the defendant's sexual organ penetrated hers after telling the defendant to stop was sufficient in and of itself, and no evidence was presented that directly contradicted this statement. Scott v. State, 281 Ga. App. 106, 635 S.E.2d 582 (2006) (decided under former O.C.G.A. § 24-4-8).

Despite the defendant's contentions that insufficient evidence as to a child's presence in the room when the victim was accosted required reversal of a cruelty to children conviction, such conviction was upheld, supported by the victim's testimony notifying the defendant of the presence of the child before the defendant fired a shot next to the victim's head. Price v. State, 281 Ga. App. 844, 637 S.E.2d 468 (2006) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony alone was sufficient under former O.C.G.A. § 24-4-8 to establish the elements of a charge against the defendant of child molestation, in violation of O.C.G.A. § 16-6-4(a), as the victim testified that while she was at the defendant's home visiting his daughter, he requested that she kiss him and have sexual intercourse with him, and that he showed her his erect penis; there was also testimony from a jail nurse who confirmed that the defendant had a tattoo on his penis as described by the victim, and there was an internet instant-message conversation between the defendant and the victim, during which he apologized to her for his actions. Hammontree v. State, 283 Ga. App. 736, 642 S.E.2d 412 (2007) (decided under former O.C.G.A. § 24-4-8).

Defendant's family violence battery con-

viction was affirmed on appeal as testimony from the victim, standing alone, describing the defendant's attack, when coupled with testimony regarding two prior incidents, sufficiently supported the conviction. Simmons v. State, 285 Ga. App. 129, 645 S.E.2d 622 (2007) (decided under former O.C.G.A. § 24-4-8).

Despite the defendant's claim that the victim's testimony was too uncertain to support a conviction for aggravated sexual battery, the conviction was upheld on appeal as: (1) it was not for the appeals court to determine or question how the jury resolved any apparent conflicts or uncertainties in the evidence; (2) in general, the testimony of the victim was sufficient to establish a fact; and (3) corroboration was not required, and if corroboration were, the bite mark on the defendant's shoulder, which was testified to by the victim, provided sufficient corroboration. Boyt v. State, 286 Ga. App. 460, 649 S.E.2d 589 (2007) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support armed robbery conviction since the victim testified that defendant took the victim's cell phone while defendant pointed a gun at the victim and threatened to shoot the victim; under former O.C.G.A. § 24-4-8, testimony of a single witness was generally sufficient to establish a fact. Burden v. State, 290 Ga. App. 734, 660 S.E.2d 481 (2008) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence existed to support a defendant's convictions for incest and child molestation with regard to actions the defendant took toward the defendant's own children based on the children's recorded police interviews that were played for the jury; the testimony from a licensed clinical social worker who was admitted as an expert in child sexual abuse and the abuse's effect on children; and the testimony of the pediatric nurse practitioner who examined the victims and stated that, although the victims' physical exams were normal, the results were consistent with their reports of sexual abuse. The victims' testimony, standing alone, would have been sufficient to support the convictions; therefore, the trial court did not err by denying the defendant's motion for a directed verdict. Hubert v. State, 297 Ga. App. 71, 676 S.E.2d 436 (2009) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence was presented to support a defendant's conviction for armed robbery because the victim, a taxi driver, identified the defendant as one of the perpetrators based, inter alia, on the victim's knowledge of the defendant from living in the same townhome complex; a single witness's testimony was sufficient to establish a fact under former O.C.G.A. § 24-4-8. Troutman v. State, 297 Ga. App. 196, 676 S.E.2d 836 (2009) (decided under former O.C.G.A. § 24-4-8).

Because former O.C.G.A. § 24-4-8 provided that a victim's testimony, standing alone, was sufficient, the victim's testimony that defendant twice shot at the victim was sufficient to find defendant guilty of violating O.C.G.A. § 16-5-21(a)(2) despite testimony to the contrary. Hartley v. State, 299 Ga. App. 534, 683 S.E.2d 109 (2009) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of malice murder, aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime because although one of the victim's identification was the only evidence linking the defendant to the crimes, the determination of a witness' credibility, including the accuracy of eyewitness identification, was within the exclusive province of the jury, and under former O.C.G.A. § 24-4-8, the testimony of a single witness was generally sufficient to establish a fact. Reeves v. State, 288 Ga. 545, 705 S.E.2d 159 (2011) (decided under former O.C.G.A. § 24-4-8).

Defendant's convictions for kidnapping, hijacking a motor vehicle, armed robbery, possession of a firearm during the commission of a felony, carrying a concealed weapon, and possession of a weapon on school property were authorized because pursuant to former O.C.G.A. § 24-4-8, the victim's testimony alone established the essential elements of the offenses. Lester v. State, 309 Ga. App. 1, 710 S.E.2d 161 (2011) (decided under former O.C.G.A. § 24-4-8).

General Consideration (Cont'd)

Trial counsel's failure to cross-examine the codefendant about a plea deal was not patently unreasonable because trial counsel's decision not to question the codefendant due to the potential harm to the defendant was a tactical and strategic decision; even if trial counsel performed deficiently, the defendant could not show prejudice in light of the overwhelming evidence against the defendant, and even in the absence of the defendant's testimony placing the defendant at the scene and acknowledging that the defendant hit the victim, under former O.C.G.A. § 24-4-8, the victim's testimony alone was sufficient to establish the facts necessary to support the defendant's convictions. Bonner v. State, 308 Ga. App. 827, 709 S.E.2d 358 (2011) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of bus hijacking, O.C.G.A. § 16-12-123(a)(1)(A), because the jury was authorized to conclude beyond a reasonable doubt that the defendant exercised control of the bus by force; the defendant brandished a handgun in the open door of the bus as the defendant ordered a passenger to get off, and the bus driver testified that the driver did not feel free to drive away because the driver felt the driver's life was in danger and the driver did not want to agitate the defendant. Cannon v. State, 310 Ga. App. 262, 712 S.E.2d 645 (2011) (decided under former O.C.G.A. § 24-4-8).

Because the victim's testimony was legally sufficient under former O.C.G.A. § 24-4-8 to establish that the defendants assaulted the victim with intent to rob, the issue of which defendant actually held the weapon was immaterial; therefore, pursuant to O.C.G.A. § 16-2-20(a), the evidence was sufficient to find them both guilty of aggravated assault with intent to rob and of possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-21(a)(1) and 16-11-106. Clark v. State, 311 Ga. App. 58, 714 S.E.2d 736 (2011) (decided under former O.C.G.A. § 24-4-8).

Evidence that a defendant became highly intoxicated while having visitation with his seven-year-old daughter, that he licked her vagina, kissed her with his tongue in her mouth, and made her rub her hand on his penis was sufficient to support convictions for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). A jury could infer from the evidence that the defendant's intent was to arouse and satisfy his sexual desires pursuant to O.C.G.A. § 16-2-6. Obeginski v. State, 313 Ga. App. 567, 722 S.E.2d 162 (2012), cert. denied, No. S12C0908, 2012 Ga. LEXIS 1013 (Ga. 2012) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support the defendant's conviction for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because the victim testified that the defendant held a knife when the defendant told the victim to take her clothes off and to open her legs so that the defendant could have vaginal intercourse with her against her will; pursuant to former O.C.G.A. § 24-4-8, that testimony alone was sufficient to support the conviction. Ellis v. State, 316 Ga. App. 352, 729 S.E.2d 492 (2012) (decided under former O.C.G.A. § 24-4-8).

Testimony of rape victim sufficient. — Evidence was more than sufficient to authorize a jury's verdict that the defendant was guilty, beyond a reasonable doubt, of rape because the victim's testimony that "it hurt" when the defendant pushed his penis in her vagina and that he threatened to put her family out of his house if she told her parents or if she refused sexual contact was more than sufficient evidence of force; the jury was authorized to consider that the victim failed to initially disclose the incidents because she was fearful of the defendant and that the defendant yelled at the victim when she moved during intercourse as additional evidence of his forcible acts, and the victim's testimony, together with her immediate and consistent outcry to her father, law enforcement, and an emergency room pediatrician, provided the jury with ample evidence of penetration. Matlock v. State, 302 Ga. App. 173, 690 S.E.2d 489 (2010) (decided under former O.C.G.A. § 24-4-8).

Testimony from nurse as to cause of rape victim's injuries. — Nurse was properly allowed to testify as to a rape victim's statement to the nurse that her assailant had blindfolded her and pushed her into furniture because the victim's statement to the nurse was given to explain the nature and origin of some of her injuries. The nurse's evidence was sufficient to allow the jury to find that the rape victim had been pushed into furniture as she was pushed and dragged through her home while blindfolded, supporting the defendant's assault convictions. Bryant v. State, 304 Ga. App. 456, 696 S.E.2d 439 (2010) (decided under former O.C.G.A. § 24-4-8).

Testimony of single informant sufficient to sustain conviction. — Because the informant's testimony was the only testimony in which defendant was identified as the person who sold the methamphetamine to the informant in violation of O.C.G.A. § 16-13-31, there was sufficient evidence to support the conviction; under former O.C.G.A. § 24-4-8, the testimony of one witness was sufficient to establish defendant's identity. Vasquez v. State, 275 Ga. App. 548, 621 S.E.2d 764 (2005) (decided under former O.C.G.A. § 24-4-8).

Testimony of motorist sufficient. — Motorist's identification of defendant as the driver of a pick-up truck that hit the motorist's vehicle and then drove away was sufficient under former O.C.G.A. § 24-4-8 to establish defendant's identity for purposes of defendant's conviction for leaving the scene of an accident and following too closely, in violation of O.C.G.A. §§ 40-6-49 and 40-6-270(a)(1). Craig v. State, 276 Ga. App. 329, 623 S.E.2d 518 (2005) (decided under former O.C.G.A. § 24-4-8).

Officer's testimony sufficient. — Because the testimony of a single witness was generally sufficient to establish a fact, and there was no requirement that an actual exchange of money for drugs be witnessed by more than one person or be recorded on videotape, the defendant's sale of cocaine conviction was upheld on appeal, based on a law enforcement agent's actions of handing the defendant $40 in exchange for two pieces of a substance that tested positive for cocaine. Hicks v. State, 281 Ga. App. 217, 635 S.E.2d 830 (2006) (decided under former O.C.G.A. § 24-4-8).

When a deputy testified that the defendant resisted the deputy's efforts to break up a prison fight, then turned on the deputy, punched the deputy, and swung at the deputy repeatedly, injuring the deputy, there was sufficient evidence of mutiny in a penal institution and felony obstruction of an officer; the trial court was authorized under O.C.G.A. § 16-2-6 to infer from the circumstances that the defendant both knowingly and willfully obstructed the deputy by the use of violence and intended to cause the deputy serious bodily injury by striking the deputy with a fist, and under former O.C.G.A. § 24-4-8 testimony of a single witness was sufficient. Butler v. State, 284 Ga. App. 802, 644 S.E.2d 898 (2007) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence existed to support a finding that the arresting officer had a clear and unobstructed view of the defendant not wearing a seat belt as required by O.C.G.A. § 40-8-76.1(f), based solely on that officer's testimony, as the testimony of a single witness was sufficient to establish a fact. Schramm v. State, 286 Ga. App. 156, 648 S.E.2d 392 (2007) (decided under former O.C.G.A. § 24-4-8).

Given that two officers testified that the officers saw the defendant, in plain view, packaging 35 grams of cocaine and 94 grams of marijuana into smaller packages, and the testimony of a single witness was generally sufficient to establish a fact, the defendant's convictions for trafficking in cocaine and possession of marijuana with the intent to distribute were upheld on appeal. King v. State, 289 Ga. App. 461, 657 S.E.2d 570 (2008) (decided under former O.C.G.A. § 24-4-8).

Evidence that a defendant was seen riding a bicycle after midnight while carrying a tire iron and a black saw case and wearing a new leather tool belt around the defendant's waist, along with the defendant's own statement that the defendant had been working at the address later determined to have been broken into and a tool belt and saw taken, was sufficient to convict the defendant of burglary under

General Consideration (Cont'd)

O.C.G.A. § 16-7-1, although the defendant fled from police and the stolen items were not recovered. Wilcox v. State, 310 Ga. App. 382, 713 S.E.2d 468 (2011) (decided under former O.C.G.A. § 24-4-8).

Testimony of arresting officer sufficient to convict. — Defendant was properly convicted of felony possession of marijuana as a deputy sheriff testified that the defendant admitted that the marijuana found in the trunk of a rental car belonged to the defendant. Even though the defendant denied saying this, or possessing the drugs, the credibility of witnesses was for the jury to determine, and under former O.C.G.A. § 24-4-8, the testimony of a single witness was sufficient to establish the facts. McKinney v. State, 293 Ga. App. 419, 667 S.E.2d 210 (2008) (decided under former O.C.G.A. § 24-4-8).

With regard to a defendant's convictions for obstruction of a police officer and other related crimes, there was sufficient evidence to support the convictions based on the single testimony of the officer involved. Because it was the function of the jury to determine the credibility of witnesses and weigh any conflict in the evidence, the testimony of a single witness is generally sufficient to establish a fact; therefore, the testimony of the police officer who was involved in the altercation with the defendant was sufficient evidence for the jury to convict the defendant. Whatley v. State, 296 Ga. App. 72, 673 S.E.2d 510 (2009) (decided under former O.C.G.A. § 24-4-8).

Testimony of police investigator sufficient. — Police investigator's testimony that the defendant held a three-inch knife to the investigator's throat amply supported a conviction under former O.C.G.A. § 24-4-8. Lloyd v. State, 280 Ga. 187, 625 S.E.2d 771 (2006) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony that the defendant raped the victim at knifepoint, standing alone, was sufficient to establish the defendant's guilt beyond a reasonable doubt. Johnson v. State, 280 Ga. App. 341, 634 S.E.2d 134 (2006) (decided under former O.C.G.A. § 24-4-8).

Under former O.C.G.A. § 24-4-8, the victim's testimony that the defendant pulled a knife out of the defendant's pocket with the defendant's right hand and lunged at the victim was sufficient in itself to support convictions for aggravated assault and carrying a concealed weapon under O.C.G.A. §§ 16-5-21 and 16-11-126. Testimony that the defendant had arthritis in the right hand at most created a conflict in the evidence, as there was also testimony that the defendant, a carpenter, used both hands in the defendant's trade. Carder v. State, 291 Ga. App. 265, 661 S.E.2d 632 (2008) (decided under former O.C.G.A. § 24-4-8).

Victim testified that as the victim walked in front of the defendant's car, the defendant hit the gas pedal, throwing the victim onto the hood; accelerated when the victim asked the defendant to stop; and slammed on the brakes, causing the victim to slide down the hood, and the victim's legs and foot to be broken as they went underneath the car. As the victim's testimony alone was sufficient to establish these facts under former O.C.G.A. § 24-4-8, the defendant was properly convicted of aggravated battery. Cash v. State, 293 Ga. App. 702, 667 S.E.2d 691 (2008) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony that the defendant kicked in the door of the victim's residence, entered without permission, pointed a shotgun at the victim, and threatened to shoot the victim if the victim did not give defendant money was sufficient in and of itself to support the defendant's conviction for armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of a crime. Reed v. State, 293 Ga. App. 479, 668 S.E.2d 1 (2008) (decided under former O.C.G.A. § 24-4-8).

With regard to a defendant's conviction for aggravated assault, there was sufficient evidence to support the conviction based on the victim's testimony that the defendant was the individual who approached the victim's car with a gun and ordered the victim out, causing the victim to be in fear. Kashamba v. State, 295 Ga. App. 540, 672 S.E.2d 512 (2009) (decided under former O.C.G.A. § 24-4-8).

Victim's uncorroborated testimony that

the defendant entered the victim's home by removing the back door from the door's hinges, ordered the victim at gunpoint to get in the defendant's truck, and did not bring the victim back home for hours, was sufficient to convict the defendant of burglary and kidnapping. Hollis v. State, 295 Ga. App. 529, 672 S.E.2d 487 (2009) (decided under former O.C.G.A. § 24-4-8).

With regard to a defendant's conviction for aggravated assault, there was sufficient evidence to support the conviction based on the victim's testimony that the defendant was the individual who approached the victim's car with a gun and ordered the victim out, causing the victim to be in fear. Kashamba v. State, 295 Ga. App. 540, 672 S.E.2d 512 (2009) (decided under former O.C.G.A. § 24-4-8).

There was sufficient evidence to support a defendant's convictions for aggravated child molestation, child molestation, and false imprisonment with regard to allegations that the defendant forced a romantic friend's minor child to perform oral sex on the defendant several times over a three year period, based on the testimony of the victim (which alone was sufficient), the videotaped forensic interview of the victim, the testimony of the police investigator and the victim's mother concerning what the victim told them, as well as the testimony of the victim's siblings, who were eyewitnesses to one incident. Further, the testimony of the victim that the defendant locked the victim in the house and would not let the victim leave supported the conviction on the false imprisonment charge. Metts v. State, 297 Ga. App. 330, 677 S.E.2d 377 (2009) (decided under former O.C.G.A. § 24-4-8).

Secret Service agent testimony. — Trial counsel was not ineffective for failing to object on hearsay grounds to portions of a Secret Service agent's testimony about what the agent learned during the investigation since the agent did not repeat the testimony of an out-of-court declarant. Bearden v. State, 316 Ga. App. 721, 728 S.E.2d 874 (2012) (decided under former O.C.G.A. § 24-4-8).

In child molestation case, the victim's testimony did not require corroboration because: (1) the defendant's 15-year-old granddaughter testified that the defendant molested her in his home and in his pickup truck between the time she was in kindergarten until about the time she was in the sixth grade; (2) a physician testified that she found physical evidence that was consistent with penetration and sexual abuse; (3) an older granddaughter testified that she was molested by defendant 25 years ago; and (4) evidence was presented that defendant molested his five-year-old great granddaughter. Delk v. State, 274 Ga. App. 261, 619 S.E.2d 310 (2005) (decided under former O.C.G.A. § 24-4-8).

Testimony alone sufficient to prove mental suffering. Fabe v. Floyd, 199 Ga. App. 322, 405 S.E.2d 265, cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991) (on motion for rehearing) (decided under former O.C.G.A. § 24-4-8).

Former statute not controlling in federal court. — Georgia law requires independent corroboration of an accomplice's testimony; this Georgia rule is not controlling upon collateral review by a federal court. Llewellyn v. Stynchcombe, 609 F.2d 194 (5th Cir. 1980) (decided under former Code 1933, § 38-121).

Juvenile proceedings. — Requirement of independent corroboration of an accomplice's testimony now set forth in former O.C.G.A. § 24-4-8 is applicable to a juvenile proceeding. In re J.H.M., 202 Ga. App. 79, 413 S.E.2d 515 (1991) (decided under former O.C.G.A. § 24-4-8).

Basis for principle of requiring corroboration in a felony when the only witness is an accomplice is to safeguard against one person falsely maintaining that the person and the defendant were accomplices to commit the crime. Coleman v. State, 227 Ga. 769, 183 S.E.2d 379 (1971) (decided under former Code 1933, § 38-121).

At common law one could be convicted on the uncorroborated testimony of an accomplice; in Georgia, in felony cases, when the only witness is an accomplice, the accomplice's testimony must be corroborated and at common law, the doctrine did not amount to a rule of evidence, but merely to a "counsel of caution" given by the judge to a jury. LaFray v. State, 48 Ga. App. 133, 172 S.E. 155 (1933) (decided under former Code 1933, § 38-121).

General Consideration (Cont'd)

If witness not accomplice. — Unless a witness sought to be impeached is an accomplice of the accused, the witness's testimony, without any corroboration, may authorize the conviction of the accused in a felony case. Preston v. State, 42 Ga. App. 280, 155 S.E. 774 (1930) (decided under former Penal Code 1910, § 1017).

Uncorroborated testimony of accomplice is not sufficient to authorize a felony conviction. Holton v. State, 61 Ga. App. 654, 7 S.E.2d 202 (1940) (decided under former Code 1933, § 38-121); Dye v. State, 77 Ga. App. 517, 48 S.E.2d 742 (1948) (decided under former Code 1933, § 38-121); Potts v. State, 86 Ga. App. 779, 72 S.E.2d 553 (1952) (decided under former Code 1933, § 38-121); Edenfield v. State, 95 Ga. App. 2, 96 S.E.2d 533 (1957) (decided under former Code 1933, § 38-121); Harris v. State, 96 Ga. App. 395, 100 S.E.2d 120 (1957) (decided under former Code 1933, § 38-121); Famber v. State, 134 Ga. App. 112, 213 S.E.2d 525 (1975) (decided under former Code 1933, § 38-121); Adams v. State, 140 Ga. App. 621, 231 S.E.2d 547 (1976) (decided under former Code 1933, § 38-121); Dudley v. State, 148 Ga. App. 560, 251 S.E.2d 815 (1978) (decided under former Code 1933, § 38-121); Stinson v. State, 151 Ga. App. 533, 260 S.E.2d 407 (1979) (decided under former Code 1933, § 38-121); Ladson v. State, 248 Ga. 470, 285 S.E.2d 508 (1981) (decided under former Code 1933, § 38-121).

Defendant may not be convicted on the uncorroborated testimony of an accomplice. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210 (1984) (decided under former O.C.G.A. § 24-4-8).

Rule applies only when accomplice is sole witness. — Rule that a felony conviction is not to be had on the uncorroborated testimony of an accomplice applies only when the accomplice is the sole witness upon whose testimony the state relies. McDaniel v. State, 158 Ga. App. 320, 279 S.E.2d 762 (1981) (decided under former Code 1933, § 38-121).

Defendant's conviction did not rely solely on accomplice testimony, contrary to former O.C.G.A. § 24-4-8, because the accomplice's sister testified. White v. State, 315 Ga. App. 54, 726 S.E.2d 548 (2012) (decided under former O.C.G.A. § 24-4-8).

Corroboration of accomplice not necessary to sustain a misdemeanor conviction. Parsons v. State, 43 Ga. 197 (1871) (decided under former Code 1868, § 3702); Grant v. State, 89 Ga. 393, 15 S.E. 488 (1892) (decided under former Code 1882, § 3755); Martin v. State, 17 Ga. App. 372, 86 S.E. 945 (1915) (decided under former Penal Code 1910, § 1017); Carson v. State, 37 Ga. App. 100, 138 S.E. 920 (1927) (decided under former Penal Code 1910, § 1017); Dobbs v. State, 44 Ga. App. 749, 162 S.E. 845 (1932) (decided under former Penal Code 1910, § 1017); Johnson v. State, 57 Ga. App. 813, 197 S.E. 61 (1938) (decided under former Code 1933, § 38-121); Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948) (decided under former Code 1933, § 38-121); Bell v. State, 85 Ga. App. 242, 68 S.E.2d 925 (1952) (decided under former Code 1933, § 38-121); Drummond v. State, 87 Ga. App. 105, 73 S.E.2d 43 (1952) (decided under former Code 1933, § 38-121),, for comment, see 16 Ga. B.J. 226 (1953); Bridges v. State, 106 Ga. App. 363, 126 S.E.2d 903 (1962) (decided under former Code 1933, § 38-121); C.C.R. v. State, 145 Ga. App. 27, 243 S.E.2d 601 (1978) (decided under former Code 1933, § 38-121); Neal v. State, 152 Ga. App. 270, 262 S.E.2d 561 (1979) (decided under former Code 1933, § 38-121); Dabney v. State, 154 Ga. App. 355, 268 S.E.2d 408 (1980) (decided under former Code 1933, § 38-121).

Trial court did not err in denying the codefendant's motion for directed verdict as to the defendant's conviction for misdemeanor theft by shoplifting because no corroboration of accomplice testimony was necessary to support a misdemeanor conviction. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011) (decided under former O.C.G.A. § 24-4-8).

When several crimes are charged, each offense must be corroborated if accomplices are involved. Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627 (1981) (decided under former Code 1933, § 38-121).

Distinction between general and specific testimony. — Distinction must be made between evidence which tends to prove the truth of the accomplice's general testimony and that which tends to prove the identity and participation of the accused. Gaudin v. State, 133 Ga. App. 252, 211 S.E.2d 189 (1974) (decided under former Code 1933, § 38-121); Boggus v. State, 136 Ga. App. 917, 222 S.E.2d 686 (1975) (decided under former Code 1933, § 38-121); Hill v. State, 236 Ga. 831, 225 S.E.2d 281 (1976) (decided under former Code 1933, § 38-121); Vaughn v. State, 139 Ga. App. 565, 228 S.E.2d 741 (1976) (decided under former Code 1933, § 38-121); Adams v. State, 140 Ga. App. 621, 231 S.E.2d 547 (1977) (decided under former Code 1933, § 38-121).

Corroboration as to material facts. — If the accomplice is corroborated in material parts of the accomplice's testimony, then the accomplice may be believed by the jury as to other material parts as to which there is no corroboration. Pitts v. State, 128 Ga. App. 434, 197 S.E.2d 495 (1973) (decided under former Code 1933, § 38-121); Quaid v. State, 132 Ga. App. 478, 208 S.E.2d 336 (1974) (decided under former Code 1933, § 38-121).

Partial corroboration. — Simply because an accomplice's testimony is corroborated in most details, it does not follow that the accomplice's testimony alone as to the identity and participation of the accused is sufficient to justify conviction. Nix v. State, 133 Ga. App. 417, 211 S.E.2d 26 (1974) (decided under former Code 1933, § 38-121); Gaudin v. State, 133 Ga. App. 252, 211 S.E.2d 189 (1974) (decided under former Code 1933, § 38-121); Hill v. State, 236 Ga. 831, 225 S.E.2d 281 (1976) (decided under former Code 1933, § 38-121); Vaughn v. State, 139 Ga. App. 565, 228 S.E.2d 741 (1976) (decided under former Code 1933, § 38-121); Hobbs v. State, 142 Ga. App. 782, 237 S.E.2d 16 (1977) (decided under former Code 1933, § 38-121).

Two crimes in unified transaction. — When armed robbery was an integral part of a murder transaction and was simultaneous with the murder, independent corroboration of the murder is adequate to corroborate an accomplice's testimony as to the entire unified transaction including the armed robbery. Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (decided under former Code 1933, § 38-121).

Witness as party. — Fact that the witness is a party and is a prisoner convicted of a crime does not afford any basis to disregard the witness's testimony. Balkcom v. Vickers, 220 Ga. 345, 138 S.E.2d 868 (1964), overruled on other grounds, Reed v. State, 291 Ga. 10, 727 S.E.2d 112 (2012) (decided under former Code 1933, § 38-121).

Testimony of victim. — When the alleged victim of the attack was the only witness to positively identify the defendant as the perpetrator, but when the victim's testimony was in many material respects corroborated, the jury had the right to believe the victim's testimony. Finney v. State, 51 Ga. App. 545, 181 S.E. 144 (1935) (decided under former Code 1933, § 38-121).

While the victim had just pulled into the parking lot of the victim's employer when defendant pointed a gun at the victim and demanded the victim's wallet, the victim's positive identification of defendant as the robber was sufficient to establish defendant's guilt and to support defendant's armed robbery conviction. Parks v. State, 257 Ga. App. 25, 570 S.E.2d 350 (2002) (decided under former O.C.G.A. § 24-4-8).

Because the victim's statement of sexual abuse was sufficient under former O.C.G.A. § 24-4-8 to convict defendant of kidnapping with bodily injury, aggravated child molestation, rape, aggravated sodomy, aggravated assault, and possession of a knife during the commission of a crime, the victim's testimony did not have to be corroborated by physical evidence. Gartrell v. State, 272 Ga. App. 726, 613 S.E.2d 226 (2005) (decided under former O.C.G.A. § 24-4-8).

Evidence that the defendant intentionally struck the victim with a stick and that either the defendant or one of the other parties to the assault intentionally struck the victim with their fists and a concrete block supported an aggravated assault conviction; further, although the victim was the only person who testified

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about having been hit with a concrete block, and was not sure which of the victim's attackers struck that blow, this testimony was sufficient to establish that the victim was hit with a concrete block because it made no difference whether an accomplice, and not the defendant, assaulted the victim in the manner alleged in the indictment. Oliver v. State, 278 Ga. App. 425, 629 S.E.2d 63 (2006) (decided under former O.C.G.A. § 24-4-8).

Even if a burglary victim had not testified that the checks were missing, an intent to steal could have been inferred since the evidence showed the defendant's unlawful entry into the building of another where valuable goods were kept, and the trial court did not err in charging the jury that it was allowed to "infer" an intent to steal in the context of burglary; while the defendant denied the burglary upon a defense of alibi, the testimony of a single witness was generally sufficient to establish a fact, and the defendant's challenge to the sufficiency of the evidence was without merit. Studiemeyer v. State, 278 Ga. App. 756, 629 S.E.2d 593 (2006) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony as to the non-consensual and forcible nature of the victim's sexual contact with the defendant, standing alone, was sufficient to sustain the defendant's conviction of rape in violation of O.C.G.A. § 16-6-1(a)(1). Brown v. State, 293 Ga. App. 633, 667 S.E.2d 899 (2008) (decided under former O.C.G.A. § 24-4-8).

While the state failed to produce a weapon, fingerprints, or other physical evidence tying defendant to the crimes, pursuant to former O.C.G.A. § 24-4-8, the jury was authorized to accept the cashier's identification testimony; accordingly, the evidence was sufficient to support defendant's conviction for armed robbery. Clowers v. State, 299 Ga. App. 576, 683 S.E.2d 46 (2009) (decided under former O.C.G.A. § 24-4-8).

The testimony of an armed robbery victim and the victim's love interest, who were eyewitnesses to the defendant's crimes of armed robbery and aggravated assault, and who separately identified the defendant as the perpetrator of the robbery and assault, standing alone, was sufficient to establish the defendant's identity as the perpetrator. Crawford v. State, 301 Ga. App. 633, 688 S.E.2d 409 (2009) (decided under former O.C.G.A. § 24-4-8).

Jury could have found the defendant guilty beyond a reasonable doubt of two counts of aggravated assault because the victim's testimony that the defendant pointed a gun at the victim and that a shot was subsequently fired wounding the victim was sufficient circumstantial evidence that the defendant committed a violent injury to the victim. Wright v. State, 302 Ga. App. 101, 690 S.E.2d 220 (2010) (decided under former O.C.G.A. § 24-4-8).

Testimony of child victim. — Even though child victim's testimony was the only direct evidence proving the essential elements, the child's testimony was sufficient to authorize defendant's conviction. Cantrell v. State, 231 Ga. App. 629, 500 S.E.2d 386 (1998) (decided under former O.C.G.A. § 24-4-8).

Georgia law does not require corroboration of a child molestation victim's testimony. Atkins v. State, 243 Ga. App. 489, 533 S.E.2d 152 (2000) (decided under former O.C.G.A. § 24-4-8).

In a child molestation prosecution, the victim's testimony that defendant touched the victim "down there" was sufficient to support defendant's conviction. Kidd v. State, 257 Ga. App. 744, 572 S.E.2d 80 (2002) (decided under former O.C.G.A. § 24-4-8).

Victim's testimony alone was sufficient to prove defendant guilty of child molestation (O.C.G.A. § 16-6-4(a)) and aggravated child molestation (O.C.G.A. § 16-6-22.2(b)), pursuant to former O.C.G.A. § 24-4-8. The testimony of the victim's cousin, two school friends, and the interviewing detective, was admissible as substantive evidence under the former Child Hearsay Statute, former O.C.G.A. § 24-3-16. Vaughn v. State, 301 Ga. App. 391, 687 S.E.2d 651 (2009) (decided under former O.C.G.A. § 24-4-8).

Victim need not be corroborated. — There is no requirement that the testimony of the victim of an alleged assault be corroborated in order to legally convict the

accused. Gay v. State, 143 Ga. App. 857, 240 S.E.2d 226 (1977) (decided under former Code 1933, § 38-121); Samuels v. State, 223 Ga. App. 275, 477 S.E.2d 414 (1996) (decided under former O.C.G.A. § 24-4-8).

When the victim's testimony established each and every element of the four offenses, the victim's testimony, alone, was sufficient to support a finding of guilt beyond a reasonable doubt. Thompson v. State, 203 Ga. App. 339, 416 S.E.2d 755, cert. denied, 203 Ga. App. 908, 416 S.E.2d 755 (1992) (decided under former O.C.G.A. § 24-4-8).

Testimony of three victims of armed robbery was sufficient to support conviction, and the testimony did not require corroboration. Johnson v. State, 213 Ga. App. 194, 444 S.E.2d 334 (1994) (decided under former O.C.G.A. § 24-4-8).

When a third person testifies that a witness for the prosecution was an accomplice of the third person, and that the defendant was not a party to the crime, the testimony of the witness for the prosecution may not be excluded on the principle of requiring corroboration in a felony since the only witness is an accomplice. Coleman v. State, 227 Ga. 769, 183 S.E.2d 379 (1971) (decided under former Code 1933, § 38-121).

Subscribing witnesses. — Bill of sale to personalty, though attested by two subscribing witnesses, is admissible in evidence upon due proof of the document's execution by only one of the witnesses, without calling or accounting for the other. Cooper v. O'Brien, 98 Ga. 773, 26 S.E. 470 (1896) (decided under former Civil Code 1895, § 5156).

Transaction with deceased person. — Generally, the testimony of one witness is sufficient to establish a fact, even though such witness may be testifying to a transaction or communications with a deceased person. Donald v. Groves, 160 Ga. 163, 126 S.E. 583 (1925) (decided under former Civil Code 1910, § 5742).

Grounds for new trial. — Motion to rule out testimony of a witness who is a coindictee on the ground that such testimony shows the witness to be an accomplice is not a legal ground of objection, but the argument can be considered in connection with the general grounds of a motion for a new trial which contend that there is insufficient corroboration to warrant a conviction. Patterson v. State, 109 Ga. App. 582, 137 S.E.2d 74 (1964) (decided under former Code 1933, § 38-121).

Crime of illegally selling drugs was not one of those listed in the former statute which would require the testimony of a second witness to support a conviction. Crews v. State, 133 Ga. App. 764, 213 S.E.2d 34 (1975) (decided under former Code 1933, § 38-121); Johnson v. State, 153 Ga. App. 771, 266 S.E.2d 551 (1980) (decided under former Code 1933, § 38-121.

Corroboration of facts in perjury prosecution. — State complied with O.C.G.A. § 24-4-8 in producing more than two fact witnesses to testify about the facts alleged to have been falsely sworn to, i.e., the underlying acts the defendants used as a basis to swear out arrest warrants, but the state was not required to produce opinion witnesses to testify that the defendants swore falsely and committed perjury. Watson v. State, 235 Ga. App. 381, 509 S.E.2d 87 (1998) (decided under former O.C.G.A. § 24-4-8).

Witness testimony about inaccurate date-time stamp. — Trial court did not err in admitting under former O.C.G.A. § 24-4-48(b) still photographs taken from an ATM's videotapes in a defendant's theft by deception prosecution because while a bank investigator testified that the date-time stamp was inaccurate by approximately one hour, such an inaccuracy went to the weight to be given the evidence but not to the evidence's admissibility. Parks v. State, 294 Ga. App. 646, 669 S.E.2d 684 (2008) (decided under former O.C.G.A. § 24-4-8).

Testimony was sufficient to sustain adjudication of child deprivation. — Juvenile court did not err in adjudicating a child deprived and granting temporary custody of the child to the Department of Family and Children Services because, under former O.C.G.A. § 24-4-8, the testimony of the pediatrician, the detective, and the caseworker were sufficient to sustain the adjudication that the child was deprived. In the Interest of K.B., 302 Ga. App. 50, 690 S.E.2d 627 (2010) (decided

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under former O.C.G.A. § 24-4-8).

Who Is an Accomplice

Test for determining. — Test for determining whether a witness is an accomplice is: "could the witness himself have been indicted for the offense, either as principal or as accessory?" Stone v. State, 118 Ga. 705, 45 S.E. 630, 98 Am. St. R. 145 (1903); Montiford v. State, 144 Ga. 582, 87 S.E. 797 (1916); LaFray v. State, 48 Ga. App. 133, 172 S.E. 115 (1933); Kearce v. State, 178 Ga. 220, 172 S.E. 643 (1934); Head v. State, 59 Ga. App. 451, 1 S.E.2d 227 (1939); Lanier v. State, 187 Ga. 534, 1 S.E.2d 405 (1939); Mosley v. State, 65 Ga. App. 800, 16 S.E.2d 504 (1941); Stebbins v. State, 78 Ga. App. 534, 51 S.E.2d 592 (1949); Harris v. State, 96 Ga. App. 395, 100 S.E.2d 120 (1957); Fortner v. State, 96 Ga. App. 855, 101 S.E.2d 908 (1958); Aimar v. State, 116 Ga. App. 204, 156 S.E.2d 367 (1967); Payne v. State, 135 Ga. App. 245, 217 S.E.2d 476 (1975); Herrin v. State, 138 Ga. App. 729, 227 S.E.2d 498 (1976), overruled on other grounds, Patterson v. State, 238 Ga. 204, 232 S.E.2d 233, cert. denied, 431 U.S. 970, 97 S. Ct. 2932, 53 L. Ed. 2d 1067 (1977).

Former O.C.G.A. § 24-4-8 provides, in part, that in felony cases when the only witness is an accomplice, the testimony of a single witness is not sufficient. This rule has been applied to juvenile proceedings. In re A.Z., 301 Ga. App. 524, 687 S.E.2d 887 (2009), cert. denied, No. S10C0492, 2010 Ga. LEXIS 335 (Ga. 2010) (decided under former O.C.G.A. § 24-4-8).

Accessory before the fact and principals in the first and second degrees are all accomplices. Kearce v. State, 178 Ga. 220, 172 S.E. 643 (1934) (decided under former Code 1933, § 38-121); Stebbins v. State, 78 Ga. App. 534, 51 S.E.2d 592 (1949) (decided under former Code 1933, § 38-121).

Accessory after the fact was not an accomplice within the meaning of the former statute. Allen v. State, 74 Ga. 769 (1885) (decided under former Code 1882, § 3755); Springer v. State, 102 Ga. 447, 30 S.E. 971 (1897) (decided under former Penal Code 1895, § 991); Kearce v. State, 178 Ga. 220, 172 S.E. 643 (1934) (decided under former Code 1933, § 38-121); Mills v. State, 193 Ga. 139, 17 S.E.2d 719 (1941) (decided under former Code 1933, § 38-121); Moore v. State, 240 Ga. 210, 240 S.E.2d 68 (1977) (decided under former Code 1933, § 38-121); Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210 (1984) (decided under former O.C.G.A. § 24-4-8); Givens v. State, 273 Ga. 818, 546 S.E.2d 509 (2001) (decided under former O.C.G.A. § 24-4-8).

Association in crime. — An accomplice is one who is associated with others in the commission of a crime, all being principals. Mosley v. State, 65 Ga. App. 800, 16 S.E.2d 504 (1941) (decided under former Code 1933, § 38-121).

An accomplice is defined as one who is associated with others in the commission of a crime, all being principals. Johnson v. State, 153 Ga. App. 771, 266 S.E.2d 551 (1980) (decided under former Code 1933, § 38-121).

Defendant's convictions were not based on insufficient evidence when a witness gave uncorroborated testimony because the witness was not the defendant's accomplice as: (1) the defendant only asked the witness how to make a fake brick of cocaine; and (2) nothing showed the witness advised, encouraged, or counseled the defendant to commit a crime, under O.C.G.A. § 16-2-20(b)(4), or that the witness intended to participate in a crime. Williams v. State, 289 Ga. 672, 715 S.E.2d 76 (2011) (decided under former O.C.G.A. § 24-4-8).

Aiding and abetting. — An "accomplice" is one who is present at the commission of a crime, aiding and abetting the perpetrator, or who could be convicted of the crime as an accessory before the fact. Venable v. State, 56 Ga. App. 366, 192 S.E. 646 (1937) (decided under former Code 1933, § 38-121).

An "accomplice" is one who is present at the commission of the crime, aiding and abetting the perpetrator, or who could be convicted of such crime as an accessory before the fact. Lanier v. State, 187 Ga. 534, 1 S.E.2d 405 (1939) (decided under former Code 1933, § 38-121).

Definition of an accomplice is one who

was present at the commission of a crime, aiding and abetting the perpetrator. Milton v. State, 248 Ga. 192, 282 S.E.2d 90 (1981) (decided under former O.C.G.A. § 24-4-8).

Participation in the commission of the same criminal act and in the execution of a common criminal intent is necessary to render one criminal, in a legal sense, an accomplice of another. Venable v. State, 56 Ga. App. 366, 192 S.E. 646 (1937) (decided under former Code 1933, § 38-121); Mosley v. State, 65 Ga. App. 800, 16 S.E.2d 504 (1941) (decided under former Code 1933, § 38-121); Cooper v. State, 197 Ga. 611, 30 S.E.2d 177 (1944) (decided under former Code 1933, § 38-121); Johnson v. State, 153 Ga. App. 771, 266 S.E.2d 551 (1980) (decided under former Code 1933, § 38-121); Milton v. State, 248 Ga. 192, 282 S.E.2d 90 (1981) (decided under former O.C.G.A. § 24-4-8).

An accessory after the fact is not an accomplice. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210 (1984) (decided under former O.C.G.A. § 24-4-8).

Voluntary participation in the commission of the same criminal act is necessary to make one an accomplice; a participation that is the result of the will of another is not such participation as will make such a participant guilty. Perryman v. State, 63 Ga. App. 819, 12 S.E.2d 388 (1940) (decided under former Code 1933, § 38-121); Fortner v. State, 96 Ga. App. 855, 101 S.E.2d 908 (1958) (decided under former Code 1933, § 38-121); Aimar v. State, 116 Ga. App. 204, 156 S.E.2d 367 (1967), overruled on other grounds, Motes v. State, 161 Ga. App. 173, 288 S.E.2d 256 (1982) (decided under former Code 1933, § 38-121).

Criminal intent is a necessary ingredient of crime and is essential to render one an accomplice. It follows that when this element is absent, one is not an accomplice. Mosley v. State, 65 Ga. App. 800, 16 S.E.2d 504 (1941) (decided under former Code 1933, § 38-121); Johnson v. State, 153 Ga. App. 771, 266 S.E.2d 551 (1980) (decided under former Code 1933, § 38-121).

Presence at scene of crime. — Although a witness may have been present at or near the scene of the crime, and may have concealed the fact for a time, yet if the witness did not in any way aid, abet, procure, or participate in the crime, the witness is not an accomplice. Venable v. State, 56 Ga. App. 366, 192 S.E. 646 (1937) (decided under former Code 1933, § 38-121).

Witness guilty only of concealing evidence of a crime after the crime's commission was not an "accomplice" within the meaning of the former statute. Ford v. State, 232 Ga. 511, 207 S.E.2d 494 (1974) (decided under former Code 1933, § 38-121).

Joint indictment and plea of guilty. — Neither the joinder of a witness in an indictment with the defendant, nor a plea of guilty entered by the witness, necessarily makes the witness an accomplice with the defendant so as to require corroboration of the witness's testimony on the latter's trial. Maddox v. State, 131 Ga. App. 86, 205 S.E.2d 31 (1974) (decided under former Code 1933, § 38-121).

Parties jointly indicted. — Former statute has no application to one who, while jointly indicted with the accused, is not shown by the evidence to have been the accused's accomplice or to have participated in the crime. Walker v. State, 118 Ga. 757, 45 S.E. 608 (1903) (decided under former Penal Code 1895, § 991); Davis v. State, 122 Ga. 564, 50 S.E. 376 (1905) (decided under former Penal Code 1895, § 991).

Evidence of conviction or plea of guilty is admissible to show the guilt of the accomplice and thereby show the status or relationship of the parties and thus lay the foundation for determining the character of testimony against the defendant and whether or not corroboration thereof is required. Dye v. State, 77 Ga. App. 517, 48 S.E.2d 742 (1948) (decided under former Code 1933, § 38-121).

Concealment of crime constitutes complicity. — Fact that witness concealed the crime for which defendant was on trial made the witness an accomplice within the meaning of former O.C.G.A. § 24-4-8. Collins v. State, 251 Ga. 521, 307 S.E.2d 496 (1983) (decided under former O.C.G.A. § 24-4-8).

Accomplice is one who acts as result of free will and not of duress or

Who Is an Accomplice (Cont'd)

coercion. Milton v. State, 248 Ga. 192, 282 S.E.2d 90 (1981) (decided under former O.C.G.A. § 24-4-8).

Action was not free will of an accomplice. — Trial court did not err by allowing the uncorroborated testimony of a witness to be admitted against two defendants as, contrary to the defendants' contentions, the witness was not an accomplice since the evidence authorized the jury to have found that the witness was coerced into participating in the racketeering crimes for which the defendants were convicted. Overton v. State, 295 Ga. App. 223, 671 S.E.2d 507 (2008), cert. denied, No. S09C0654, 2009 Ga. LEXIS 212 (Ga. 2009) (decided under former O.C.G.A. § 24-4-8).

Indictment for same crime does not make witness an accomplice. — Fact that witness was indicted for the same murder as the defendant does not, without more, make the witness an accomplice. Collins v. State, 251 Ga. 521, 307 S.E.2d 496 (1983) (decided under former O.C.G.A. § 24-4-8).

Fact that witness was jointly indicted with defendant on trial does not of itself render such witness an accomplice. Milton v. State, 248 Ga. 192, 282 S.E.2d 90 (1981) (decided under former O.C.G.A. § 24-4-8).

Female under the age of consent cannot be convicted of incestuous adultery and thus cannot be an accomplice. Mosley v. State, 65 Ga. App. 800, 16 S.E.2d 504 (1941) (decided under former Code 1933, § 38-121).

Informer for law enforcement agency who was cooperating with law enforcement at the time the evidence against the defendant was being gathered was not an accomplice. Marshall v. State, 98 Ga. App. 429, 105 S.E.2d 748 (1958) (decided under former Code 1933, § 38-121).

Principal thief is not an accomplice of the receiver of stolen goods. Birdsong v. State, 120 Ga. 850, 48 S.E. 329 (1904).

Thief and one who receives stolen property from the thief are not accomplices. Stover v. State, 158 Ga. App. 644, 281 S.E.2d 642 (1981) (decided under former O.C.G.A. § 24-4-8).

If a thief and a receiver of stolen goods have acted pursuant to a common criminal enterprise, they are accomplices. Selvidge v. State, 252 Ga. 243, 313 S.E.2d 84, cert. denied, 469 U.S. 823, 105 S. Ct. 99, 83 L. Ed. 2d 44 (1984) (decided under former O.C.G.A. § 24-4-8).

Presenter of check was not accomplice. — Uttering element was established by sufficient evidence that the defendant's friend presented the check to a bank for cashing at the defendant's behest; the trial court properly charged the jury on the corroboration requirement for accomplice testimony even though the jury determined that the friend was not an accomplice. King v. State, 277 Ga. App. 190, 626 S.E.2d 161 (2006) (decided under former O.C.G.A. § 24-4-8).

Buyer of whiskey is not an accomplice of the seller. Gamble v. State, 4 Ga. App. 845, 62 S.E. 544 (1908) (decided under former Penal Code 1895, § 991).

Person is not an accomplice to murder when the person does not know who the intended victim is or when the attempt on the victim's life is to be made, and the person does not in any way participate in or encourage the murder. Kilgore v. State, 251 Ga. 291, 305 S.E.2d 82 (1983) (decided under former O.C.G.A. § 24-4-8).

Self incrimination. — Joint principals to a crime as accomplices are competent witnesses against each other, and while the one sought to be used as a witness has the right to claim the protection afforded by Ga. Const. 1983, Art. I, Sec. I, Para. XVI, providing that no person shall be competent to give testimony tending in any manner to criminate oneself, yet this constitutional guaranty is a personal privilege belonging to the witness and cannot be claimed for the witness for the benefit of another party. Dye v. State, 77 Ga. App. 517, 48 S.E.2d 742 (1948) (decided under former Code 1933, § 38-121).

Sufficiency of Corroborating Evidence

Rules concerning extent of corroboration required are: (1) it is not essential that the testimony of the accomplice should be corroborated in every material

particular; (2) it is not required that this corroboration shall of itself be sufficient to warrant a verdict, or that the testimony of the accomplice be corroborated in every material particular; (3) such corroborating circumstances need not be enough to amount to another witness or sufficient to support one to that extent; (4) slight evidence of corroboration connecting defendant with the crime is sufficient; and (5) the sufficiency of corroboration of the accomplice is entirely a matter for the jury. Quaid v. State, 132 Ga. App. 478, 208 S.E.2d 336 (1974) (decided under former Code 1933, § 38-121).

Although a defendant may not be convicted on the uncorroborated testimony of an accomplice, the corroborating evidence need not of itself be sufficient to warrant a conviction of the crime charged, the corroborating evidence may be circumstantial, and the sufficiency of the corroborating evidence is a matter for the jury to determine. An accomplice's testimony combined with a videotape of defendant in the front seat of a car while talking to a confidential police informant during a drug buy was sufficient corroboration to justify defendant's convictions for selling drugs. Etchison v. State, 266 Ga. App. 528, 597 S.E.2d 583 (2004) (decided under former O.C.G.A. § 24-4-8).

Defendant's claim to the contrary notwithstanding, the record was replete with evidence corroborating the testimony of defendant's accomplice which identified defendant as one of the perpetrators of an armed robbery; there was no claim that a store clerk's opinion as to the identity of the perpetrators was unfounded, the clerk's testimony that the clerk heard a customer identify one of the perpetrators as defendant was undisputed res gestae, and the clerk's testimony that the clerk had been sprayed in the face with mace corroborated this aspect of the accomplice's testimony as well. Carter v. State, 266 Ga. App. 691, 598 S.E.2d 76 (2004) (decided under former O.C.G.A. § 24-4-8).

Independent inference of defendant's guilt. — To sustain a conviction upon the testimony of an accomplice, there must be corroborating circumstances which in themselves and independently of the testimony of the accomplice directly connect the defendant with the crime, or lead to the inference that defendant is guilty. Childers v. State, 52 Ga. 106 (1874) (decided under former Code 1873, § 3755); McCrory v. State, 101 Ga. 779, 28 S.E. 92 (1897) (decided under former Penal Code 1895, § 991); Taylor v. State, 110 Ga. 150, 35 S.E. 161 (1900) (decided under former Penal Code 1895, § 991); Braxley v. State, 17 Ga. App. 196, 86 S.E. 425 (1915) (decided under former Penal Code 1910, § 1017); Allen v. State, 40 Ga. App. 657, 150 S.E. 863 (1929) (decided under former Penal Code 1910, § 1017); Jolly v. State, 41 Ga. App. 494, 153 S.E. 432 (1930) (decided under former Penal Code 1910, § 1017); Bradshaw v. State, 44 Ga. App. 783, 163 S.E. 295 (1932) (decided under former Penal Code 1910, § 1017); Whitehead v. State, 46 Ga. App. 176, 167 S.E. 204 (1932) (decided under former Penal Code 1910, § 1017); Sanders v. State, 46 Ga. App. 175, 167 S.E. 207 (1932) (decided under former Penal Code 1910, § 1017); Austin v. State, 47 Ga. App. 217, 169 S.E. 729 (1933) (decided under former Code 1933, § 38-121); Thompson v. State, 52 Ga. App. 105, 182 S.E. 414 (1935) (decided under former Code 1933, § 38-121); Perkins v. State, 59 Ga. App. 335, 200 S.E. 812 (1939) (decided under former Code 1933, § 38-121); Worley v. State, 60 Ga. App. 557, 4 S.E.2d 417 (1939) (decided under former Code 1933, § 38-121); Smith v. State, 189 Ga. 169, 5 S.E.2d 762 (1939) (decided under former Code 1933, § 38-121); Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248 (1940) (decided under former Code 1933, § 38-121); Middleton v. State, 72 Ga. App. 817, 35 S.E.2d 317 (1945) (decided under former Code 1933, § 38-121); Blakely v. State, 78 Ga. App. 282, 50 S.E.2d 762 (1948) (decided under former Code 1933, § 38-121); Stebbins v. State, 78 Ga. App. 534, 51 S.E.2d 592 (1949) (decided under former Code 1933, § 38-121); Crowe v. State, 83 Ga. App. 325, 63 S.E.2d 682 (1951) (decided under former Code 1933, § 38-121); Ivey v. State, 91 Ga. App. 455, 85 S.E.2d 829 (1955) (decided under former Code 1933, § 38-121); McPherson v. State, 96 Ga. App. 839, 101 S.E.2d 750 (1958) (decided under former Code 1933, § 38-121); Allen v. State, 215 Ga. 455, 111

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S.E.2d 70 (1959) (decided under former Code 1933, § 38-121); Patterson v. State, 109 Ga. App. 582, 137 S.E.2d 74 (1964) (decided under former Code 1933, § 38-121); Waldrop v. State, 221 Ga. 319, 144 S.E.2d 372 (1965) (decided under former Code 1933, § 38-121); Sutton v. State, 223 Ga. 313, 154 S.E.2d 578 (1967) (decided under former Code 1933, § 38-121); Powell v. State, 123 Ga. App. 795, 182 S.E.2d 677 (1971) (decided under former Code 1933, § 38-121); West v. State, 232 Ga. 861, 209 S.E.2d 195 (1974) (decided under former Code 1933, § 38-121); Smith v. State, 236 Ga. 12, 222 S.E.2d 308, cert. denied, 428 U.S. 910, 96 S. Ct. 3224, 49 L. Ed. 2d 1219 (1976) (decided under former Code 1933, § 38-121); Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976) (decided under former Code 1933, § 38-121); Birt v. State, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976) (decided under former Code 1933, § 38-121); Hill v. State, 236 Ga. 831, 225 S.E.2d 281 (1976) (decided under former Code 1933, § 38-121); Vaughn v. State, 139 Ga. App. 565, 228 S.E.2d 741 (1976) (decided under former Code 1933, § 38-121); Green v. State, 139 Ga. App. 652, 229 S.E.2d 129 (1976) (decided under former Code 1933, § 38-121); Baker v. State, 238 Ga. 389, 233 S.E.2d 347, cert. denied, 431 U.S. 970, 97 S. Ct. 2931, 53 L. Ed. 2d 1066 (1977) (decided under former Code 1933, § 38-121); Smith v. State, 238 Ga. 640, 235 S.E.2d 17 (1977) (decided under former Code 1933, § 38-121); Hobbs v. State, 142 Ga. App. 782, 237 S.E.2d 16 (1977) (decided under former Code 1933, § 38-121); Felix v. State, 143 Ga. App. 376, 238 S.E.2d 734 (1977) (decided under former Code 1933, § 38-121); J.B.L. v. State, 144 Ga. App. 223, 241 S.E.2d 40 (1977) (decided under former Code 1933, § 38-121); Eubanks v. State, 240 Ga. 544, 242 S.E.2d 41 (1978) (decided under former Code 1933, § 38-121); Llewellyn v. State, 241 Ga. 192, 243 S.E.2d 853 (1978) (decided under former Code 1933, § 38-121); Reaves v. State, 146 Ga. App. 409, 246 S.E.2d 427 (1978) (decided under former Code 1933, § 38-121); Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204 (1980) (decided under former Code 1933, § 38-121); Stanford v. State, 157 Ga. App. 633, 278 S.E.2d 175 (1981) (decided under former O.C.G.A. § 24-4-8); Gilbert v. State, 159 Ga. App. 326, 283 S.E.2d 361 (1981) (decided under former O.C.G.A. § 24-4-8).

Contrary to defendant's argument, the testimony of defendant's accomplice, corroborated by two witnesses, provided sufficient evidence for the jury to find defendant guilty; the jury did not have to find that the corroborating evidence was itself sufficient to support the verdict, or that that evidence matched the testimony of the accomplice in every detail, as slight evidence identifying defendant as a participant in the criminal act was sufficient corroboration. Mitchell v. State, 279 Ga. 158, 611 S.E.2d 15 (2005) (decided under former O.C.G.A. § 24-4-8).

Testimony of a single witness was generally sufficient to establish a fact, and the defendant's conviction of burglary, O.C.G.A. § 16-7-1, was supported by sufficient evidence, including a neighbor's eyewitness testimony that the neighbor saw the defendant taking property out of the victim's house during the time when the burglary happened, which was corroborated by the discovery of an item of stolen property at the place where the defendant was residing, evidence which was entitled to even greater weight was the discovery of a business card from the defendant's probation officer at the victim's home. Walker v. State, 279 Ga. App. 390, 631 S.E.2d 413 (2006) (decided under former O.C.G.A. § 24-4-8).

Corroboration must be independent of the accomplice's testimony, and the corroboration must connect the defendant to the crime or lead to the inference that the defendant is guilty. Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210 (1984) (decided under former O.C.G.A. § 24-4-8); Allen v. State, 175 Ga. App. 128, 333 S.E.2d 11 (1985) (decided under former O.C.G.A. § 24-4-8); Hanson v. State, 193 Ga. App. 246, 387 S.E.2d 441 (1989) (decided under former O.C.G.A. § 24-4-8); In re P.A.W., 224 Ga. App. 329,

480 S.E.2d 347 (1997) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence supported defendant's felony murder conviction because the defendant's polygraph results, which the defendant stipulated to admitting at trial, corroborated the defendant's accomplice's inculpatory testimony. Thornton v. State, 279 Ga. 676, 620 S.E.2d 356 (2005) (decided under former O.C.G.A. § 24-4-8).

Testimony of an accomplice must be corroborated by independent evidence as to the identity and participation of the accused which tends to connect the accused with the crime or leads to the inference that the accused is guilty. Gaddis v. Kemp, 638 F. Supp. 819 (S.D. Ga. 1986) (decided under former O.C.G.A. § 24-4-8).

Evidence independent of accomplice's out-of-court statements constituted sufficient corroboration to support the verdict of guilty. Slaughter v. State, 257 Ga. 104, 355 S.E.2d 660 (1987), overruled on other grounds, Woodard v. State, 269 Ga. 317, 496 S.E.2d 896 (1998) (decided under former O.C.G.A. § 24-4-8).

Connection of defendant with crime. — Corroborating circumstances must connect the defendant with the crime independently of the testimony of the accomplice, and this requirement is not met by merely corroborating the accomplice as to time, place, and circumstances of the transaction, if there is nothing to connect the defendant therewith. Lanier v. State, 187 Ga. 534, 1 S.E.2d 405 (1939) (decided under former Code 1933, § 38-121); Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248 (1940) (decided under former Code 1933, § 38-121); Rozier v. State, 68 Ga. App. 797, 24 S.E.2d 137 (1943) (decided under former Code 1933, § 38-121); Croker v. State, 101 Ga. App. 742, 115 S.E.2d 413 (1960) (decided under former Code 1933, § 38-121); Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968) (decided under former Code 1933, § 38-121); Pritchard v. State, 224 Ga. 776, 164 S.E.2d 808 (1968) (decided under former Code 1933, § 38-121); Nix v. State, 133 Ga. App. 417, 211 S.E.2d 26 (1974) (decided under former Code 1933, § 38-121); Gaudin v. State, 133 Ga. App. 252, 211 S.E.2d 189 (1974) (decided under former Code 1933, § 38-121).

Defendant's conduct before, during, and after the fatal strangulation of the victim including: (1) volunteering to kill the victim after an accomplice claimed that the victim's brother was responsible for the death of the accomplice's cousin; (2) participating in the strangulation death of the victim; (3) concealing the victim's dead body; and (4) disposing of the victim in the woods provided ample evidence to support defendant's guilt as a party to a malice murder and other crimes. Mitchell v. State, 279 Ga. 158, 611 S.E.2d 15 (2005) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in entering judgments of conviction on defendant's three burglary convictions in two cases following jury verdicts finding defendant guilty of those offenses; the state introduced sufficient evidence apart from the testimony of defendant's accomplice to warrant convictions, primarily based on the three homeowners' identification of the property taken and the homeowners' testimony about the circumstances under which the relevant property went missing. Daniel v. State, 275 Ga. App. 70, 619 S.E.2d 770 (2005) (decided under former O.C.G.A. § 24-4-8).

In an armed robbery prosecution, when an investigator who had viewed and heard a videotape of the crime, in which one of the perpetrators made a high-pitched yell, testified that, while at the jail, the officer heard defendant make a sound that was so much like the sound on the tape that, "it was unreal," this testimony authorized the jury to convict this defendant. Shannon v. State, 275 Ga. App. 550, 621 S.E.2d 540 (2005) (decided under former O.C.G.A. § 24-4-8).

On appeal from the defendant's aggravated assault, possession of a firearm during the commission of a crime, and first-degree criminal damage to property convictions, the court held that the testimony provided by two of the victims identifying the defendant as one of the perpetrators was sufficient to uphold the conviction as: (1) the testimony of a single witness was generally sufficient to establish a fact; and (2) under former O.C.G.A. § 24-9-80 (see now O.C.G.A. § 24-6-620),

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the credibility of a witness was a matter to be determined by the jury under proper instructions from the court. Reid v. State, 281 Ga. App. 640, 637 S.E.2d 62 (2006) (decided under former O.C.G.A. § 24-4-8).

Passenger's testimony stating that the defendant passed marijuana to the passenger and told the passenger to discard the marijuana was sufficiently corroborated under former O.C.G.A. § 24-4-8 to support a finding of guilt of possession of more than an ounce of marijuana under O.C.G.A. § 16-13-30; the marijuana found near the defendant was packaged the same way as the marijuana found outside the car, and it could, therefore, be inferred that the marijuana found outside the car had previously been in the back seat beside the defendant. Curtis v. State, 282 Ga. App. 322, 638 S.E.2d 773 (2006), cert. denied, No. S07C0427, 2007 Ga. LEXIS 203 (Ga. 2007) (decided under former O.C.G.A. § 24-4-8).

While the testimony of an accomplice standing alone was insufficient to convict, when the evidence identifying two of the three defendants as participants to an armed robbery of a female victim was not limited to the uncorroborated testimony of the driver of the getaway car, the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that both were guilty. Williamson v. State, 285 Ga. App. 779, 648 S.E.2d 118 (2007) (decided under former O.C.G.A. § 24-4-8).

Defendant's convictions for possessing 28 grams or more of cocaine, possessing cocaine with intent to distribute, and possession of a firearm during the commission of a felony were upheld on appeal as sufficient evidence was presented via the direct testimony of the defendant's live-in girlfriend, which when combined with the evidence showing their joint constructive possession of the drugs and gun tended to connect and identify the defendant with the crimes charged. Allen v. State, 286 Ga. App. 469, 649 S.E.2d 583 (2007) (decided under former O.C.G.A. § 24-4-8).

Despite a juvenile's challenge to the sufficiency of the evidence, an adjudication entered by the juvenile court on a charge of attempted rape was proper because the charge was supported not only by the testimony of the victim, but also by the corroborating testimony offered by both the victim's neighbor, who witnessed the attack, and the victim's sister, who chased the juvenile away from the scene. In the Interest of J.L.H., 289 Ga. App. 30, 656 S.E.2d 160 (2007) (decided under former O.C.G.A. § 24-4-8).

Despite waiving error regarding a show up identification because: (1) a victim's identification of the defendant as one of the perpetrators of a burglary, robbery, and battery was sufficient and non-suggestive; and (2) the corroborating testimony from the defendant's two accomplices was admissible to support the defendant's convictions, as both accomplices testified as to the defendant's involvement in the crimes, those convictions were upheld on appeal; thus a new trial was properly denied. Carr v. State, 289 Ga. App. 875, 658 S.E.2d 419 (2008) (decided under former O.C.G.A. § 24-4-8).

With regard to a defendant's convictions on one count of enticing a child for indecent purposes, ten counts of child molestation, one count of aggravated child molestation, and three counts of cruelty to children in the first degree, regarding actions the defendant took toward three children and what the children were forced to do to each other by gunpoint while the defendant was a babysitter for the children, the state proved the charged offenses beyond a reasonable doubt based on the testimony of the three victims and the victims' videotaped forensic interviews. It was within the province of the jury to disbelieve the defendant's testimony that the defendant did not commit the charged crimes. Sullivan v. State, 295 Ga. App. 145, 671 S.E.2d 180 (2008), cert. denied, No. S09C0624, 2009 Ga. LEXIS 215 (Ga. 2009) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in convicting the defendant of armed robbery of a restaurant, O.C.G.A. § 16-8-41(a), and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106(b)(1), because sufficient evidence corroborated an accomplice's testimony that the defendant participated in the robbery; the driver

corroborated that the driver picked the defendant up and dropped the defendant and the accomplice off at the defendant's residence near the restaurant about two-and-one-half hours before the robbery, the driver overheard the defendant speaking to the accomplice about committing a robbery, and two more witnesses confirmed that the two were together that evening. Jones v. State, 302 Ga. App. 147, 690 S.E.2d 460 (2010) (decided under former O.C.G.A. § 24-4-8).

There was sufficient corroboration of the defendant as a perpetrator of the principal crime, and, ultimately, sufficient evidence to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment, possession of a firearm during the commission of a felony, and burglary because there was circumstantial evidence to show that the defendant committed a similar transaction after the first incident, that the same gun an accomplice bought and used in the first crime was used in the second crime and ended up in a car at the house of the defendant's mother afterwards, and that the defendant was nervous and felt guilty about events that the defendant participated in with the accomplice, whom the defendant had only known a short time; that corroborative evidence connected the accomplice to the crimes. Ward v. State, 304 Ga. App. 517, 696 S.E.2d 471 (2010) (decided under former O.C.G.A. § 24-4-8).

Any rational trier of fact could have found the defendant guilty of trafficking in cocaine, possession of methylenedioxyamphetamine, and possession of less than one ounce of marijuana beyond a reasonable doubt because based on the evidence, the jury was authorized to conclude that the defendant threw a plastic bag containing drugs out the passenger side window of the defendant's car when the state presented evidence that a deputy saw the defendant actually possessing the bag of illegal narcotics as the defendant held the bag in the car before the defendant threw the bag out the passenger's window; an officer's testimony that the officer saw the defendant's hand on a plastic bag containing cocaine is sufficient to authorize a rationale trier of fact to find that the defendant possessed the cocaine. McCombs v. State, 306 Ga. App. 64, 701 S.E.2d 496 (2010) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of malice murder and related offenses because there was no violation of former O.C.G.A. § 24-4-8 since although a co-indictee could be considered an accomplice to murder and the other non-drug-related crimes on which the defendant was tried, there was no evidence of the co-indictee's intent to participate in any crime other than drug trafficking; assuming that the co-indictee was an accomplice, a witness's apparent firsthand knowledge about the crime connected the defendant to the crime and thereby corroborated a co-indictee's testimony identifying the defendant as the shooter. Moore v. State, 288 Ga. 187, 702 S.E.2d 176 (2010) (decided under former O.C.G.A. § 24-4-8).

Defendant's conviction for trafficking in cocaine, in violation of O.C.G.A. § 16-13-31(a)(1), was supported by sufficient evidence under O.C.G.A. § 16-2-20(b)(3) and former O.C.G.A. § 24-4-8 since the defendant and the co-defendant had both made statements regarding the defendant's involvement in the criminal activity, and the police observed the defendant's actions; there was evidence that the defendant was an active participant and a party to the trafficking offense. Martinez v. State, 314 Ga. App. 551, 724 S.E.2d 851 (2012) (decided under former O.C.G.A. § 24-4-8).

With regard to the defendant's challenge to the sufficiency of the evidence supporting the defendant's conviction for aggravated assault, the testimony of the victim alone was sufficient to support the conviction based on the victim identifying the defendant as the assailant from a photo array, as well as the victim testifying that the defendant had a gun, that when the victim turned and ran, the victim heard a gunshot and then discovered that the victim was shot. Lomax v. State, 319 Ga. App. 693, 738 S.E.2d 152 (2013) (decided under former O.C.G.A. § 24-4-8).

Accomplice to felony exception not applicable. — Sufficient evidence sup-

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ported defendant's O.C.G.A. § 16-7-1 burglary conviction. The former O.C.G.A. § 24-4-8 "accomplice to a felony" exception did not apply and the defendant's codefendant's evidence was admissible (and subject to cross-examination) since a neighbor also testified that the neighbor saw the defendant enter the victim's home and remove items which were later recovered from the codefendant. Millirons v. State, 268 Ga. App. 644, 602 S.E.2d 346 (2004) (decided under former O.C.G.A. § 24-4-8).

Knowledge and use of home security code. — Accomplice's testimony was sufficiently corroborated when the victim's body was found in a manner consistent with the accomplice's testimony, other witnesses corroborated various details of the accomplice's testimony, and defendant left town, as the accomplice testified defendant warned the accomplice to do likewise. Hinely v. State, 275 Ga. 777, 573 S.E.2d 66 (2002) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence to convict the defendant of burglary, assault, and battery included an accomplice's testimony (sufficiently corroborated under former O.C.G.A. § 24-4-8 by accomplice's knowledge and use of the defendant's grandmother's security code) that defendant hired an accomplice to kill the grandmother. Hill v. State, 268 Ga. App. 642, 602 S.E.2d 348 (2004) (decided under former O.C.G.A. § 24-4-8).

Identity of accomplice alone is insufficient corroboration. — Under former O.C.G.A. § 24-4-8, testimony which concerns the identity of other participants must be corroborated by some means independent of the testimony of the accomplice. One who is guilty of a crime in which one participated will always be able to relate the facts of the case and if the corroboration goes only to the truth of that history, without identifying the person accused, it is really no corroboration at all. Milton v. State, 248 Ga. 192, 282 S.E.2d 90 (1981) (decided under former O.C.G.A. § 24-4-8).

Corroboration required by former O.C.G.A. § 24-4-8 need not be sufficient to warrant guilty verdict or prove every material element of the crime; it need only tend to connect and identify the defendant with the crime charged. Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627 (1981) (decided under former O.C.G.A. § 24-4-8); Raines v. State, 186 Ga. App. 239, 366 S.E.2d 841 (1988) (decided under former O.C.G.A. § 24-4-8); Hanson v. State, 193 Ga. App. 246, 387 S.E.2d 441 (1989) (decided under former O.C.G.A. § 24-4-8).

Accomplice's testimony was corroborated for bank robbery conviction since: (1) the security guard identified defendant as a perpetrator; (2) a baseball cap dropped by the gunman was scientifically linked to defendant; (3) defendant gave the accomplice a gun before the later robberies, and the gun the accomplice discarded after a later robbery was the weapon taken from the bank security guard at the bank robbery; and (4) a still photograph of the gunman made from the bank surveillance videotape was shown to the jury. Smith v. State, 257 Ga. App. 595, 571 S.E.2d 817 (2002) (decided under former O.C.G.A. § 24-4-8).

Accomplice's identification of participants in crime must be corroborated. — When an accomplice's testimony is corroborated in material part, other uncorroborated testimony may be believed by the jury, with one important exception: testimony which concerns the identity of other participants must be corroborated by some means independent of the testimony of the accomplice. Cofer v. State, 166 Ga. App. 436, 304 S.E.2d 537 (1983) (decided under former O.C.G.A. § 24-4-8).

Testimony of a defendant's accomplice implicating the defendant in several robberies was sufficiently corroborated based on the defendant's admission, eyewitnesses confirming that two persons participated, and the defendant's use of the victims' bank cards after the robberies. Thus, the defendant's participation as an accessory was sufficiently corroborated by evidence other than from the accomplice. Epps v. State, 296 Ga. App. 92, 673 S.E.2d 608 (2009) (decided under former O.C.G.A. § 24-4-8).

Slight evidence sufficient to prove identity. — Corroborating evidence of

testimony of an accomplice, albeit slight, tended to prove defendant's identity and participation in the crime and therefore was sufficient as a matter of law. Walker v. State, 57 Ga. App. 868, 197 S.E. 67 (1938) (decided under former Code 1933, § 38-121); McPherson v. State, 96 Ga. App. 839, 101 S.E.2d 750 (1958) (decided under former Code 1933, § 38-121); Trull v. State, 221 Ga. 442, 145 S.E.2d 242 (1965) (decided under former Code 1933, § 38-121); Pitts v. State, 128 Ga. App. 434, 197 S.E.2d 495 (1973) (decided under former Code 1933, § 38-121); Harris v. State, 165 Ga. App. 186, 299 S.E.2d 393 (1983) (decided under former O.C.G.A. § 24-4-8); Williams v. State, 198 Ga. App. 725, 402 S.E.2d 796 (1991) (decided under former O.C.G.A. § 24-4-8); Brown v. State, 199 Ga. App. 18, 404 S.E.2d 154 (1991) (decided under former O.C.G.A. § 24-4-8); Tucker v. State, 205 Ga. App. 683, 423 S.E.2d 422 (1992) (decided under former O.C.G.A. § 24-4-8); Young v. State, 213 Ga. App. 278, 444 S.E.2d 598 (1994) (decided under former O.C.G.A. § 24-4-8); Knott v. State, 225 Ga. App. 604, 484 S.E.2d 342 (1997) (decided under former O.C.G.A. § 24-4-8).

Slight evidence of corroboration, which may be entirely circumstantial, that connects a defendant with the crime satisfies the requirements of former O.C.G.A. § 24-4-8, and the sufficiency of the corroboration of an accomplice's testimony is peculiarly a matter for the jury; thus, the evidence presented at defendant's trial for multiple burglary counts was sufficient to support defendant's convictions since the testimony of defendant's nephew, who acted as an accomplice, was corroborated by the testimony of the victims describing the methods used to break into their homes and the items that were taken. Gibson v. State, 267 Ga. App. 473, 600 S.E.2d 417 (2004) (decided under former O.C.G.A. § 24-4-8).

There was at least slight evidence from sources extraneous to the defendant's accomplice as to the defendant's identity and participation in a robbery, and the evidence was sufficient to support a guilty verdict on that count. Extraneous evidence connected the defendant to at least one robbery in which the defendant employed the same modus operandi as the accomplice employed. Grimes v. State, 291 Ga. App. 585, 662 S.E.2d 346 (2008) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support the defendant's convictions for armed robbery, burglary, aggravated assault, criminal attempt to commit armed robbery, criminal attempt to commit burglary, and sexual battery because there was at lease slight evidence from sources extraneous to a co-conspirator as to the defendant's identity and participation in a home invasion and robbery; the co-conspirator testified that the co-conspirator attended a meeting to plan the robbery and that the meeting occurred at the apartment where the defendant resided, and extraneous evidence connected the defendant to at least two home invasions that employed the same modus operandi. Martinez v. State, 306 Ga. App. 512, 702 S.E.2d 747 (2010) (decided under former O.C.G.A. § 24-4-8).

Testimony of other witnesses sufficient. — Finding of delinquency by virtue of the minor's having committed acts which if done by an adult would have constituted motor vehicle theft and burglary was not based solely upon the uncorroborated testimony of an accomplice; rather, many of the details were also corroborated by the testimony of two investigators, a relative of the minor, the owner of one of the stolen vehicles and the minor personally. In re J.B., 223 Ga. App. 429, 477 S.E.2d 874 (1996) (decided under former O.C.G.A. § 24-4-8).

When a former detective testified without objection that a witness to a robbery gave a statement positively identifying the defendant as the gunman in an armed robbery, this testimony corroborated testimony of a co-participant, and whether it was sufficient for a conviction was for the jury to determine. Kenney v. State, 236 Ga. App. 359, 511 S.E.2d 923 (1999) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support defendant's convictions for armed robbery and kidnapping as the testimony of at least one witness that was presented against defendant as to each offense was sufficient to establish as a fact that defendant committed the offenses. Singleton v. State, 259 Ga. App. 184, 577 S.E.2d 6

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(2003) (decided under former O.C.G.A. § 24-4-8).

Trial court properly denied defendant's motion for a directed verdict of acquittal, pursuant to O.C.G.A. § 17-9-1, because there was sufficient evidence to support the convictions for aggravated assault and reckless conduct, in violation of O.C.G.A. §§ 16-5-21(a)(2) and 16-5-60(b), respectively; defendant and the codefendants were involved in a physical altercation with two restaurant patrons, and a codefendant's testimony that defendant retrieved a gun and shot the victim was sufficiently repeated by the testimony of other witnesses, who also connected defendant with the shooting pursuant to the corroboration requirement in former O.C.G.A. § 24-4-8. Baker v. State, 273 Ga. App. 297, 614 S.E.2d 904 (2005) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support defendant's conviction for violation of O.C.G.A. § 16-13-30 of the Georgia Controlled Substances Act because a passenger in the defendant's truck testified that defendant purchased crack cocaine from an individual in a high drug area, a rock of crack cocaine was found in defendant's truck, and a police officer corroborated that testimony pursuant to former O.C.G.A. § 24-4-8 with the officer's own observations that the individual that defendant was talking to had money in a hand as the individual lowered the hand from defendant's truck window. Millsap v. State, 275 Ga. App. 732, 621 S.E.2d 837 (2005) (decided under former O.C.G.A. § 24-4-8).

Because testimony from a single witness was sufficient to establish a fact, testimony from both victims of an armed robbery that the defendant was the gunman during that robbery was sufficient direct evidence to establish that fact; moreover, the fact that the defendant offered another explanation for the defendant's presence at the scene, did not render the other evidence against the defendant insufficient or circumstantial. Bakyayita v. State, 278 Ga. App. 624, 629 S.E.2d 539 (2006) (decided under former O.C.G.A. § 24-4-8).

Because sufficient evidence was presented that a juvenile was a party to the crime of entering an automobile with the intent to commit a theft or felony, and the evidence was corroborated by a police officer who questioned the juvenile's cohort, an adjudication based on the juvenile's commission of the act was upheld on appeal; thus, the juvenile's motion for a directed verdict was properly denied. In the Interest of B.D., 287 Ga. App. 185, 651 S.E.2d 129 (2007) (decided under former O.C.G.A. § 24-4-8).

In defendant's conviction for child molestation, the trial court properly denied defendant's motion for a directed verdict of acquittal as sufficient evidence existed based on testimony of the child victim's parent, who testified as to discovery of defendant on top of the victim; further evidence in support of defendant's conviction included the child's videotaped police interviews describing what happened. Lopez v. State, 291 Ga. App. 210, 661 S.E.2d 618 (2008) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient for the jury to find a defendant guilty of child molestation beyond a reasonable doubt as it was within the jury's province to reject the defendant's defense denying the crime with regard to the victim as well as with regard to the witnesses who testified as to similar transactions with the defendant. The testimony of the victim was corroborated by an investigator and a forensic interviewer, who testified as to what the victim had told had occurred; the victim's statements were corroborated by the sheriff's investigator; and the jury was entitled to consider the victim's out-of-court statements as substantive evidence under the former Child Hearsay Statute, former O.C.G.A. § 24-3-16. Lamb v. State, 293 Ga. App. 65, 666 S.E.2d 462 (2008) (decided under former O.C.G.A. § 24-4-8).

There was sufficient evidence to support a defendant's convictions for aggravated assault and possession-of-a-firearm based on the testimony of three separate witnesses, including the victim, that the defendant threateningly pointed a gun at the victim's head. Further, regarding the need to show the victim's reasonable apprehension of immediately receiving a vi-

olent injury, the state presented evidence from the victim's mouth that the victim feared the gun and that the fear resulted in the victim urinating on the victim's person and in the victim lying to an officer at the front door to protect the victim's children. Hardy v. State, 293 Ga. App. 265, 666 S.E.2d 730 (2008) (decided under former O.C.G.A. § 24-4-8).

The testimony of a victim and the victim's neighbor that the defendant was the person who held a gun to the victim's side and led the victim outside to search for money in the victim's truck, as well as a letter from the defendant to a codefendant implicating the defendant, was sufficient corroboration under former O.C.G.A. § 24-4-8 to create a jury question as to whether the defendant was guilty of aggravated assault. Decoteau v. State, 302 Ga. App. 451, 691 S.E.2d 328 (2010) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in convicting the defendant of driving under the influence of alcohol to the extent it was less safe for the defendant to drive, possession of an open container of alcoholic beverage, and disorderly conduct because the testimony of the driver accosted by the defendant and the arresting officer was sufficient to enable a rational jury to find the defendant guilty beyond a reasonable doubt of the charged crimes. Corbin v. State, 305 Ga. App. 768, 700 S.E.2d 868 (2010) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support the defendant's conviction for forgery because although the only witness who testified to the defendant's participation in the forgery was her boyfriend's daughter, who testified that she and the defendant had together forged counterfeit currency, the trial court found that the daughter's testimony was corroborated by the fact that the counterfeit currency was found in a common area of the house where the defendant was the only resident; the judgment as to the sufficiency of the corroborating evidence was for the finder of fact to determine, and the trial court clearly found that the presumption of possession raised by the defendant's residence at the home was sufficiently corroborative. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871 (2010) (decided under former O.C.G.A. § 24-4-8).

Testimony of two codefendants that a defendant was the third man in a burglary was sufficiently corroborated under former O.C.G.A. § 24-4-8 because the codefendants corroborated each other, and one codefendant's sibling testified that the sibling lent the three defendants the sibling's car and later noticed the defendant carrying a flat-screen television, which was taken in the burglary. Sims v. State, 306 Ga. App. 68, 701 S.E.2d 534 (2010) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal on the ground that there was insufficient corroboration of an accomplice's testimony because there was no violation of former O.C.G.A. § 24-4-8; the testimony of the victim's fiancée and the accomplice's friend was sufficient to corroborate the accomplice's testimony directly identifying the defendant as the shooter, the physical description of the shooter that the fiancé provided to the police fit the defendant, and the fiancée's description of the shooter's clothes was consistent with the accomplice's trial testimony about what the defendant was wearing on the day of the incident. Johnson v. State, 288 Ga. 803, 708 S.E.2d 331 (2011) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support a malice murder conviction, although no forensic or physical evidence was presented, because the jury determined that the eyewitnesses' testimony that the defendant fatally shot the victim during a drug transaction was credible. The testimony of a single witness was sufficient pursuant to former O.C.G.A. § 24-4-8. Handley v. State, 289 Ga. 786, 716 S.E.2d 176 (2011) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support a defendant's conviction for aggravated assault. Pursuant to former O.C.G.A. § 24-4-8, a defendant could not be convicted solely upon the uncorroborated testimony of an accomplice, and while the only evidence of the shotgun at the scene of the assault of the victim came from a codefendant, other evidence from the victim and the police served to corroborate it. Emerson v. State, 315 Ga. App. 105, 726 S.E.2d 600 (2012) (decided under former O.C.G.A. § 24-4-8).

Sufficiency of Corroborating Evidence (Cont'd)

Corroboration need not extend to every material detail. — Testimony of one accomplice adequately corroborated that of another accomplice to the murder of appellant's former husband since although there were inconsistencies in that each attempted to place more culpability on the other in carrying out the scheme, they amply corroborated each other on the ultimate question of appellant's involvement in the scheme to have her former husband killed. Blalock v. State, 250 Ga. 441, 298 S.E.2d 477 (1983) (decided under former O.C.G.A. § 24-4-8).

Need not warrant conviction. — Corroborating evidence need not be in and of itself so strong as to support a verdict of guilty. Nance v. State, 126 Ga. 95, 54 S.E. 932 (1906) (decided under former Penal Code 1895, § 991); Parham v. State, 3 Ga. App. 468, 60 S.E. 123 (1908) (decided under former Penal Code 1895, § 991); Smith v. State, 189 Ga. 169, 5 S.E.2d 762 (1939) (decided under former Code 1933, § 38-121); Smith v. State, 238 Ga. 640, 235 S.E.2d 17 (1977) (decided under former Code 1933, § 38-121); Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210 (1984) (decided under former O.C.G.A. § 24-4-8).

Grave suspicion not sufficient. — Corroborating evidence which merely casts a grave suspicion upon the defendant is not sufficient. McCalla v. State, 66 Ga. 346 (1881) (decided under former Code 1873, § 3755); Baker v. State, 14 Ga. App. 578, 81 S.E. 805 (1914) (decided under former Penal Code 1910, § 1017); Thompson v. State, 52 Ga. App. 105, 182 S.E. 414 (1935) (decided under former Code 1933, § 38-121); Worley v. State, 60 Ga. App. 557, 4 S.E.2d 417 (1939) (decided under former Code 1933, § 38-121); Ivey v. State, 91 Ga. App. 455, 85 S.E.2d 829 (1955) (decided under former Code 1933, § 38-121); Hill v. State, 236 Ga. 831, 224 S.E.2d 281 (1976) (decided under former Code 1933, § 38-121); Smith v. State, 238 Ga. 640, 235 S.E.2d 17 (1977) (decided under former Code 1933, § 38-121).

Testimony of an accomplice must be corroborated by independent evidence tending to connect the accused with the crime or leading to an inference that the accused is guilty and must do more than merely cast a grave suspicion of guilt on the accused. Powell v. State, 166 Ga. App. 393, 304 S.E.2d 515 (1983) (decided under former O.C.G.A. § 24-4-8).

Slight evidence from an extraneous source identifying the accused as a participator in the criminal act is sufficient corroboration of the accomplice to support a verdict. Hargett v. State, 55 Ga. App. 192, 189 S.E. 675 (1937) (decided under former Code 1933, § 38-121); King v. State, 77 Ga. App. 720, 49 S.E.2d 790 (1948) (decided under former Code 1933, § 38-121); Blakely v. State, 78 Ga. App. 282, 50 S.E.2d 762 (1948) (decided under former Code 1933, § 38-121); McPherson v. State, 96 Ga. App. 839, 101 S.E.2d 750 (1958) (decided under former Code 1933, § 38-121); Wilkins v. State, 96 Ga. App. 841, 101 S.E.2d 912 (1958) (decided under former Code 1933, § 38-121); Waldrop v. State, 221 Ga. 319, 144 S.E.2d 372 (1965) (decided under former Code 1933, § 38-121); Lindsey v. State, 227 Ga. 48, 178 S.E.2d 848 (1970) (decided under former Code 1933, § 38-121); Pitts v. State, 128 Ga. App. 434, 197 S.E.2d 495 (1973) (decided under former Code 1933, § 38-121); Birt v. State, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976) (decided under former Code 1933, § 38-121); Jones v. State, 139 Ga. App. 643, 229 S.E.2d 121 (1976) (decided under former Code 1933, § 38-121); Green v. State, 139 Ga. App. 652, 229 S.E.2d 129 (1976) (decided under former Code 1933, § 38-121); Hill v. State, 237 Ga. 794, 229 S.E.2d 737 (1976) (decided under former Code 1933, § 38-121); Smith v. State, 238 Ga. 640, 235 S.E.2d 17 (1977) (decided under former Code 1933, § 38-121); Felix v. State, 143 Ga. App. 376, 238 S.E.2d 734 (1977) (decided under former Code 1933, § 38-121); Cummings v. State, 240 Ga. 104, 239 S.E.2d 529 (1977) (decided under former Code 1933, § 38-121); Reaves v. State, 242 Ga. 542, 250 S.E.2d 376 (1978) (decided under former Code 1933, § 38-121); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979) (decided under former Code 1933, § 38-121); Neal v. State,

152 Ga. App. 270, 262 S.E.2d 561 (1979) (decided under former Code 1933, § 38-121); Smith v. State, 245 Ga. 205, 264 S.E.2d 15 (1980) (decided under former Code 1933, § 38-121); Davis v. State, 154 Ga. App. 803, 269 S.E.2d 874 (1980) (decided under former Code 1933, § 38-121); Smith v. State, 154 Ga. App. 741, 270 S.E.2d 5 (1980) (decided under former Code 1933, § 38-121); Black v. State, 155 Ga. App. 798, 272 S.E.2d 762 (1980) (decided under former Code 1933, § 38-121); Cole v. State, 156 Ga. App. 288, 274 S.E.2d 685 (1980) (decided under former Code 1933, § 38-121); Inman v. State, 182 Ga. App. 209, 355 S.E.2d 119 (1987) (decided under former O.C.G.A. § 24-4-8); Thurston v. State, 186 Ga. App. 881, 368 S.E.2d 822 (1988) (decided under former O.C.G.A. § 24-4-8); Martin v. State, 209 Ga. App. 720, 434 S.E.2d 534 (1993) (decided under former O.C.G.A. § 24-4-8); Dalton v. State, 237 Ga. App. 217, 513 S.E.2d 745 (1999) (decided under former O.C.G.A. § 24-4-8).

Only slight evidence of participation in the offense from an extraneous source will provide the necessary corroboration under former O.C.G.A. § 24-4-8, which may consist entirely of circumstantial evidence. Chergi v. State, 234 Ga. App. 548, 507 S.E.2d 795 (1998) (decided under former O.C.G.A. § 24-4-8).

Confession of defendant was corroborated. — Defendant's convictions for armed robbery and robbery by intimidation in violation of O.C.G.A. §§ 16-8-40(a)(2) and 16-8-41(a) were appropriate because the defendant's own confessions to participating in the crimes were corroborated by the testimony of the victims, among other evidence. Likewise, the defendant's codefendants' statements and testimony implicating the defendant in the crimes were corroborated by the defendant's confessions and the victims' testimony. Cantrell v. State, 299 Ga. App. 746, 683 S.E.2d 676 (2009) (decided under former O.C.G.A. § 24-4-8).

Connection with crime more than suspicion of guilt. — Corroborating evidence must, independently of the accomplice's testimony and of itself, connect the defendant on trial with the commission of the offense and tend to show defendant's guilt; a grave suspicion of the defendant's guilt is not sufficient. King v. State, 77 Ga. App. 720, 49 S.E.2d 790 (1948) (decided under former Code 1933, § 38-121); Price v. State, 208 Ga. 695, 69 S.E.2d 253 (1952) (decided under former Code 1933, § 38-121); Wilkins v. State, 96 Ga. App. 841, 101 S.E.2d 912 (1958) (decided under former Code 1933, § 38-121); Allen v. State, 215 Ga. 455, 111 S.E.2d 70 (1959) (decided under former Code 1933, § 38-121); Seay v. State, 108 Ga. App. 724, 134 S.E.2d 422 (1963) (decided under former Code 1933, § 38-121); Pritchard v. State, 224 Ga. 776, 164 S.E.2d 808 (1968) (decided under former Code 1933, § 38-121); Caldwell v. State, 227 Ga. 703, 182 S.E.2d 789 (1971) (decided under former Code 1933, § 38-121); Vaughn v. State, 139 Ga. App. 565, 228 S.E.2d 741 (1976) (decided under former Code 1933, § 38-121); Felix v. State, 143 Ga. App. 376, 238 S.E.2d 734 (1977) (decided under former Code 1933, § 38-121); Drake v. State, 241 Ga. 583, 247 S.E.2d 57 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979) (decided under former Code 1933, § 38-121); Stinson v. State, 151 Ga. App. 533, 260 S.E.2d 407 (1979) (decided under former Code 1933, § 38-121); Black v. State, 155 Ga. App. 798, 272 S.E.2d 762 (1980) (decided under former Code 1933, § 38-121).

Need not warrant conviction but must do more than create suspicion. — Corroborating evidence need not be so strong as to support a verdict of guilty, but it must be sufficient to connect the accused with the perpetration of the offense and lead to the inference of the accused's guilt, and more than sufficient to merely raise a suspicion against the accused. Sheppard v. State, 44 Ga. App. 481, 162 S.E. 413 (1931) (decided under former Penal Code 1910, § 1017); Reaves v. State, 242 Ga. 542, 250 S.E.2d 376 (1978) (decided under former Code 1933, § 38-121); Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979) (decided under former Code 1933, § 38-121).

Need not warrant conviction or be exhaustively corroborated. — Corroboration need not of itself be sufficient to warrant a verdict or be corroborated in every material particular. Hargett v.

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State, 55 Ga. App. 192, 189 S.E. 675 (1937) (decided under former Code 1933, § 38-121); Mitchell v. State, 202 Ga. 247, 42 S.E.2d 767 (1947) (decided under former Code 1933, § 38-121); Blakely v. State, 78 Ga. App. 282, 50 S.E.2d 762 (1948) (decided under former Code 1933, § 38-121); Mears v. State, 98 Ga. App. 576, 106 S.E.2d 854 (1958) (decided under former Code 1933, § 38-121); Waldrop v. State, 221 Ga. 319, 144 S.E.2d 372 (1965) (decided under former Code 1933, § 38-121); Pitts v. State, 128 Ga. App. 434, 197 S.E.2d 495 (1973) (decided under former Code 1933, § 38-121); Atcheson v. State, 136 Ga. App. 152, 220 S.E.2d 483 (1975) (decided under former Code 1933, § 38-121); Turner v. State, 235 Ga. 826, 221 S.E.2d 590 (1976) (decided under former Code 1933, § 38-121); Birt v. State, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976) (decided under former Code 1933, § 38-121); Jones v. State, 139 Ga. App. 643, 229 S.E.2d 121 (1976) (decided under former Code 1933, § 38-121); Cole v. State, 156 Ga. App. 288, 274 S.E.2d 685 (1980) (decided under former Code 1933, § 38-121).

Evidence corroborating the accomplice's testimony does not have to be sufficient in and of itself to support a verdict of guilty; circumstantial evidence tying the defendant to the crime and justifying an inference of guilt is satisfactory. Cofer v. State, 166 Ga. App. 436, 304 S.E.2d 537 (1983) (decided under former O.C.G.A. § 24-4-8).

Slight evidence not warranting conviction and not supporting every material fact. — Law does not require that the corroborating evidence shall in and of itself alone be sufficient to warrant a verdict of guilty, or that the testimony of the accomplice shall be corroborated in every material particular. On the contrary, slight evidence that the crime was committed by both defendants, and identifying the defendants with the crime, will corroborate the testimony of the accomplice and warrant a conviction. Evans v. State, 78 Ga. 351 (1886) (decided under former Code 1882, § 3755); Boswell v. State, 92 Ga. 581, 17 S.E. 805 (1893) (decided under former Code 1882, § 3755); Pritchett v. State, 92 Ga. 33, 18 S.E. 350 (1893) (decided under former Code 1882, § 3755); Chapman v. State, 112 Ga. 56, 37 S.E. 102 (1900) (decided under former Penal Code 1895, § 991); Dixon v. State, 116 Ga. 186, 42 S.E. 357 (1902) (decided under former Penal Code 1895, § 991); Nance v. State, 126 Ga. 95, 54 S.E. 932 (1906) (decided under former Penal Code 1895, § 991); Davis v. State, 25 Ga. App. 532, 103 S.E. 819, cert. denied, 25 Ga. App. 840 (1920) (decided under former Penal Code 1910, § 1017); Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248 (1940) (decided under former Code 1933, § 38-121); Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968) (decided under former Code 1933, § 38-121); Caldwell v. State, 227 Ga. 703, 182 S.E.2d 789 (1971) (decided under former Code 1933, § 38-121); Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204 (1980) (decided under former Code 1933, § 38-121); Bennett v. State, 156 Ga. App. 617, 275 S.E.2d 701 (1980) (decided under former Code 1933, § 38-121); Powell v. State, 166 Ga. App. 393, 304 S.E.2d 515 (1983) (decided under former O.C.G.A. § 24-4-8); Whitton v. State, 178 Ga. App. 862, 344 S.E.2d 703 (1986) (decided under former O.C.G.A. § 24-4-8); Howard v. State, 181 Ga. App. 187, 351 S.E.2d 550 (1986) (decided under former O.C.G.A. § 24-4-8); Durham v. State, 181 Ga. App. 155, 351 S.E.2d 683 (1986) (decided under former O.C.G.A. § 24-4-8); Slaughter v. State, 227 Ga. App. 739, 490 S.E.2d 399 (1997) (decided under former O.C.G.A. § 24-4-8).

Direct or circumstantial evidence. — Sufficient corroboration may consist of either direct or circumstantial evidence which connects the defendant with the crime, tends to show the defendant's participation therein, and would justify an inference of the guilt of the accused independently of the testimony of the accomplice. Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979) (decided under former Code 1933, § 38-121).

Circumstantial evidence. — Circumstantial evidence, when taken with the

accomplice testimony, showing guilt beyond a reasonable doubt is sufficient corroboration. Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627 (1981) (decided under former O.C.G.A. § 24-4-8).

Although corroboration may be by circumstantial evidence, the evidence must do more than merely cast a grave suspicion of guilt on the accused. Claybrooks v. State, 189 Ga. App. 431, 375 S.E.2d 880, cert. denied, 189 Ga. App. 911, 375 S.E.2d 880 (1988) (decided under former O.C.G.A. § 24-4-8).

Circumstantial evidence presented at trial sufficient to corroborate testimony of accomplice. — See Howard v. State, 187 Ga. App. 74, 369 S.E.2d 271 (1988) (decided under former O.C.G.A. § 24-4-8); Martinez v. State, 222 Ga. App. 497, 474 S.E.2d 708 (1996) (decided under former O.C.G.A. § 24-4-8).

Testimony of other witnesses linking the defendant to the crime was sufficient to corroborate the testimony of the accomplice and was sufficient for a rational trier of fact to find defendant guilty of the crimes charged beyond a reasonable doubt. Sanchez v. State, 203 Ga. App. 61, 416 S.E.2d 139 (1992) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to corroborate accomplice testimony in a prosecution for burglary of a store since the corroborating evidence included a burglary call to the police, a store security video which showed events testified to by the accomplice, and an incriminating statement made by the defendant. Williams v. State, 234 Ga. App. 191, 506 S.E.2d 237 (1998) (decided under former O.C.G.A. § 24-4-8).

Corroboration by second accomplice. — Evidence was sufficient to support the defendant's convictions of armed robbery under O.C.G.A. § 16-8-41(a), aggravated battery under O.C.G.A. § 16-5-24(a), aggravated assault under O.C.G.A.§ 16-5-21(a), burglary under O.C.G.A.§ 16-7-1(a)(2), possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b), and conspiracy to possess cocaine under O.C.G.A. §§ 16-4-8 and 16-13-30(a) as a conspirator because, while the uncorroborated testimony of one accomplice was insufficient under former O.C.G.A. § 24-4-8, the evidence sufficed to sustain the defendant's conviction where an additional accomplice provided testimony to corroborate that of the first accomplice. Both codefendants testified that the defendant was present from the robbery's inception through the robbery's execution, that the defendant was aware of the conspiracy to obtain the victim's money and cocaine by armed robbery, and that the defendant willingly participated in the crimes and shared the criminal intent of those who committed the crimes inside the victim's residence by supplying the defendant's car and acting as a get-away driver. Watson v. State, 308 Ga. App. 871, 708 S.E.2d 703 (2011) (decided under former O.C.G.A. § 24-4-8).

Corroboration circumstantial and consistent with innocence. — When corroboration of the alleged accomplice's testimony is entirely circumstantial and is of itself as consistent with innocence as with guilt, such evidence is insufficient to sustain a verdict. Reed v. State, 127 Ga. App. 458, 194 S.E.2d 121 (1972) (decided under former Code 1933, § 38-121).

Source of corroboration. — Corroboration of an accomplice must come from a source or sources other than his or her own testimony, were it otherwise the rule as to corroboration would obviously be nugatory and worthless. Taylor v. State, 110 Ga. 150, 35 S.E. 161 (1900) (decided under former Penal Code 1895, § 991); Butler v. State, 17 Ga. App. 522, 87 S.E. 712 (1916) (decided under former Penal Code 1910, § 1017).

There was adequate corroboration. — See Cain v. State, 212 Ga. App. 531, 442 S.E.2d 279 (1994) (decided under former O.C.G.A. § 24-4-8); Bush v. State, 267 Ga. 877, 485 S.E.2d 466 (1997) (decided under former O.C.G.A. § 24-4-8); Givens v. State, 227 Ga. App. 861, 490 S.E.2d 530 (1997) (decided under former O.C.G.A. § 24-4-8); In re J.L., 229 Ga. App. 447, 494 S.E.2d 274 (1997) (decided under former O.C.G.A. § 24-4-8); Pye v. State, 269 Ga. 779, 505 S.E.2d 4 (1998), cert. denied, 526 U.S. 1118, 119 S. Ct. 1767, 143 L. Ed. 2d 797 (1999) (decided under former O.C.G.A. § 24-4-8); Sparks v. State, 234 Ga. App. 11, 505 S.E.2d 555 (1998) (decided under former O.C.G.A. § 24-4-8); Dalton v. State, 237 Ga. App. 217, 513

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S.E.2d 745 (1999) (decided under former O.C.G.A. § 24-4-8); Purvis v. State, 239 Ga. App. 900, 522 S.E.2d 499 (1999) (decided under former O.C.G.A. § 24-4-8); Terrell v. State, 271 Ga. 783, 523 S.E.2d 294 (1999) (decided under former O.C.G.A. § 24-4-8); Crumpton v. State, 244 Ga. App. 57, 534 S.E.2d 809 (2000) (decided under former O.C.G.A. § 24-4-8); Blair v. State, 246 Ga. App. 533, 541 S.E.2d 120 (2000) (decided under former O.C.G.A. § 24-4-8); Jackson v. State, 246 Ga. App. 731, 541 S.E.2d 701 (2000) (decided under former O.C.G.A. § 24-4-8); Callaway v. State, 247 Ga. App. 310, 542 S.E.2d 596 (2000) (decided under former O.C.G.A. § 24-4-8); Rogers v. State, 247 Ga. App. 219, 543 S.E.2d 81 (2000) (decided under former O.C.G.A. § 24-4-8); Eidson v. State, 247 Ga. App. 26, 543 S.E.2d 100 (2000) (decided under former O.C.G.A. § 24-4-8); Miller v. State, 273 Ga. 831, 546 S.E.2d 524 (2001) (decided under former O.C.G.A. § 24-4-8); Parker v. State, 249 Ga. App. 530, 549 S.E.2d 154 (2001) (decided under former O.C.G.A. § 24-4-8).

Sufficient corroborating evidence existed to support accomplice's testimony that defendant kicked in the door of the victim's residence and committed other crimes inside that residence against the victim, as another person, other than defendant and the other two men who committed the crimes, gave a statement to police regarding defendant's presence at the scene of the crime and that statement was introduced at trial through the police officer who witnessed the statement. Moore v. State, 261 Ga. App. 752, 583 S.E.2d 588 (2003) (decided under former O.C.G.A. § 24-4-8).

Although the uncorroborated testimony of a codefendant was insufficient to convict defendant under former O.C.G.A. § 24-4-8, there was other evidence, including defendant's statements to police that defendant urged the codefendant to kill the victim, to show that defendant aided and abetted and counseled another to commit the crimes under O.C.G.A. § 16-2-20(b)(3) and (4). Lucky v. State, 286 Ga. 478, 689 S.E.2d 825 (2010) (decided under former O.C.G.A. § 24-4-8).

Because of the corroborating testimony from the defendant's two accomplices, the accomplice testimony was admissible to support the defendant's conviction for aggravated assault, O.C.G.A. § 16-5-21(a)(3), and aggravated battery, O.C.G.A. § 16-5-24(a). Scott v. State, 302 Ga. App. 111, 690 S.E.2d 242 (2010) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to authorize a rational trier of fact to find the defendants guilty beyond a reasonable doubt of malice murder and aggravated assault because the independent corroborating evidence in the case was substantial; an accomplice's testimony implicating the defendants was corroborated by the aggravated assault victim, who positively identified one of the defendants, that defendant's own admission to a woman in the defendant's apartment, evidence that the second defendant had sustained shotgun wounds on the evening of the crimes, ballistics evidence tying that defendant to the crime scene, and the presence of that defendant's blood on the first defendant's clothing and in the getaway vehicle. Ward v. State, 288 Ga. 641, 706 S.E.2d 430 (2011) (decided under former O.C.G.A. § 24-4-8).

Testimony of the defendant's two accomplices was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt of the crimes (murder, armed robbery, and aggravated assault) for which the defendant was convicted. Herbert v. State, 288 Ga. 843, 708 S.E.2d 260 (2011) (decided under former O.C.G.A. § 24-4-8).

Evidence corroborating an accomplice's testimony was sufficient to authorize the jury's determination that the defendant was guilty beyond a reasonable doubt of theft by receiving because in addition to the accomplice's testimony, a deputy with the county sheriff's office observed the accomplice and a codefendant appear to shoplift at a store, after which they got into the defendant's car; the defendant did not stop when police were chasing the defendant but instead continued to drive evasively while the codefendant threw items out of the passenger window, and there were no receipts showing that the

items had been purchased. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011) (decided under former O.C.G.A. § 24-4-8).

In an armed robbery prosecution, the testimony of the defendant's accomplice was corroborated as required by former O.C.G.A. § 24-4-8, in that the accomplice's testimony regarding the defendant's planning of the crime was corroborated by telephone records, the store's security video tape, and the fact that money was deposited into the defendant's account only two days after the crime. Bell v. State, 314 Ga. App. 28, 722 S.E.2d 871 (2012) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for RICO conviction. — Testimony by defendant's cousin that the cousin saw defendant deliver packages to defendant's mother on several occasions corroborated defendant's mother's testimony that defendant supplied cocaine for sale by family members and was sufficient to sustain defendant's conviction under the Georgia Racketeer Influenced and Corrupt Organization Act, O.C.G.A. § 16-14-1 et seq. McGee v. State, 255 Ga. App. 708, 566 S.E.2d 431 (2002), cert. denied, 537 U.S. 1058, 123 S. Ct. 633, 154 L. Ed. 2d 539 (2002) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for marijuana conviction. — Sufficient corroboration existed to support a conviction for possession of marijuana with intent to distribute based on the testimony of an accomplice after the police saw that defendant was in a house that had marijuana in many rooms, the marijuana was divided into different colored baggies, implying different ownership, and defendant's flight from the scene showed defendant's consciousness of guilt. Ellison v. State, 265 Ga. App. 446, 594 S.E.2d 675 (2004) (decided under former O.C.G.A. § 24-4-8).

In a trial for attempted trafficking in marijuana, a codefendant's statements were sufficiently corroborated under former O.C.G.A. § 24-4-8 by the testimony of a case agent that a loaded pistol was found at the defendant's feet and that a bag containing the currency used in the drug transaction was found within arm's reach of the defendant. Green v. State, 298 Ga. App. 17, 679 S.E.2d 348 (2009) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for burglary conviction. — Evidence was sufficient to support defendant's conviction for burglary after an accomplice's testimony that defendant was an active participant in the burglary was corroborated by: (1) a police officer's testimony that defendant was in a vehicle with two accomplices shortly after the burglary; (2) another officer's testimony that handguns were found in a pillowcase retrieved from the vehicle; and (3) the pawn shop owner's testimony that the guns found in the vehicle were the guns stolen from the owner's shop. Reynolds v. State, 267 Ga. App. 148, 598 S.E.2d 868 (2004) (decided under former O.C.G.A. § 24-4-8).

Testimony of defendant's accomplice was sufficiently corroborated by defendant's possession of tools used in the crime, the fact that defendant was found near the scene of a bank burglary covered in grease that could have come from a bank machine, the fact that defendant was sweaty, as if defendant had been working, and the fact that pine straw similar to the pine straw in front of the burglarized bank was found in defendant's car. McNair v. State, 267 Ga. App. 872, 600 S.E.2d 830 (2004) (decided under former O.C.G.A. § 24-4-8).

Defendant's burglary convictions were affirmed based on the defendant's accomplice's testimony that the defendant was present with the accomplice during two of the three burglaries, corroborated by the property owners' testimony that items were stolen during unauthorized entries into their respective residences, evidence that the stolen items were found in the defendant's bedroom shortly thereafter, and the defendant's inconsistent explanations for the defendant's possession of the stolen items. Mays v. State, 306 Ga. App. 507, 703 S.E.2d 21 (2010) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for aggravated assault conviction. — Sufficient evidence supported aggravated assault conviction because both the victim and another witness testified that defendant stabbed the victim, and a nurse testified

Sufficiency of Corroborating Evidence (Cont'd)

that the victim's injury was serious. Hampton v. State, 272 Ga. App. 273, 612 S.E.2d 96 (2005) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence supported the defendant's conviction of aggravated assault under O.C.G.A. § 16-5-21(a)(2) after the defendant's companions used metal knuckles, a metal pipe, and a gun to beat the victim; the defendant was a party to the offense under O.C.G.A. § 16-2-20(a), as the victim, whose testimony was sufficient to establish a fact under former O.C.G.A. § 24-4-8, testified that, during the incident, the defendant summoned the companions to help beat the victim, and the defendant and the companions repeatedly warned the victim not to testify in court in the defendant's criminal case. Souder v. State, 281 Ga. App. 339, 636 S.E.2d 68 (2006), cert. denied, No. S07C0113, 2007 Ga. LEXIS 97 (Ga. 2007) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for malice murder conviction. — Sufficient non-accomplice evidence was presented to corroborate the testimony by accomplices of both defendants in trial on charges of malice murder and other related offenses, specifically, that: (1) the first defendant admitted to the victim's killing, via a note from that defendant to a non-accomplice witness, in order to prevent the victim from testifying; and (2) independent evidence was presented regarding the second defendant's participation in the crimes to corroborate the testimony of the accomplice. Williams v. State, 280 Ga. 584, 630 S.E.2d 370 (2006) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for methamphetamine conviction. — Sufficient evidence existed to support defendant's conviction for criminal attempt to manufacture methamphetamine, and defendant's challenge to the sufficiency of the evidence based upon the uncorroborated testimony of defendant's accomplice alone failed as the incriminating testimony by the accomplice was adequately corroborated by independent evidence, including defendant's possession of essential items for manufacturing methamphetamine; defendant's statement to a passenger in the back of the patrol car that a store likely had ratted about the matchbook purchases; and the large quantity of matchbooks found discarded along the route defendant had just traveled. Kohlmeier v. State, 289 Ga. App. 709, 658 S.E.2d 261 (2008) (decided under former O.C.G.A. § 24-4-8).

Because the accomplice testimony presented against a juvenile was sufficiently corroborated by two other witness, the juvenile's prior similar acts, and the juvenile's flight from the scene, the appeals court rejected the juvenile's sufficiency challenge. In the Interest of S.K., 289 Ga. App. 672, 658 S.E.2d 220 (2008) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for armed robbery and hijacking motor vehicle conviction. — Trial court properly convicted defendant of armed robbery and hijacking of a motor vehicle because: (1) there was sufficient evidence to establish defendant committed the crimes based on the testimony of the victim, who identified defendant as the individual who approached the victim's vehicle, pointed a gun, and demanded the vehicle; (2) two officers testified as to observing defendant driving the stolen vehicle the same night; and (3) the victim's cell phone was found on defendant's person when the defendant was arrested. Culver v. State, 290 Ga. App. 321, 659 S.E.2d 390 (2008) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for robbery, burglary, and related crimes conviction. — With regard to a defendant's convictions for robbery, burglary, and other related crimes, the testimony of a codefendant that implicated defendant was sufficiently corroborated by other testimony and evidence at trial. Burton v. State, 293 Ga. App. 822, 668 S.E.2d 306 (2008) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for armed robbery conviction. — Evidence was sufficient to support a defendant's armed robbery conviction since an accomplice, who was wearing a mask and holding a gun when the accomplice entered the victim's bedroom, testified that the defen-

dant had given the accomplice the mask and the gun and that the accomplice had shouted downstairs to the defendant during the robbery; the testimony was corroborated under former O.C.G.A. § 24-4-8 by the victim's recognition of the defendant's voice from the shouted conversation during the robbery and by the defendant's resistance and flight when police arrived. Williams v. State, 287 Ga. App. 361, 651 S.E.2d 768 (2007) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict a defendant of armed robbery since the testimony of a 14-year-old accomplice was corroborated by testimony from a clerk in the store that was robbed by the defendant and others, and the state presented physical evidence—clothing worn by the robbers—that linked the defendant to the robbery. Sellers v. State, 294 Ga. App. 536, 669 S.E.2d 544 (2008) (decided under former O.C.G.A. § 24-4-8).

In an armed robbery prosecution, as the victim identified the defendant as the driver of a car and the codefendant as the passenger who robbed the victim at gunpoint, and the pistol used in the robbery was found in the car's locked glove compartment, to which only the defendant had the key, the evidence was sufficient to establish that the defendant aided and abetted the codefendant in the robbery under O.C.G.A. § 16-2-20 and sufficiently corroborated the codefendant's accomplice testimony under former O.C.G.A. § 24-4-8. Bailey v. State, 295 Ga. App. 480, 672 S.E.2d 450 (2009) (decided under former O.C.G.A. § 24-4-8).

While no witness could specifically identify the dark clothes that were recovered by the police from the crawl space of the defendant's parent as having been worn by one of the robbers of a grocery store, these articles of clothing matched descriptions given to an officer that the two suspects wore dark attire with full sleeves. This evidence sufficiently corroborated an accomplice's testimony that the defendant participated in the robbery. Jupiter v. State, 308 Ga. App. 386, 707 S.E.2d 592 (2011) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err in denying the defendant's motion for directed verdict after the defendant was convicted of armed robbery because there was no violation of former O.C.G.A. § 24-4-8 since there was evidence from which a jury could find sufficient corroboration of the accomplice's testimony to support the defendant's conviction; the testimony of the victims corroborated the accomplice's testimony because the victims physical description of the perpetrator was consistent with the accomplice's testimony about what the defendant was wearing on the day of the robbery. Harris v. State, 311 Ga. App. 336, 715 S.E.2d 757 (2011) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for weapons possession conviction. — Evidence was sufficient to convict a defendant of possession of a weapon during the commission of a crime as the testimony of the defendant's accomplice that the defendant raped the victim at gunpoint was corroborated by the victim's out-of-court and in-court identification of the defendant as the rapist, and the fact that the defendant's DNA was found on the victim's clothing. Williams v. State, 295 Ga. App. 9, 670 S.E.2d 828 (2008) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for rape conviction. — Evidence was sufficient to convict a defendant of rape as the testimony of the defendant's accomplice that the defendant raped the victim was corroborated by the victim's out-of-court and in-court identification of the defendant as the rapist and the fact that the defendant's DNA was found on the victim's clothing. Williams v. State, 295 Ga. App. 9, 670 S.E.2d 828 (2008) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for sodomy conviction. — Trial court properly denied a defendant's motion for new trial on the ground that there was insufficient evidence to prove aggravated sodomy since the only evidence of the victim performing oral sodomy upon the defendant came from the uncorroborated testimony of the victim's parent, who was an accomplice to the sexual abuse and because there was insufficient evidence of force. To the contrary, the victim's testimony as to the sexual abuse committed by the defendant sufficiently corroborated the testi-

Sufficiency of Corroborating Evidence (Cont'd)

mony of the victim's parent, and the testimony of the victim that the defendant kept multiple guns around the outbuilding where the trio lived and that the defendant had repeatedly threatened to shoot the victim if the victim did not engage in the sexual acts was sufficient to prove the element of force. Driggers v. State, 295 Ga. App. 711, 673 S.E.2d 95 (2009) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for cocaine conviction. — While a defendant claimed that the evidence was insufficient to exclude the possibility that the cocaine belonged solely to the defendant's passenger, the testimony of the passenger that the passenger dropped the drugs out of the truck after the defendant threw the drugs in the passenger's lap was adequately corroborated under former O.C.G.A. § 24-4-8 by the facts that the defendant had more than $2,000 in the defendant's pocket and that the defendant was the owner and driver of the truck from which the drugs were thrown; the defendant was, thus, properly convicted of trafficking in cocaine under O.C.G.A. § 16-13-31(a)(1) and possession of cocaine as a lesser included offense of possession with intent to distribute. Wingfield v. State, 297 Ga. App. 476, 677 S.E.2d 704 (2009) (decided under former O.C.G.A. § 24-4-8).

Defendant's accomplice's testimony that the defendant was knowingly in possession of cocaine found in their vehicle was corroborated by evidence of 575 grams of cocaine in the vehicle, that the defendant was extremely anxious when stopped by police, and the fact that there were 18 air fresheners hung throughout the vehicle, and was therefore sufficiently corroborated under former O.C.G.A. § 24-4-8, supporting the defendant's conviction for trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1). Richardson v. State, 305 Ga. App. 850, 700 S.E.2d 738 (2010) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for robbery conviction. — Evidence that the defendant committed a robbery was not based solely on the uncorroborated testimony of the defendant's accomplice. A store employee corroborated the accomplice's testimony, and items similar to those taken during the robbery, as well as items taken during a later robbery, were recovered from the defendant's car, which was occupied by the defendant and the accomplice. Savage v. State, 298 Ga. App. 350, 679 S.E.2d 734 (2009) (decided under former O.C.G.A. § 24-4-8).

Accomplice cannot corroborate the accomplices own testimony by something the accomplice told another witness. The corroborating circumstances must be independent of the testimony of the accomplice. Payne v. State, 135 Ga. App. 245, 217 S.E.2d 476 (1975) (decided under former Code 1933, § 38-121).

Corroboration required for each offense. — Although slight evidence of corroboration connecting the defendant with the crime is sufficient, when the defendant is charged with the commission of several offenses, there must be corroborating evidence for each offense charged. Davis v. State, 154 Ga. App. 803, 269 S.E.2d 874 (1980), cert. dismissed, 247 Ga. 8, 273 S.E.2d 409 (1981) (decided under former Code 1933, § 38-121).

Testimony corroborated in murder trial. — Testimony of the principal witness, an accomplice in the murder of which the accused was tried, was corroborated and the conviction was authorized by the evidence. George v. State, 167 Ga. 532, 146 S.E. 120 (1928) (decided under former Penal Code 1910, § 1017).

When appellant was convicted of burglary, armed robbery, and felony murder, and appellant admitted that the appellant went to the victim's house with an accomplice, but insisted that the accomplice killed the victim, and contends that the only evidence that the appellant committed the murder is the uncorroborated testimony of the appellant's accomplice, the court found that the evidence was sufficient to satisfy the requirements of former O.C.G.A. § 24-4-8, since appellant's own statement is sufficient evidence of the appellant's participation in the crime to corroborate the testimony of the accomplice. Wisenbaker v. State, 259 Ga. 416,

383 S.E.2d 132 (1989) (decided under former O.C.G.A. § 24-4-8).

Evidence of tenancy and drug paraphernalia. — Evidence that the defendant lived in an apartment and quantities of methamphetamine were located there, along with the implements of trafficking, a triple-beam scale, cutting materials, and baggies for packaging was sufficient to enable a rational trier of fact to find the defendant guilty beyond a reasonable doubt of the offense of possession of methamphetamine with intent to distribute. Lowe v. State, 208 Ga. App. 49, 430 S.E.2d 169 (1993) (decided under former O.C.G.A. § 24-4-8).

Testimony corroborated for drug possession. — When defendant's flight itinerary was identical to drug courier's and defendant made voluntary statements that defendant would have cooperated with officials had the officials talked to defendant first instead of talking to "that girl first," the conviction was authorized by the evidence. Warren v. State, 207 Ga. App. 53, 427 S.E.2d 45 (1993) (decided under former O.C.G.A. § 24-4-8).

There was sufficient corroboration when the testimony of the detective regarding what the detective heard about setting up the deal, the detective's observation of the drug transaction, and the detective's later finding the marked bill was at least slight evidence from which the jury could conclude that evidence, independent of the accomplice's testimony, connected defendant to the crime and led to the inference that defendant was guilty. Black v. State, 242 Ga. App. 271, 529 S.E.2d 410 (2000) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict defendant of possession of cocaine since defendant's two accomplices testified as to their purchase of cocaine and their being stopped by the police while enroute to a motel to smoke the cocaine and since the police found cocaine in the back seat of the car defendant was driving to the motel. Heard v. State, 257 Ga. App. 505, 571 S.E.2d 524 (2002) (decided under former O.C.G.A. § 24-4-8).

Testimony corroborated in sudden snatching robbery. — Independent testimony of two separate victims sufficiently established evidence that defendant participated in accomplice's crimes, and thus was sufficient corroboration of accomplice's testimony. Daniel v. State, 207 Ga. App. 720, 429 S.E.2d 130 (1993) (decided under former O.C.G.A. § 24-4-8).

Testimony of victim sufficient to corroborate accomplice's testimony. — Jury charge that defendant may not have been convicted on the uncorroborated testimony of an accomplice to the charged home invasion was unwarranted since, inter alia, the victims' testimony corroborated the accomplice's testimony regarding defendant's involvement. Skaggs-Ferrell v. State, 266 Ga. App. 248, 596 S.E.2d 743 (2004) (decided under former O.C.G.A. § 24-4-8).

Although under Georgia law, a defendant could not be convicted solely upon the uncorroborated testimony of an accomplice, former O.C.G.A. § 24-4-8, the evidence corroborated some particulars of the accomplice's testimony implicating the codefendants in the charged crimes since all three of the victims from the three separate gas stations provided descriptions of their assailants that generally matched the codefendants and the accomplice, and all three victims also testified that their assailants brandished a handgun and a shotgun, which were indeed the weapons that were found at the scene where the stolen SUV crashed and where the accomplice was arrested. Accordingly, the evidence corroborating the accomplice's testimony was sufficient to authorize the jury's determination that the codefendants were guilty beyond a reasonable doubt as parties to armed robbery, O.C.G.A. § 16-8-41, hijacking a motor vehicle, O.C.G.A. § 16-5-44.1, aggravated assault, O.C.G.A. § 16-5-21, theft by taking, O.C.G.A. § 16-8-2, theft by receiving, O.C.G.A. § 16-8-7, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106. Daniels v. State, 306 Ga. App. 577, 703 S.E.2d 41 (2010) (decided under former O.C.G.A. § 24-4-8).

Testimony of defendant sufficient to corroborate accomplice's testimony. — In a prosecution for malice murder, even though defendant and defendant's accomplice each accused the other

Sufficiency of Corroborating Evidence (Cont'd)

of being the actual perpetrator, defendant's own testimony — placing oneself at the scene and as a participant in disposing of some of the evidence, including the murder weapon — provided ample corroboration for the accomplice's testimony to support a conviction of defendant either as a party to the crime or as an actual perpetrator in the murder. Parkerson v. State, 265 Ga. 438, 457 S.E.2d 667 (1995) (decided under former O.C.G.A. § 24-4-8).

Defendant's testimony sufficiently corroborated that of a codefendant to support the defendant's conviction of armed robbery since the defendant testified that the defendant was present during the planning of an armed robbery and that the defendant supplied the gun used during the robbery. Short v. State, 234 Ga. App. 633, 507 S.E.2d 514 (1998) (decided under former O.C.G.A. § 24-4-8).

Defendant's statement concerning willing accompaniment of friends despite knowing those friends were involved in criminal activity and defendant's knowledge about items that were taken during such activity was sufficient evidence corroborating an accomplice's testimony inculpating the defendant. Moore v. State, 245 Ga. App. 641, 537 S.E.2d 764 (2000) (decided under former O.C.G.A. § 24-4-8).

When defendant robbed the victims at gunpoint with two accomplices, the testimony of one accomplice that defendant was involved in the robbery was sufficient to corroborate testimony to the same effect from defendant's other accomplice and sustain defendant's convictions for armed robbery and aggravated assault, under O.C.G.A. §§ 16-5-21(a)(1), (2) and 16-8-41(a). Gallimore v. State, 264 Ga. App. 629, 591 S.E.2d 485 (2003) (decided under former O.C.G.A. § 24-4-8).

There was sufficient corroboration of an accomplice's testimony as required under former O.C.G.A. § 24-4-8 based on the defendant's own testimony admitting that the defendant deliberately drove to the scene of the murder and shooting with others, knew that the men doing the shooting were armed, and moved to the crime scene rather than away from the scene. Laye v. State, 312 Ga. App. 862, 720 S.E.2d 233 (2011), cert. denied, 2012 Ga. LEXIS 280 (Ga. 2012) (decided under former O.C.G.A. § 24-4-8).

Testimony of state's witness sufficient to corroborate testimony of accomplice. — See Herndon v. State, 187 Ga. App. 77, 369 S.E.2d 264 (1988) (decided under former O.C.G.A. § 24-4-8).

Recent possession of stolen property, not satisfactorily explained, is sufficient basis for the corroboration of an accomplice's testimony. Inman v. State, 182 Ga. App. 209, 355 S.E.2d 119 (1987) (decided under former O.C.G.A. § 24-4-8).

Guns and ski mask sufficient corroboration. — Testimony of the codefendant, corroborated by circumstantial evidence was sufficient to support a conviction of armed robbery, since the codefendant testified that defendant actively participated in the robbery and guns and a ski mask identified as those used in the commission of the crime were found in the defendant's trailer. Eschena v. State, 203 Ga. App. 621, 417 S.E.2d 214, cert. denied, 203 Ga. App. 908, 417 S.E.2d 336 (1992) (decided under former O.C.G.A. § 24-4-8).

Identification by robbery victim. — Evidence was sufficient to sustain the defendant's conviction for armed robbery and to corroborate the accomplice's testimony, when one of the robbery victims identified the defendant as one of the robbers. Telfair v. State, 234 Ga. App. 444, 507 S.E.2d 195 (1998) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41 and possession of a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(1) because even though the defendant was found near a car similar to that involved in the robbery, with a shotgun similar to that used in the attack, and the defendant admitted being present at the scene of the robbery, the victim's testimony alone was sufficient to authorize the jury's verdict of guilty beyond a reasonable doubt pursuant to former O.C.G.A. § 24-4-8. Law v. State, 308 Ga. App. 76, 706 S.E.2d 604 (2011) (decided under former O.C.G.A. § 24-4-8).

Testimony corroborated in prosecution for armed robbery. — An accomplice's specific, extensive testimony linking the defendant to an armed robbery was sufficiently corroborated by substantial evidence of the defendant's immediate, unexplained possession of stolen checks, forged identification cards, and the vehicle used during the robbery. Smith v. State, 234 Ga. App. 586, 506 S.E.2d 406 (1998) (decided under former O.C.G.A. § 24-4-8).

In a prosecution for armed robbery and possession of a firearm by a convicted felon, the defendant's presence at a convenience store identified by defendant's accomplice, at the specific time identified by the accomplice, in the type of vehicle identified by the accomplice, with the array of loaded weaponry — including a 9mm weapon — identified by the accomplice, was sufficient to corroborate the accomplice's testimony regarding the defendant's participation as a party to the crime. House v. State, 237 Ga. App. 504, 515 S.E.2d 652 (1999) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient for a rational trier of fact to find that the defendant participated in an armed robbery because an accomplice's testimony, which implicated the defendant as a party to the crimes, was sufficiently corroborated by the testimony and evidence at trial when the testimony of a second accomplice regarding the circumstances surrounding the planned robbery, the defendant's participation in the planning of the robbery, and the party's actions before and after the robbery sufficiently corroborated the first accomplice's testimony; the first accomplice's testimony was further corroborated by the victims' descriptions of the events surrounding the robbery, and the police chief testified at trial that police found two sets of shoe prints at the scene of the robbery, but only one set where the second accomplice waited with the car, which also corroborated the accomplice's testimony about what happened after the robbery. Smith v. State, 302 Ga. App. 222, 690 S.E.2d 867 (2010) (decided under former O.C.G.A. § 24-4-8).

In a malice murder action, an accomplice's testimony that defendant was the shooter was corroborated by the evidence of defendant's animosity towards the victim, the fact that defendant had previously pulled a handgun on the victim, and the fact that defendant had celebrated the victim's murder. Moreover, defendant's confession to another that defendant shot the victim corroborated the accomplice's testimony. Hewitt v. State, 277 Ga. 327, 588 S.E.2d 722 (2003) (decided under former O.C.G.A. § 24-4-8).

Violation of former statute not grounds for habeas corpus relief. — Corroboration of the testimony of an accomplice is a statutory requirement, not a constitutional right. Since violation of a state law no longer constitutes a basis for habeas corpus relief, there is no constitutional nor habeas corpus ground for relief since the contention is the absence of corroboration of the testimony of an accomplice. Gunter v. Hickman, 256 Ga. 315, 348 S.E.2d 644 (1986) (concurring opinions); (decided under former O.C.G.A. § 24-4-8).

Corroborated by other testimony and physical evidence. — Although there was one witness who implicated defendant in the commission of aggravated assault and recanted the witness's statements at trial, the evidence was sufficient to convict defendant since the witness's statements to police implicating defendant in the fatal assault were corroborated by other testimony and the physical evidence. Kinney v. State, 271 Ga. 877, 525 S.E.2d 91 (2000) (decided under former O.C.G.A. § 24-4-8).

There was sufficient evidence under former O.C.G.A. § 24-4-8 to convict defendant of firearms offenses and drug possession, after the codefendant testified that defendant owned five of the guns and the drugs that were found in the stopped vehicle in which defendant was a passenger, and the police officer who stopped defendant's vehicle corroborated the codefendant's testimony by stating that the officer found a gun under defendant's seat in the car. Spratling v. State, 255 Ga. App. 500, 565 S.E.2d 839 (2002) (decided under former O.C.G.A. § 24-4-8).

Accomplice's testimony corroborated. — Although a conviction cannot be based upon the uncorroborated testimony

Sufficiency of Corroborating Evidence (Cont'd)

of an accomplice, slight evidence of defendant's identity and participation from an extraneous source is all that is required to corroborate the accomplice's testimony, and thus, support the verdict. Leonard v. State, 241 Ga. App. 899, 528 S.E.2d 540 (2000) (decided under former O.C.G.A. § 24-4-8).

Accomplice's testimony not sufficiently corroborated. — Juvenile adjudications were reversed since the testimony of an accomplice witness was not sufficiently corroborated to support the guilty findings; the victim's prior report to a school concerning two of the three defendants did not connect defendants to the crime, and was insufficient corroboration. In the Interest of M.B., 267 Ga. App. 721, 601 S.E.2d 370 (2004) (decided under former O.C.G.A. § 24-4-8).

Lay opinion testimony of deputy admitted. — Trial court did not err in denying the defendant's motion for directed verdict because the evidence was sufficient to find the defendant guilty of distribution of cocaine beyond a reasonable doubt; a deputy's lay opinion testimony was sufficient to identify the defendant as the perpetrator of the crime. Strickland v. State, 302 Ga. App. 44, 690 S.E.2d 638 (2010) (decided under former O.C.G.A. § 24-4-8).

Evidence Constituting Corroboration

Testimony of one accomplice may be corroborated by the testimony of another accomplice. Chance v. State, 33 Ga. App. 137, 125 S.E. 730 (1924) (decided under former Penal Code 1910, § 1017); Pope v. State, 171 Ga. 655, 156 S.E. 599 (1930), answer conformed to, 42 Ga. App. 680, 157 S.E. 211 (1931) (decided under former Penal Code 1910, § 1017); Austin v. State, 47 Ga. App. 217, 169 S.E. 729 (1933) (decided under former Code 1933, § 38-121); Wise v. State, 52 Ga. App. 98, 182 S.E. 535 (1935) (decided under former Code 1933, § 38-121); Wise v. State, 53 Ga. App. 363, 186 S.E. 142 (1936) (decided under former Code 1933, § 38-121); Walker v. State, 57 Ga. App. 868, 197 S.E. 67 (1938) (decided under former Code 1933, § 38-121); Rozier v. State, 68 Ga. App. 797, 24 S.E.2d 137 (1943) (decided under former Code 1933, § 38-121); Greeson v. State, 90 Ga. App. 57, 81 S.E.2d 839 (1954) (decided under former Code 1933, § 38-121); Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968) (decided under former Code 1933, § 38-121); Nix v. State, 133 Ga. App. 417, 211 S.E.2d 26 (1974) (decided under former Code 1933, § 38-121); Vaughn v. State, 139 Ga. App. 565, 228 S.E.2d 741 (1976) (decided under former Code 1933, § 38-121); Baker v. State, 238 Ga. 389, 233 S.E.2d 347, cert. denied, 431 U.S. 970, 97 S. Ct. 2931, 53 L. Ed. 2d 1066 (1977) (decided under former Code 1933, § 38-121); Eubanks v. State, 240 Ga. 544, 242 S.E.2d 41 (1978) (decided under former Code 1933, § 38-121); Smith v. State, 154 Ga. App. 741, 270 S.E.2d 5 (1980) (decided under former Code 1933, § 38-121); Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627 (1981) (decided under former O.C.G.A. § 24-4-8); Hanifa v. State, 269 Ga. 797, 505 S.E.2d 731 (1998) (decided under former O.C.G.A. § 24-4-8).

Rule barring conviction based on uncorroborated testimony of a single accomplice was inapplicable to a robbery case since the evidence against each of three juvenile defendants was derived from more than one witness and was supported by corroborating evidence after the victim identified one juvenile defendant and one of the two coconspirators, but the victim could not identify the others, and an officer testified regarding statements given to the officer by one of the coconspirators and another of the juvenile defendants which implicated all three juvenile defendants in the crime; although all three juvenile defendants argued that the corroborating evidence was not credible, the trial court was the sole arbiter of credibility. In the Interest of C.L.B., 267 Ga. App. 456, 600 S.E.2d 407 (2004) (decided under former O.C.G.A. § 24-4-8).

Pursuant to former O.C.G.A. § 24-4-8, defendant juvenile's statements to the police corroborated an accomplice's testimony that the juvenile struck a woman unconscious, caused her serious bodily in-

jury, used force to steal her pocketbook, and dragged her down onto her front yard; accordingly, the evidence was sufficient to adjudicate the juvenile delinquent under O.C.G.A. §§ 16-5-21(a)(2), 16-5-40(a), and 16-8-40(a)(1). In re D. T., 294 Ga. App. 486, 669 S.E.2d 471 (2008) (decided under former O.C.G.A. § 24-4-8).

Felony conviction based on testimony of accomplice. — In order to sustain a felony conviction based upon the testimony of an accomplice, there must be corroborating facts and circumstances, which, in themselves and independently of the testimony of the accomplice, directly connect the defendant with the crime or lead to the inference that the defendant is guilty, and are more than sufficient to merely cast on the defendant a grave suspicion of guilt. The necessary corroboration may consist entirely of circumstantial evidence, and evidence of the defendant's conduct before and after the crime was committed may give rise to an inference that defendant participated in the crime. Bradford v. State, 262 Ga. 512, 421 S.E.2d 523 (1992) (decided under former O.C.G.A. § 24-4-8); Klinect v. State, 269 Ga. 570, 501 S.E.2d 810 (1998) (decided under former O.C.G.A. § 24-4-8).

Defendant's possession of the gun identified by the victim as used in the crime was sufficient to corroborate the accomplice's testimony as to the sequence of events and acts perpetrated by defendant and the accomplice with regard to the crimes of armed robbery, rape, and aggravated sodomy with the accomplice agreeing to testify against the defendant in return for a lighter sentence. Palmer v. State, 286 Ga. App. 751, 650 S.E.2d 255 (2007), cert. denied, No. S07C1770, 2007 Ga. LEXIS 678 (Ga. 2007) (decided under former O.C.G.A. § 24-4-8).

Uncorroborated testimony of accomplices is sufficient to authorize a felony conviction; thus, convictions of defendant for hijacking a motor vehicle, aggravated assault, and armed robbery that were based upon the testimony of defendant's two accomplices to the crimes were affirmed. Boles v. State, 257 Ga. App. 240, 570 S.E.2d 677 (2002) (decided under former O.C.G.A. § 24-4-8).

Conduct on the part of the defendant may act to corroborate the testimony of an accomplice. Holton v. State, 61 Ga. App. 654, 7 S.E.2d 202 (1940) (decided under former Code 1933, § 38-121); Nix v. State, 133 Ga. App. 417, 211 S.E.2d 26 (1974) (decided under former Code 1933, § 38-121); Drake v. State, 241 Ga. 583, 247 S.E.2d 57 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979) (decided under former Code 1933, § 38-121).

Defendant's attempts to conceal defendant's participation in an offense can corroborate defendant's accomplice's testimony regarding defendant's participation. Smith v. State, 245 Ga. 168, 263 S.E.2d 910 (1980) (decided under former Code 1933, § 38-121); Drake v. State, 245 Ga. 798, 267 S.E.2d 237 (1980) (decided under former Code 1933, § 38-121).

Evidence of conduct as corroboration may be circumstantial or direct. — Conduct of a defendant before, during the time of, and after the commission of a crime can corroborate the testimony of an accomplice and can be shown by circumstantial as well as by direct evidence. Smith v. State, 238 Ga. 640, 235 S.E.2d 17 (1977) (decided under former Code 1933, § 38-121); Stanford v. State, 157 Ga. App. 633, 278 S.E.2d 175 (1981) (decided under former O.C.G.A. § 24-4-8).

Jury may consider the conduct of the defendant before, during, and after the commission of the crime to determine the defendant's intent and defendant's participation in the crime to determine whether defendant's conduct is sufficient corroboration of the accomplice's testimony to sustain the conviction. Whitfield v. State, 159 Ga. App. 398, 283 S.E.2d 627 (1981) (decided under former O.C.G.A. § 24-4-8).

The necessary corroboration required by former O.C.G.A. § 24-4-8 may consist entirely of circumstantial evidence, and evidence of the defendant's conduct before and after the crime was committed may give rise to an inference that defendant participated in the crime. Berry v. State, 248 Ga. 430, 283 S.E.2d 888 (1981) (decided under former O.C.G.A. § 24-4-8).

While a conviction based upon uncorroborated testimony of an alleged accomplice is insufficient, corroboration itself is peculiarly a matter for the jury, and may be shown by direct or circumstantial evi-

Evidence Constituting Corroboration (Cont'd)

dence tending to show defendant's participation. Howell v. State, 163 Ga. App. 445, 295 S.E.2d 329 (1982) (decided under former O.C.G.A. § 24-4-8).

Corroborating evidence connecting a defendant to a crime may consist entirely of circumstantial evidence, and evidence of the defendant's conduct before and after the crime was committed may give rise to an inference that the defendant participated in the crime; whether the corroborating evidence was sufficient in a given context was a matter for the jury, and even slight evidence of corroboration connecting an accused to a crime was legally sufficient. Anderson v. State, 261 Ga. App. 456, 582 S.E.2d 575 (2003) (decided under former O.C.G.A. § 24-4-8).

Confession is sufficient to corroborate the testimony of an accomplice. Lancaster v. State, 54 Ga. App. 243, 187 S.E. 617 (1936) (decided under former Code 1933, § 38-121); Wade v. State, 195 Ga. 870, 25 S.E.2d 712 (1943) (decided under former Code 1933, § 38-121); Nix v. State, 133 Ga. App. 417, 211 S.E.2d 26 (1974) (decided under former Code 1933, § 38-121); Vaughn v. State, 139 Ga. App. 565, 228 S.E.2d 741 (1976) (decided under former Code 1933, § 38-121); Spencer v. State, 192 Ga. App. 822, 386 S.E.2d 705 (1989) (decided under former O.C.G.A. § 24-4-8).

Testimony of the codefendant that the murder defendant was the triggerman in the armed robbery was corroborated by the defendant's confession in which defendant admitted participation in the robbery. McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), aff'd, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (decided under former O.C.G.A. § 24-4-8).

Defendant's own testimony regarding defendant's presence at the scene of the crime provided corroboration for defendant's brother's testimony linking the defendant with the crime. Mosier v. State, 223 Ga. App. 75, 476 S.E.2d 842 (1996) (decided under former O.C.G.A. § 24-4-8).

Proof of corpus delicti as corroboration. — Proof of the corpus delicti independently of the evidence of the accomplice is corroborative of the guilt of the accomplice, but does not at all corroborate the accomplice's testimony as to the guilt of another. Childers v. State, 52 Ga. 106 (1874) (decided under former Code 1873, § 3755); McCalla v. State, 66 Ga. 346 (1881) (decided under former Code 1873, § 3755); Altman v. State, 5 Ga. App. 833, 63 S.E. 928 (1909) (decided under former Penal Code 1895, § 991); Smith v. State, 7 Ga. App. 781, 68 S.E. 335 (1910) (decided under former Penal Code 1910, § 1017); Sanders v. State, 46 Ga. App. 175, 167 S.E. 207 (1932) (decided under former Penal Code 1910, § 1017); Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248 (1940) (decided under former Code 1933, § 38-121).

Statement describing burglary corroborated by officer's observations and guilty plea. — Defendant's videotaped statement describing a burglary, which statement conflicted with defendant's subsequent testimony denying knowledge of or participation in the burglary, could be corroborated by: (1) the officer's independent observations of the items taken which corresponded with defendant's description; and (2) the district attorney's testimony as to defendant's plea of guilty to the burglary. Dixon v. State, 172 Ga. App. 803, 324 S.E.2d 780 (1984) (decided under former O.C.G.A. § 24-4-8).

Recent unexplained possession of stolen property is sufficient basis for the corroboration of an accomplice's testimony and for a conviction of burglary. Green v. State, 139 Ga. App. 652, 229 S.E.2d 129 (1976); Cole v. State, 156 Ga. App. 288, 274 S.E.2d 685 (1980) (decided under former Code 1933, § 38-121).

Unexplained recent possession of goods taken in an armed robbery and burglary has some corroborative value. Brady v. State, 169 Ga. App. 316, 312 S.E.2d 632 (1983) (decided under former O.C.G.A. § 24-4-8).

Pregnancy of the unmarried prosecutor, unless it be shown that such pregnancy resulted from the act of the defendant, does not constitute corroboration of the testimony of the prosecutor. Wilkins v. State, 96 Ga. App. 841, 101 S.E.2d 912 (1958) (decided under former Code 1933, § 38-121).

When testimony of defendant's wife-accomplice was corroborated by

testimony of wife's sister who observed defendant beating the same victim on an earlier occasion, such evidence was sufficient to sustain defendant's conviction for cruelty to children. Jackson v. State, 178 Ga. App. 378, 343 S.E.2d 122 (1986) (decided under former O.C.G.A. § 24-4-8).

Polygraph test results are sufficient corroboration of an accomplice's testimony. Smith v. State, 245 Ga. 205, 264 S.E.2d 15 (1980) (decided under former Code 1933, § 38-121).

Defendant's prior inconsistent statements, which constituted substantive evidence, were sufficient to corroborate the accomplice's testimony. Arnold v. State, 243 Ga. App. 118, 532 S.E.2d 458 (2000) (decided under former O.C.G.A. § 24-4-8).

Evidence from extraneous source. — First defendant and second defendant were incorrect in asserting that their convictions arising out of the robbery and murder of a drug dealer were supported by insufficient evidence as their convictions were not based solely on the uncorroborated testimony of accomplices; rather, those convictions also rested on extraneous source evidence identifying the defendants as participants in the crime, including the testimony and identification of the defendant's by a person present at the drug dealer's apartment when the crimes were committed as well as substantial forensic evidence linking the defendants to the crimes. Howard v. State, 279 Ga. 166, 611 S.E.2d 3 (2005) (decided under former O.C.G.A. § 24-4-8).

Testimony and cell phone records sufficient corroboration. — Defendant's convictions of malice murder, armed robbery, and other crimes were not based on the uncorroborated testimony of an accomplice in violation of former O.C.G.A. § 24-4-8 as: 1) a victim testified that intruders took a wallet that police later found in the defendant's home; and 2) cell phone tower records established that the defendant and the accomplice were exchanging phone calls during the times when the crimes were committed and within the vicinity of the crime sites. Jackson v. State, 289 Ga. 798, 716 S.E.2d 188 (2011) (decided under former O.C.G.A. § 24-4-8).

Slight physical evidence sufficient to corroborate. — Evidence of a large bag of marijuana, digital scales, and plastic baggies in a bedroom belonging to defendant slightly corroborated defendant's brother's girlfriend's testimony that defendant possessed the marijuana and gave it to the girlfriend to sell, and a tax return and receipt belonging to defendant corroborated the girlfriend's contention that this room belonged to defendant. Slight corroboration was sufficient under former O.C.G.A. § 24-4-8. Williams v. State, 299 Ga. App. 798, 683 S.E.2d 860 (2009) (decided under former O.C.G.A. § 24-4-8).

Adequate corroboration for gang related beating. — In addition to an accomplice's testimony linking the defendants to the beatings of the victims, there was evidence that one defendant was involved in a conversation about retribution, that the defendant was near the exit to an amusement park among the larger group shortly before the assault, and that the defendant rode home in a car with an admitted participant in the beating. Morey v. State, 312 Ga. App. 678, 719 S.E.2d 504 (2011), cert. denied, No. S12C0451, 2012 Ga. LEXIS 592 (Ga. 2012) (decided under former O.C.G.A. § 24-4-8).

Perjury

Perjury is never presumed. Georgia Power Co. v. Owen, 207 Ga. 178, 60 S.E.2d 436 (1950) (decided under former Code 1933, § 38-121).

In general. — To convict of perjury, there must be two witnesses, or one witness and proof by corroborating circumstances. McLaren v. State, 4 Ga. App. 643, 62 S.E. 138 (1908) (decided under former Penal Code 1895, § 991); Davis v. State, 7 Ga. App. 680, 67 S.E. 839 (1910) (decided under former Penal Code 1910, § 1017). See Flemister v. State, 81 Ga. 768, 7 S.E. 642 (1888) (decided under former Code 1882, § 3755); Rodenberry v. State, 37 Ga. App. 359, 140 S.E. 386 (1927) (decided under former Penal Code 1910, § 1017); Potts v. State, 78 Ga. App. 799, 52 S.E.2d 575 (1949) (decided under former Code 1933, § 38-121).

Evidence was insufficient to support a

Perjury (Cont'd)

finding that the juvenile committed perjury and, thus, was not sufficient to support the juvenile's adjudication as a delinquent since the state's perjury case against the juvenile rested solely on the testimony of a codefendant, and was not supported by the required two witnesses, or one witness and corroborating circumstances. In the Interest of C.H., 262 Ga. App. 630, 585 S.E.2d 921 (2003) (decided under former O.C.G.A. § 24-4-8).

Sufficiency of corroboration. — Nature and sufficiency of the corroboration necessary to prove the perjury must in each case be determined by the jury, but the equilibrium between the oath of the alleged perjurer and the oath of the contradicting witness should be destroyed by material and independent circumstances strongly corroborative of the positive testimony of the witness. Bell v. State, 5 Ga. App. 701, 63 S.E. 860 (1909) (decided under former Penal Code 1895, § 991).

Evidence was sufficient to support defendant's conviction for armed robbery since: (1) defendant affirmatively lied by denying that defendant knew one accomplice in defendant's initial statement to the police; (2) defendant was driving the getaway car when it was stopped by the police; and (3) defendant was in possession of the handgun used in the armed robbery and the money stolen in the armed robbery. The sufficiency of the corroboration of the accomplice's testimony that defendant participated in the planning of the robbery as required under former O.C.G.A. § 24-4-8 was a matter for the jury to determine. Clemons v. State, 265 Ga. App. 825, 595 S.E.2d 530 (2004) (decided under former O.C.G.A. § 24-4-8).

Conspirator's testimony sufficient. — Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator's testimony under former O.C.G.A. § 24-4-8 and for the jury to find beyond a reasonable doubt that the defendant committed the crimes for which the defendant was convicted; the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the coconspirator's testimony about the defendant's participation in the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011) (decided under former O.C.G.A. § 24-4-8).

Proof based on circumstantial evidence. — Former statute did not apply to a case where the proof of perjury was necessarily based upon circumstantial evidence. Mallard v. State, 19 Ga. App. 99, 90 S.E. 1044 (1916) (decided under former Penal Code 1910, § 1017).

Charging part of former statute when inapplicable. — Court did not err in giving in charge the former statute as to the number of witnesses necessary to convict of perjury and certain other offenses, although a part of the statute was not applicable to the case where the inapplicable part was explained. Pence v. State, 36 Ga. App. 270, 136 S.E. 820 (1927) (decided under former Penal Code 1910, § 1017).

Jury

When state does not rely solely upon evidence of accomplice to connect the accused with an offense, it is not incumbent upon the court, without request, to instruct the jury on corroboration. Smith v. State, 154 Ga. App. 741, 270 S.E.2d 5 (1980) (decided under former Code 1933, § 38-121).

Charge unnecessary when two witnesses testify. — When two witnesses swear to the same state of facts, the fact that the witnesses are accomplices or are not accomplices, or that one is an accomplice and other not an accomplice, does not require a charge by the court, in the trial of a defendant alleged to be a party to a joint crime, that "where the only witness is an accomplice" the accomplice's testimony must be corroborated. Wilson v. State, 51 Ga. App. 570, 181 S.E. 134 (1935) (decided under former Code 1933, § 38-121); Farley v. State, 210 Ga. App. 580, 436 S.E.2d 770 (1993) (decided under former O.C.G.A. § 24-4-8); Reeves v. State, 244 Ga. App. 15, 534 S.E.2d 179 (2000) (decided under former O.C.G.A. § 24-4-8).

Failure to charge connection with crime. — In charging upon the subject of corroboration of an accomplice, the court

having instructed that the extent of corroborative testimony was a question for the jury, it was not error, in the absence of a proper request, to fail to charge further that the evidence in corroboration should connect the accused with the commission of the crime. Jones v. State, 200 Ga. 793, 38 S.E.2d 429 (1946) (decided under former Code 1933, § 38-121); Hill v. State, 237 Ga. 794, 229 S.E.2d 737 (1976) (decided under former Code 1933, § 38-121).

When charge on corroboration not required. — Trial court did not err in failing to charge the jury that an accomplice's testimony alone, without corroboration, was insufficient to support a conviction because trial counsel did not request this charge and because the state did not rely wholly on the accomplice's testimony. Wooten v. State, 240 Ga. App. 725, 524 S.E.2d 776 (1999) (decided under former O.C.G.A. § 24-4-8).

Because the state relied on evidence other than the accomplice's testimony, the trial court was not required to submit the issue of the sufficiency of the corroborating evidence to the jury and was therefore not required to charge the jury on corroboration. Jenkins v. Byrd, 103 F. Supp. 2d 1350 (S.D. Ga. 2000) (decided under former O.C.G.A. § 24-4-8).

Charge not harmful. — Charge in regard to the provision of the former statute, relating to corroboration of testimony of an accomplice in a felony case was not harmful to the defendants. Cole v. State, 156 Ga. App. 288, 274 S.E.2d 685 (1980) (decided under former Code 1933, § 38-121).

Jury instruction proper. — Trial court did not err in charging the jury as follows while deleting the bracketed word "generally": "The testimony of a witness is :generally] sufficient to establish a fact if the jury believes the witness." Thomas v. State, 249 Ga. App. 556, 548 S.E.2d 71 (2001) (decided under former O.C.G.A. § 24-4-8).

Trial counsel was not ineffective for failing to object to a jury charge that the testimony of a single witness, if believed, was generally sufficient to establish a fact because the trial court did not err in giving the charge. Bellamy v. State, 312 Ga. App. 899, 720 S.E.2d 323 (2011) (decided under former O.C.G.A. § 24-4-8).

Trial court did not err by charging the jury that the testimony of a single witness, if believed, was generally sufficient to establish a fact because the first sentence of former O.C.G.A. § 24-4-8 was not a truism that the jury could only be instructed on when the case involved one of the exceptions. Bellamy v. State, 312 Ga. App. 899, 720 S.E.2d 323 (2011) (decided under former O.C.G.A. § 24-4-8).

Whether witness was an accomplice is a question for the jury. Venable v. State, 56 Ga. App. 366, 192 S.E. 646 (1937); Aimar v. State, 116 Ga. App. 204, 156 S.E.2d 367 (1967); Maddox v. State, 131 Ga. App. 86, 205 S.E.2d 31 (1974); Payne v. State, 135 Ga. App. 245, 217 S.E.2d 476 (1975); Durham v. State, 243 Ga. 408, 254 S.E.2d 359 (1979) (decided under former Code 1933, § 38-121).

Former O.C.G.A. § 24-4-8 requires that accomplice testimony be corroborated in felony cases when the only witness is the accomplice, but only slight evidence from an extraneous source as to a defendant's identity and participation is needed to corroborate an accomplice's testimony, and, such evidence may be entirely circumstantial. Smith v. State, 257 Ga. App. 595, 571 S.E.2d 817 (2002) (decided under former O.C.G.A. § 24-4-8).

Submitting question as to whether witness was accomplice. — It is not error to submit to the jury the question of whether a witness for the state was or was not an accomplice even if the witness had confessed to being an accomplice and had been jointly indicted with the defendant on trial. Milton v. State, 248 Ga. 192, 282 S.E.2d 90 (1981) (decided under former O.C.G.A. § 24-4-8).

Jury determines whether participation voluntary. — When a witness testifies that the witness was forced to accompany the defendants out of fear of one or both of the defendant's, it is for the jury to determine whether the witness is an accomplice. Milton v. State, 248 Ga. 192, 282 S.E.2d 90 (1981) (decided under former O.C.G.A. § 24-4-8); Jones v. State, 268 Ga. 12, 483 S.E.2d 871 (1997) (decided under former O.C.G.A. § 24-4-8).

Instruction to jury on status as accomplice is expression of opinion of guilt. — To be accomplices of each other,

Jury (Cont'd)

both the defendant and the state's witness must have been involved in the criminal enterprise. One cannot be the "accomplice" of an innocent man. It therefore constitutes an expression of opinion by the court as to the guilt of the accused to instruct the jury that a witness who testified as to the defendant's guilt and admitted the witness's participation in the crime would be an accomplice of the accused. Ladson v. State, 248 Ga. 470, 285 S.E.2d 508 (1981) (decided under former O.C.G.A. § 24-4-8).

Instruction on slight evidence. — Judge should not charge the jury as matter of law that slight evidence is sufficient to corroborate the testimony of an accomplice; but as a matter of fact slight evidence is sufficient, if it is satisfactory to the minds of the jury. Smith v. State, 189 Ga. 169, 5 S.E.2d 762 (1939) (decided under former Code 1933, § 38-121).

Trial court's pattern charge that "slight evidence" connecting the defendant to the crime may have been sufficient to support the testimony of an accomplice stated the law accurately. Richardson v. State, 277 Ga. App. 429, 626 S.E.2d 518 (2006) (decided under former O.C.G.A. § 24-4-8).

Sufficiency of corroboration of accomplice's testimony is a question for the jury. Powers v. State, 44 Ga. 209 (1871) (decided under former Code 1868, § 3702); Ransone v. Christian, 56 Ga. 351 (1876) (decided under former Code 1873, § 3755); Bell v. State, 73 Ga. 572 (1884) (decided under former Code 1882, § 3755); Evans v. State, 78 Ga. 351 (1886) (decided under former Code 1882, § 3755); Sikes v. State, 105 Ga. 592, 31 S.E. 567 (1898) (decided under former Penal Code 1895, § 991); Parham v. State, 3 Ga. App. 468, 60 S.E. 123 (1908) (decided under former Penal Code 1895, § 991); Gilbert v. State, 27 Ga. App. 604, 109 S.E. 697 (1921) (decided under former Penal Code 1910, § 1017); Sheppard v. State, 44 Ga. App. 481, 162 S.E. 413 (1931) (decided under former Penal Code 1910, § 1017); Hargett v. State, 55 Ga. App. 192, 189 S.E. 675 (1937) (decided under former Code 1933, § 38-121); Garner v. State, 72 Ga. App. 819, 35 S.E.2d 317 (1945) (decided under former Code 1933, § 38-121); Waldrop v. State, 221 Ga. 319, 144 S.E.2d 372 (1965) (decided under former Code 1933, § 38-121); Sutton v. State, 223 Ga. 313, 154 S.E.2d 578 (1967) (decided under former Code 1933, § 38-121); Lindsey v. State, 227 Ga. 48, 178 S.E.2d 848 (1970) (decided under former Code 1933, § 38-121); Pitts v. State, 128 Ga. App. 434, 197 S.E.2d 495 (1973) (decided under former Code 1933, § 38-121); Smith v. State, 236 Ga. 12, 222 S.E.2d 308, cert. denied, 428 U.S. 910, 96 S. Ct. 3224, 49 L. Ed. 2d 1219 (1976) (decided under former Code 1933, § 38-121); Birt v. State, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029, 97 S. Ct. 654, 50 L. Ed. 2d 632 (1976) (decided under former Code 1933, § 38-121); Jones v. State, 139 Ga. App. 643, 229 S.E.2d 121 (1976) (decided under former Code 1933, § 38-121); Green v. State, 139 Ga. App. 652, 229 S.E.2d 129 (1976) (decided under former Code 1933, § 38-121); Davis v. State, 154 Ga. App. 803, 269 S.E.2d 874 (1980) (decided under former Code 1933, § 38-121); Smith v. State, 154 Ga. App. 741, 270 S.E.2d 5 (1980) (decided under former Code 1933, § 38-121); Cody v. State, 195 Ga. App. 318, 393 S.E.2d 692 (1990) (decided under former O.C.G.A. § 24-4-8).

Jury must infer guilt. — Sufficiency of circumstances proved to corroborate the accomplice is entirely a matter for the jury, provided the circumstances proved, independently of the testimony of the accomplice, lead to the inference that the defendant is guilty, and in some way connect the defendant with the guilty act. Potts v. State, 86 Ga. App. 779, 72 S.E.2d 553 (1952) (decided under former Code 1933, § 38-121); Mears v. State, 98 Ga. App. 576, 106 S.E.2d 854 (1958) (decided under former Code 1933, § 38-121).

Slight evidence to support jury's determination. — Extent of corroboration is a question to be determined by the jury; it may be strong, or it may be slight, but in each case it must be of such character as to satisfy the minds of the jury as to the connection of the accused with the criminal enterprise. Sheppard v. State, 44 Ga. App. 481, 162 S.E. 413 (1931) (decided under former Penal Code 1910, § 1017);

Walker v. State, 57 Ga. App. 868, 197 S.E. 67 (1938) (decided under former Code 1933, § 38-121); Smith v. State, 189 Ga. 169, 5 S.E.2d 762 (1939) (decided under former Code 1933, § 38-121); Newman v. State, 63 Ga. App. 417, 11 S.E.2d 248 (1940) (decided under former Code 1933, § 38-121); Mitchell v. State, 202 Ga. 247, 42 S.E.2d 767 (1947) (decided under former Code 1933, § 38-121); Blakely v. State, 78 Ga. App. 282, 50 S.E.2d 762 (1948) (decided under former Code 1933, § 38-121); Croker v. State, 101 Ga. App. 742, 115 S.E.2d 413 (1960) (decided under former Code 1933, § 38-121); Park v. State, 224 Ga. 467, 162 S.E.2d 359, cert. denied, 393 U.S. 980, 89 S. Ct. 449, 21 L. Ed. 2d 441 (1968) (decided under former Code 1933, § 38-121); Quaid v. State, 132 Ga. App. 478, 208 S.E.2d 336 (1974) (decided under former Code 1933, § 38-121); Townsend v. State, 141 Ga. App. 743, 234 S.E.2d 368 (1977) (decided under former Code 1933, § 38-121); Smith v. State, 238 Ga. 640, 235 S.E.2d 17 (1977) (decided under former Code 1933, § 38-121); Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978); Haynes v. State, 149 Ga. App. 179, 253 S.E.2d 851 (1979) (decided under former Code 1933, § 38-121); Butler v. State, 150 Ga. App. 751, 258 S.E.2d 691 (1979) (decided under former Code 1933, § 38-121); Williams v. State, 153 Ga. App. 421, 265 S.E.2d 341 (1980) (decided under former Code 1933, § 38-121); Cole v. State, 156 Ga. App. 288, 274 S.E.2d 685 (1980) (decided under former Code 1933, § 38-121); Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983), aff'd, 252 Ga. 418, 314 S.E.2d 210 (1984) (decided under former O.C.G.A. § 24-4-8).

Jury to decide sufficiency of corroborating evidence. — Sufficiency of corroboration evidence is peculiarly a matter for the jury to determine. If the verdict is founded on slight evidence of corroboration connecting a defendant with the crime, the verdict is legally sufficient. Bradford v. State, 262 Ga. 512, 421 S.E.2d 523 (1992) (decided under former O.C.G.A. § 24-4-8); Klinect v. State, 269 Ga. 570, 501 S.E.2d 810 (1998) (decided under former O.C.G.A. § 24-4-8); Pinkins v. State, 243 Ga. App. 737, 534 S.E.2d 192 (2000) (decided under former O.C.G.A. § 24-4-8).

Failure to charge statute. — When a person accused of perjury is on trial, the judge should instruct the jury that, before the jury would be authorized to convict the accused, the charge must be established by the testimony of two witnesses or by one witness and corroborating circumstances. However, the failure so to charge could not be harmful to the cause of the defendant, since the defendant introduced no evidence, and two or more witnesses for the plaintiff testified positively to each of the material allegations in the indictment. Oxford v. State, 40 Ga. App. 511, 150 S.E. 466 (1929) (decided under former Penal Code 1910, § 1017).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1407.

ALR. — Rule as to corroborative evidence in prosecutions for subornation of perjury, 56 ALR 407.

Character and sufficiency of evidence required to corroborate testimony of plaintiff in divorce suit, 65 ALR 169.

Testimony of defendant in favor of codefendant on setoff or counterclaim interposed by latter alone against decedent's estate, under statute disqualifying or requiring corroboration of adverse or interested party, 67 ALR 1548.

Bribe giver as accomplice of bribe taker and vice versa within rule requiring corroboration of testimony of accomplice, 73 ALR 389.

Corroboration of accomplice by evidence of defendant's actual or contemplated flight, or concealment of himself, 87 ALR 767.

Corroboration by circumstantial evidence of testimony of single witness in prosecution for perjury, 111 ALR 825.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury, 156 ALR 499.

Question as to who are accomplices, within rule requiring corroboration of

their testimony, as one of law or fact, 19 ALR2d 1352.

Corroboration required under statute prohibiting judgment against representative of deceased person on uncorroborated testimony of his adversary, 21 ALR2d 1013.

Thief as accomplice of one charged with receiving stolen property, or vice versa, within rule requiring corroboration or cautionary instruction, 53 ALR2d 817.

Necessity and sufficiency of corroboration of plaintiff's testimony concerning ground for annulment of marriage, 71 ALR2d 620.

Prosecutrix in incest case as accomplice or victim, 74 ALR2d 705.

Conviction of perjury where one or more of elements is established solely by circumstantial evidence, 88 ALR2d 852.

Corroboration of accomplice witness by objective evidence authenticated by same accomplice, 96 ALR2d 1185.

Limiting number of noncharacter witnesses in civil case, 5 ALR3d 169.

Limiting number of noncharacter witnesses in criminal case, 5 ALR3d 238.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 ALR3d 858.

Receiver of stolen goods as accomplice of thief for purposes of corroboration, 74 ALR3d 560.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused, 19 ALR4th 368.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 ALR4th 120.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury — state cases, 41 ALR5th 1.

24-14-9. Inferences from evidence or lack thereof.

In arriving at a verdict, the jury, from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved. (Code 1981, § 24-14-9, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-4-9, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Beall v. State, 68 Ga. 820 (1882); Castleberry v. City of Atlanta, 74 Ga. 164 (1885); Brown v. Matthews, 79 Ga. 1, 4 S.E. 13 (1887); and White v. Hammond, 79 Ga. 182, 4 S.E. 102 (1887).

Law reviews. — For article, "The Doctrine of Res Ipsa Loquitur in Georgia," see 9 Ga. B.J. 31 (1946).

For note, "Res Ipsa Loquitur and its Application in Georgia," see 14 Mercer L. Rev. 427 (1963).

JUDICIAL DECISIONS

Analysis

General Consideration
Res Ipsa Loquitur

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5157, former Civil Code 1910, § 5743, former Code 1933, § 38-123, and former O.C.G.A. § 24-4-9 are included in the annotations for this Code section.

Constitutionality. — Presumption that allows, but does not require, the trier

of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant is not inherently unconstitutional, but is to be tested by a "rational connection" test asking if the ultimate fact to be presumed is more likely than not to flow from the proved fact. Whisenhunt v. State, 152 Ga. App. 829, 264 S.E.2d 271 (1979), cert. denied, 449 U.S. 886, 101 S. Ct. 241, 66 L. Ed. 2d 112 (1980) (decided under former Code 1933, § 38-123).

Admissibility. — When facts are such that the jury may or may not make an inference pertinent to the issue, the facts are such that the jury ought to be permitted to hear the facts. Brand v. State, 154 Ga. App. 781, 270 S.E.2d 206 (1980) (decided under former Code 1933, § 38-123).

When facts are such that the jury, if permitted to hear the facts, may or may not make an inference pertinent to the issue, according to the view which the jury may take of the facts, in connection with the other facts in evidence, the facts are such that the jury ought to be permitted to hear those facts. Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205 (1979) (decided under former Code 1933, § 38-123).

Inference of guilt. — When there is some evidence from which the guilt of one accused of a crime can be legitimately inferred, it is entirely within the province of the jury to draw that inference. Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205 (1979) (decided under former Code 1933, § 38-123).

Effect of positive and uncontradicted evidence. — Finding of fact which may be inferred but is not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists. Backus v. Ray Jones, Inc., 150 Ga. App. 753, 258 S.E.2d 693 (1979) (decided under former Code 1933, § 38-123).

Directed verdict properly denied. — In a medical malpractice action, the issue of reliance by a patient on a hospital to provide needed services and personnel was subject to proof by circumstantial evidence; thus, denial of a directed verdict in favor of the hospital was not error. Doctors Hosp. v. Bonner, 195 Ga. App. 152, 392 S.E.2d 897 (1990) (decided under former O.C.G.A. § 24-4-9).

Flight is always a circumstance which may be shown and which the jury is authorized to take into account in determining guilt or innocence of an accused. Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205 (1979) (decided under former Code 1933, § 38-123).

Jury was authorized to believe that defendant's attempts to flee when confronted by firefighters constituted circumstantial evidence of guilt. Williams v. State, 273 Ga. App. 213, 614 S.E.2d 834 (2005) (decided under former O.C.G.A. § 24-4-9).

Evidence of a refusal to submit to a blood-alcohol test is circumstantial evidence. — There was ample evidence to support the defendant's DUI conviction, after the arresting officer testified that the officer smelled alcohol as the officer approached the defendant's van, that the defendant's eyes were red, glassy, and "hazed over," that the defendant's speech was slower than normal, and that the defendant performed poorly on sobriety field tests, and the defendant's failure to submit to breath tests was circumstantial evidence of defendant's intoxication. Lucas v. State, 234 Ga. App. 534, 507 S.E.2d 253 (1998) (decided under former O.C.G.A. § 24-4-9).

Doctrine of presumption of continuity. — Whether the doctrine of presumption of continuity — a state of things once existing is presumed to continue until a change occurs — holds true in a particular case is a question for jury determination. Mattison v. Travelers Indem. Co., 157 Ga. App. 372, 277 S.E.2d 746 (1981) (decided under former O.C.G.A. § 24-4-9).

Permissive inference almost identical to presumption of fact. — No reversible error occurred when a trial court charged the jury in language of permissive inference rather than presumption of fact. A thin line exists at best between a permissible inference of fact and a rebuttable presumption of fact. Pouncey v.

General Consideration (Cont'd)

Adams, 206 Ga. App. 126, 424 S.E.2d 376 (1992) (decided under former O.C.G.A. § 24-4-9).

Summary judgment determines only whether material fact exists. — On summary judgment, a trial court determines only whether a material issue of fact exists, and such determination does not include "the discovery of the truth of such fact" or permit frustration of a plaintiff's constitutional right to a trial by jury "by inferring with the existence of other facts" from predicate evidence. Bruno's Food Stores, Inc. v. Taylor, 228 Ga. App. 439, 491 S.E.2d 881 (1997) (decided under former O.C.G.A. § 24-4-9).

Res Ipsa Loquitur

Doctrine of res ipsa loquitur is embraced in this statute and the doctrine's application authorized by statute. Macon Coca-Cola Bottling Co. v. Chancey, 216 Ga. 61, 114 S.E.2d 517 (1960) (decided under former Code 1933, § 38-123); Hospital Auth. v. Eason, 222 Ga. 536, 150 S.E.2d 812 (1966) (decided under former Code 1933, § 38-123).

Elements of doctrine. — In a tort action for personal injuries, the doctrine of res ipsa loquitur applies when the following elements are present: (1) the injury must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) the injury must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) the injury must not have been due to any voluntary action or contribution on the part of the plaintiff; and (4) the injury must have occurred absent an intervening cause which could have produced the injury. Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980) (decided under former Code 1933, § 38-123).

Application of doctrine. — When an event is unusual and extraordinary in nature, and there is nothing to indicate an external cause, but the peculiar character of the accident is sufficient within itself to indicate that the event must have been brought about by negligence on the part of someone, and when the most reasonable and probable inference which can be rationally drawn from the happening of such an event is that it would not and could not have taken place, had not the person charged with furnishing or maintaining the instrumentality causing the accident been guilty of the particular acts or omissions set forth by the plaintiff as constituting the actual cause, then the jury is authorized to apply the rule of evidence known as the doctrine of res ipsa loquitur in determining whether or not the accident must have been thus occasioned. Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S.E. 443 (1903) (decided under former Civil Code 1895, § 5157); Sinkovitz v. Peters Land Co., 5 Ga. App. 788, 64 S.E. 93 (1909) (decided under former Civil Code 1895, § 5157); Bonita Theatre v. Bridges, 31 Ga. App. 798, 122 S.E. 255 (1924) (decided under former Civil Code 1910, § 5743); Atlanta Coca-Cola Bottling Co. v. Shipp, 41 Ga. App. 705, 154 S.E. 385 (1930) (decided under former Civil Code 1910, § 5743); Macon Coca-Cola Bottling Co. v. Crane, 55 Ga. App. 573, 190 S.E. 879 (1937) (decided under former Code 1933, § 38-123); Macon Coca-Cola Bottling Co. v. Chancey, 216 Ga. 61, 114 S.E.2d 517 (1960) (decided under former Code 1933, § 38-123); Hall v. Chastain, 246 Ga. 782, 273 S.E.2d 12 (1980) (decided under former Code 1933, § 38-123).

Trial court committed reversible error, entitling the plaintiffs in a personal injury suit to a new trial after a verdict in favor of the defense was returned, by refusing to charge the jury on the doctrine of res ipsa loquitur; here, the plaintiffs established the three elements necessary for the doctrine to apply, namely: that a 15-ton machine rolling off a trailer without explanation and crushing a car was an extraordinary event; that the defendant driver admitted that trailers do not ordinarily roll over and that the defendant driver was in exclusive control of the truck and trailer; and that the defendant driver testified twice that the plaintiffs did nothing to cause the accident. Doyle v. RST Constr. Specialty, Inc., 286 Ga. App. 53, 648 S.E.2d 664 (2007), cert. denied, No. S07C1631, 2007 Ga. LEXIS 860 (Ga. 2007) (decided under former O.C.G.A. § 24-4-9).

Doctrine applied with caution. — Doctrine of res ipsa loquitur, when appli-

cable, should be applied with caution, and should be drawn by the jury only in extreme cases. Sinkovitz v. Peters Land Co., 5 Ga. App. 788, 64 S.E. 93 (1909) (decided under former Civil Code 1895, § 5157); Miller v. Gerber Prods. Co., 207 Ga. 385, 62 S.E.2d 174 (1950) (decided under former Code 1933, § 38-123).

Rule of evidence. — Doctrine of res ipsa loquitur is simply a rule of circumstantial evidence which permits an inference to be drawn from proved facts. Cochrell v. Langley Mfg. Co., 5 Ga. App. 317, 63 S.E. 244 (1908) (decided under former Civil Code 1895, § 5157); Armour & Co. v. Gulley, 61 Ga. App. 414, 6 S.E.2d 165 (1939) (decided under former Code 1933, § 38-123); White v. Executive Comm. of Baptist Convention, 65 Ga. App. 840, 16 S.E.2d 605 (1941) (decided under former Code 1933, § 38-123); Clayton Coca-Cola Bottling Co. v. Coleman, 68 Ga. App. 302, 22 S.E.2d 768 (1942) (decided under former Code 1933, § 38-123); Dalton Coca-Cola Bottling Co. v. Watkins, 70 Ga. App. 790, 29 S.E.2d 281 (1944) (decided under former Code 1933, § 38-123); Miller v. Gerber Prods. Co., 207 Ga. 385, 62 S.E.2d 174 (1950) (decided under former Code 1933, § 38-123).

Presumption of negligence not raised. — Application of the rule of res ipsa loquitur does not raise a presumption of negligence, unless it is to the extent of getting a case to a jury only, but authorizes a jury in the jury's discretion to infer negligence. Wimpy v. Rogers, 58 Ga. App. 67, 197 S.E. 656 (1938) (decided under former Code 1933, § 38-123).

Mere inference. — Res ipsa loquitur creates a mere inference of fact and not a presumption of truth. DeVane v. Smith, 154 Ga. App. 442, 268 S.E.2d 711 (1980) (decided under former Code 1933, § 38-123).

Inference is slight. — Maxim res ipsa loquitur is applied with caution in every case and when applied, the inference is only prima facie, is generally slight, and is easily overcome. White v. Executive Comm. of Baptist Convention, 65 Ga. App. 840, 16 S.E.2d 605 (1941) (decided under former Code 1933, § 38-123).

Exclusion of other hypotheses. — In the application of the res ispa loquitor doctrine, if in the opinion of the jury the most reasonable and most probable inference which can be drawn from the nature and character of an extraordinary event is that it would not and could not have happened had not the defendant been guilty of the particular conduct charged, then there has been an exclusion in their minds of every other reasonable hypothesis, not by evidence, but by virtue of the peculiar nature and character of the event speaking for itself. Macon Coca-Cola Bottling Co. v. Chancey, 216 Ga. 561, 114 S.E.2d 517 (1960) (decided under former Code 1933, § 38-123).

Negligence of defendant. — Before the doctrine can be applied, the act must speak not only of negligence but of negligence on the part of the defendant. Payne v. Rome Coca-Cola Bottling Co., 10 Ga. App. 762, 73 S.E. 1087 (1912) (decided under former Civil Code 1910, § 5743).

Probability of defendant's negligence. — In order to invoke a theory of res ipsa loquitur, the plaintiff must prove "control" by evidence sufficient to permit a finding that there is a greater probability that the injury was the result of defendant's negligence than some other cause. Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225 S.E.2d 691 (1976) (decided under former Code 1933, § 38-123).

No evidence of external cause. — Doctrine of res ipsa loquitur is applicable only in the absence of evidence as to an external cause of injury. Stanfield v. Gardner, 56 Ga. App. 634, 193 S.E. 375 (1937) (decided under former Code 1933, § 38-123); Floyd v. Swift & Co., 59 Ga. App. 154, 200 S.E. 531 (1938) (decided under former Code 1933, § 38-123).

Conclusions must be clear. — When "the thing itself speaks" or "the obvious is self-evident," the obvious must be clearly seen, and what is spoken must be plain. If two images appear, or the statement spoken is ambiguous, before a legal verdict can be predicated thereon, the conclusions claimed must more clearly appear or be understood than any other or inconsistent theory. Armour & Co. v. Gulley, 61 Ga. App. 414, 6 S.E.2d 165 (1939) (decided under former Code 1933, § 38-123); White v. Executive Comm. of Baptist Convention, 65 Ga. App. 840, 16 S.E.2d 605 (1941)

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(decided under former Code 1933, § 38-123); Miller v. Gerber Prods. Co., 207 Ga. 385, 62 S.E.2d 174 (1950) (decided under former Code 1933, § 38-123).

Inference of fact. — When something unusual happens with respect to a defendant's property, over which defendant has control, and by such extraordinary occurrence a plaintiff is injured, an inference may in some case arise from an unexplained occurrence which has worked an injury to another that the defendant who had in charge the instrumentality which was the direct cause of the injury was guilty of negligence, which inference of negligence may or may not be drawn by the jury but, like the facts of negligence or no negligence, the inference which the jury may be authorized to draw is peculiarly an inference of fact, and it is not an inference of law. And, if from the facts an inference of negligence arises, it may be rebutted by the defendant, like any other inference arising from the proof submitted. Georgia Power Co. v. Stonecypher, 47 Ga. App. 386, 170 S.E. 530 (1933) (decided under former Code 1933, § 38-123).

Inference authorized but not required. — While negligence is never presumed from the mere fact of injury, the manner of the occurrence of the injury complained of, or the attendant circumstances, may sometimes well warrant an inference of negligence, such inference being one which the jury is authorized to draw, and not an inference which the jury is compelled to draw. Gainesville Coca-Cola Bottling Co. v. Stewart, 51 Ga. App. 102, 179 S.E. 734 (1935) (decided under former Code 1933, § 38-123); Macon Coca-Cola Bottling Co. v. Chancey, 216 Ga. 61, 114 S.E.2d 517 (1960) (decided under former Code 1933, § 38-123).

Inference based on proven facts. — Before the jury could arrive at the ultimate fact by inference of the existence of other facts, the facts inferred must be reasonably and logically consequent upon proven facts; the jury cannot assume the ultimate fact merely from other facts which are based upon an inference rather than upon proof. Miller v. Gerber Prods. Co., 207 Ga. 385, 62 S.E.2d 174 (1950) (decided under former Code 1933, § 38-123); Hospital Auth. v. Eason, 222 Ga. 536, 150 S.E.2d 812 (1966) (decided under former Code 1933, § 38-123).

Inference based on circumstantial evidence. — When the inference of negligence is dependent upon circumstantial evidence, and direct unambiguous testimony shows that the defendant was without negligence, a verdict for the plaintiff is unauthorized. Miller v. Gerber Prods. Co., 207 Ga. 385, 62 S.E.2d 174 (1950) (decided under former Code 1933, § 38-123).

Inference based on inference. — Proof of plaintiff's case resting upon inferences made from inferences is insufficient when the inference is too remote. Spruell v. Georgia Automatic Gas Appliance Co., 84 Ga. App. 657, 67 S.E.2d 178 (1951) (decided under former Code 1933, § 38-123).

Intervening cause. — When there is some intervention or intermediary cause which produces or could produce the injury complained of, the doctrine of res ipsa loquitur is not applicable. Floyd v. Swift & Co., 59 Ga. App. 154, 200 S.E. 531 (1938) (decided under former Code 1933, § 38-123); Miller v. Gerber Prods. Co., 207 Ga. 385, 62 S.E.2d 174 (1950) (decided under former Code 1933, § 38-123); Rupek v. Pig'n Whistle, Inc., 94 Ga. App. 404, 94 S.E.2d 747 (1956) (decided under former Code 1933, § 38-123).

Fact of injury. — Mere fact of injury does not call for the application of the doctrine of res ipsa loquitur. Stansfield v. Gardner, 56 Ga. App. 634, 193 S.E. 375 (1937) (decided under former Code 1933, § 38-123).

Question for jury. — Maxim res ipsa loquitur is of limited application, and the process by which it is to be determined whether the physical facts and circumstances accompanying an injury are such that the act may be said itself to speak the negligence of the defendant is to be worked out by the jury, and not by the court. Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S.E. 443 (1903) (decided under former Civil Code 1895, § 5157); Sinkovitz v. Peters Land Co., 5 Ga. App. 788, 64 S.E. 93 (1909) (decided under former Civil Code 1895, § 5157); Bonita Theatre v. Bridges, 31 Ga. App. 798, 122

S.E. 255 (1924) (decided under former Civil Code 1910, § 5743); Dawson v. American Heritage Life Ins. Co., 121 Ga. App. 266, 173 S.E.2d 424 (1970) (decided under former Code 1933, § 38-123).

Conclusions beyond evidence. — In construing and applying testimony, reasonable inferences and deductions may be made, and conclusions may be reached that lie quite beyond the mere letter of the evidence. Armour & Co. v. Gulley, 61 Ga. App. 414, 6 S.E.2d 165 (1939) (decided under former Code 1933, § 38-123).

Shifting of burden. — If the extraordinary character of the occurrence is sufficient to raise an inference of the negligence alleged, a prima facia case is established, and the burden of disproving negligence is cast upon the defendant, to disprove negligence upon the defendant's part. Sinkovitz v. Peters Land Co., 5 Ga. App. 788, 64 S.E. 93 (1909) (decided under former Civil Code 1895, § 5157); Macon Coca-Cola Bottling Co. v. Crane, 55 Ga. App. 573, 190 S.E. 879 (1937) (decided under former Code 1933, § 38-123).

Burden of proof not shifted. — Doctrine of res ipsa loquitur is merely a rule of evidence permitting the jury to draw the inference of negligence and does not have the effect of shifting the burden of proof. DeVane v. Smith, 154 Ga. App. 442, 268 S.E.2d 711 (1980) (decided under former Code 1933, § 38-123).

Rebuttal by defendant. — An inference of negligence may be rebutted by the defendant like any other presumption arising from proofs submitted. Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S.E. 443 (1903) (decided under former Civil Code 1895, § 5157).

Motion for nonsuit should not be granted when there is any evidence tending to sustain the plaintiff's action, or when the jury can fairly infer from the evidence a state of facts favorable to the plaintiff. Mason v. Hall, 72 Ga. App. 867, 35 S.E.2d 478 (1945) (decided under former Code 1933, § 38-123).

Specific applications. — Doctrine of res ispa loquitur has been applied in the following cases: Chenall v. Palmer Brick Co., 117 Ga. 106, 43 S.E. 443 (1903) (unexplained falling of brick arch) (decided under former Civil Code 1895, § 5157); Rivers v. State, 118 Ga. 42, 44 S.E. 859 (1903) (purpose for leasing house) (decided under former Civil Code 1895, § 5157); McDonnell v. Central of Ga. Ry., 118 Ga. 86, 44 S.E. 840 (1903) (explosion of boilers) (decided under former Civil Code 1895, § 5157); Seaboard Air-Line Ry. v. Bishop, 132 Ga. 71, 63 S.E. 1103 (1909) (projecting nail) (decided under former Civil Code 1895, § 5157); Payne v. Rome Coca-Cola Bottling Co., 10 Ga. App. 762, 73 S.E. 1087 (1912) (explosion of bottle) (decided under former Civil Code 1895, § 5157); McPherson v. Capuano & Co., 31 Ga. App. 82, 121 S.E. 580 (1923) (illness following eating in restaurant) (decided under former Civil Code 1895, § 5157); Eckerd-Walton, Inc. v. Adams, 126 Ga. App. 210, 190 S.E.2d 490 (1972) (driving car through wall of building) (decided under former Code 1933, § 38-123); Parrish v. State, 182 Ga. App. 247, 355 S.E.2d 682 (1987) (destruction of marijuana plants) (decided under former O.C.G.A. § 24-4-9).

Proof insufficient. — Mere proof that a hospital bed was on fire, from undetermined origin, was not sufficient to invoke res ipsa loquitur. Hospital Auth. v. Eason, 222 Ga. 536, 150 S.E.2d 812 (1966) (decided under former Code 1933, § 38-123).

RESEARCH REFERENCES

ALR. — Liability for injuries by breaking or bursting of container in which goods are sold, 4 ALR 1094.

Applicability of res ipsa loquitur to fall of person, 5 ALR 282.

Presumption of negligence from throwing passenger from seat, 5 ALR 1034.

Res ipsa loquitur as applied to automobile accidents, 5 ALR 1240; 12 ALR 668; 64 ALR 255; 93 ALR 1101; 79 ALR2d 6.

Application of res ipsa loquitur doctrine to injury to passenger from defective or dangerous condition of floor of car, 7 ALR 1675.

Applicability of "res ipsa loquitur" to explosion of gases or chemicals, 8 ALR 500; 39 ALR 1006; 59 ALR 593.

Res ipsa loquitur as affected by circumstances tending to negative negligence by defendant, 22 ALR 1471.

Applicability of res ipsa loquitur in case of boiler explosion, 23 ALR 484.

Res ipsa loquitur as applicable to injury to passenger in a collision where one of the vehicles is not within carrier's control, 25 ALR 690; 83 ALR 1163; 161 ALR 1113.

Res ipsa loquitur distinguished from characterization of a known condition as negligence, and the establishment of negligence by circumstantial evidence, 59 ALR 468; 78 ALR 731; 141 ALR 1016.

Res ipsa loquitur in its relation to burden of proof and burden of evidence, 59 ALR 486; 92 ALR 653.

Res ipsa loquitur as applicable in action against municipality for injuries from dangerous condition in parks, streets, or highways, 74 ALR 1226.

Pleading particular cause of injury as waiver of right to rely on res ipsa loquitur, 79 ALR 48; 160 ALR 1450; 2 ALR3d 1335.

Debtor's intent to defraud or delay creditors within contemplation of attachment statute as inferable as matter of law from fact that he has removed or is about to remove property from the state without making adequate provision for his creditors, 92 ALR 966.

Right or duty of court to instruct jury as to presumptions, 103 ALR 126.

Presumption of ownership of automobile by one in whose name it is registered or whose license plates it bears, 103 ALR 138.

Presumption against suicide as evidence, 103 ALR 185; 158 ALR 747.

Presumption of negligence from foreign substance in food, 105 ALR 1039.

Res ipsa loquitur, or presumption, or inference of negligence on part of carrier where passenger is injured by object coming from outside, through or against, car window, 129 ALR 1340.

Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from middleman, 140 ALR 191; 142 ALR 1490.

Presumption that public officers have properly performed their duty, as evidence, 141 ALR 1037.

Res ipsa loquitur as applicable in action against landlord for injury to person or property due to condition of premises, 145 ALR 870.

Res ipsa loquitur as applicable to injury to person in street by fall of object in course of construction or repair of building, 146 ALR 523.

Res ipsa loquitur as applied to a collision between a moving automobile and a standing automobile or other vehicle, 151 ALR 876.

May presumption rest upon admission by opponent's pleading without proof of constituent fact, 153 ALR 1106.

Physicians and surgeons: presumption or inference of negligence in malpractice cases; res ipsa loquitur, 162 ALR 1265; 82 ALR2d 1262.

"Res ipsa loquitur" as a presumption or a mere permissible inference, 167 ALR 658.

Res ipsa loquitur doctrine as affected by injured person's control over or connection with instrumentality, 169 ALR 953.

Presumption of negligence from foreign substance in food, 171 ALR 1209.

Right of plaintiff in res ipsa loquitur case to an instruction respecting inference by jury, 173 ALR 880.

Application of res ipsa loquitur rule in case of injury or damages from heating unit, electrical appliance, etc., installed by defendant, 3 ALR2d 1448.

Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile, 5 ALR2d 196.

Res ipsa loquitur in aviation accidents, 6 ALR2d 528.

Death of or injury to occupant of airplane from collision or near collision with another aircraft, 12 ALR2d 677.

Applicability of res ipsa loquitur to injuries or death sustained by collapse, failure, or falling of scaffold, 22 ALR2d 1176.

Applicability of res ipsa loquitur doctrine to fall of object or substance from ceiling of place of public resort, 24 ALR2d 643.

Error as to instructions on burden of proof under doctrine of res ipsa loquitur as prejudicial, 29 ALR2d 1390.

Proof, in absence of direct testimony by survivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident, 32 ALR2d 988.

Evidence of specific negligence as affecting reliance on res ipsa loquitur, 33 ALR2d 791.

Liability for injuries occasioned by falling of awning or the like, 34 ALR2d 486.

Res ipsa loquitur in Federal Employers' Liability Act cases, 35 ALR2d 475.

Applicability of res ipsa loquitur or doctrine of exclusive control to injury or damage caused by fall of object from train, 41 ALR2d 932.

Res ipsa loquitur doctrine with respect to firearms accident, 46 ALR2d 1216.

Presumption or prima facie case of negligence based on presence of foreign substance in bottled or canned beverage, 52 ALR2d 117.

Applicability of res ipsa loquitur doctrine in nonautomatic elevator accident cases, 56 ALR2d 1059.

Liability of proprietor of store, office, or similar business premises for injury from fall on floor made slippery by tracked-in or spilled water, oil, mud, snow, and the like, 62 ALR2d 6.

Liability of proprietor of store, office, or similar business premises for injury from fall or steps made slippery by tracked-in or spilled water, oil, mud, snow, and the like, 62 ALR2d 131.

Liability of proprietor of store, office, or similar business premises for injury from fall down open stairway, or into trap door or similar floor-level opening, 66 ALR2d 331.

Liability of proprietor of store, office, or similar business premises for fall due to improper lighting of steps or stairway, 66 ALR2d 443.

Liability to patron of scenic railway, roller coaster, or miniature railway, 66 ALR2d 689.

Applicability of res ipsa loquitur doctrine where objects being transported fall from motor vehicle, 66 ALR2d 1255.

Comment, in argument of civil case, on adversary's failure to call employee as witness, 68 ALR2d 1072.

Applicability of res ipsa loquitur where injury or damage results from contact with open door or tailgate of motor vehicle, 71 ALR2d 375.

Sufficiency of evidence, in absence of survivors or of eyewitnesses competent to testify, as to place or point of impact of motor vehicles going in opposite directions and involved in collision, 77 ALR2d 580.

Liability of manufacturer or seller for injury caused by automobile or other vehicle, aircraft, boat, or their parts, supplies, or equipment, 78 ALR2d 460.

Liability of manufacturer or seller for injury caused by industrial, business, or farm machinery, tools, equipment, or materials, 78 ALR2d 594.

Liability of manufacturer or seller for injury caused by paint, cement, lumber, building supplies, ladders, small tools, and like products, 78 ALR2d 696.

Liability of manufacturer or seller for injury caused by toys, games, athletic or sports equipment, or like products, 78 ALR2d 738.

Applicability of res ipsa loquitur doctrine where motor vehicle leaves road, 79 ALR2d 6.

Applicability of res ipsa loquitur doctrine where motor vehicle stops on highway, 79 ALR2d 153.

Applicability of res ipsa loquitur doctrine where motor vehicle turns over on highway, 79 ALR2d 211.

Physicians and surgeons: res ipsa loquitur, or presumption or inference of negligence, in malpractice cases, 82 ALR2d 1262.

Liability of physician for injury to esophagus or other internal organs occurring in course of gastroscopic examination, 88 ALR2d 297.

Liability of owner or operator of theater or other place of amusement to patron injured by condition of or defect in lavatory, restroom, or toilet facilities, 88 ALR2d 1090.

Res ipsa loquitur as ground for direction of verdict in favor of plaintiff, 97 ALR2d 522.

Res ipsa loquitur with respect to personal injuries or death on or about ship, 1 ALR3d 642.

Modern trends as to pleading a particular cause of injury or act of negligence as waiving or barring the right to rely on res ipsa loquitur, 2 ALR3d 1335.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption, 5 ALR3d 100.

Relation back of presumption of continuance of condition of property, 7 ALR3d 1302.

Res ipsa loquitur in actions against owner or occupant of premises for personal injury, death, or property damage caused by fire, 8 ALR3d 974.

Hospital's liability for negligence in connection with preparation, storage, or dispensing of drug or medicine, 9 ALR3d 579.

Res ipsa loquitur in action against hospital for injury to patient, 9 ALR3d 1315; 49 ALR4th 63.

Liability for accident occurring in motor transportation of house or similar structure on public streets or highways, 9 ALR3d 1436.

Liability of water distributor for damage caused by water escaping from main, 20 ALR3d 1294.

Water distributor's liability for injuries due to condition of service lines, meters, and the like, which serve individual consumer, 20 ALR3d 1363.

Applicability of res ipsa loquitur where plaintiff must prove active or gross negligence, willful misconduct, recklessness, or the like, 23 ALR3d 1083.

Hospital's liability for injuries sustained by patient as a result of restraints imposed on movement, 25 ALR3d 1450.

Liability, because of improper loading, of railroad consignee or his employee injured while unloading car, 29 ALR3d 1039.

Aviation: helicopter accidents, 35 ALR3d 707.

Malpractice: attending physician's liability for injury caused by equipment furnished by hospital, 35 ALR3d 1068.

Liability in connection with fire or explosion of explosives while being stored or transported, 35 ALR3d 1177.

Liability for injury to guest in airplane, 40 ALR3d 1117.

Liability of owner or proprietor for injury or death caused by collision with glass door, panel, or wall, 41 ALR3d 176.

Liability of one selling or distributing liquid or bottled fuel gas, for personal injury, death, or property damage, 41 ALR3d 782.

Liability for alleged negligence of independent servicer or repairer of aircraft, 41 ALR3d 1320.

Liability of vendor or grantor of real estate for personal injury to purchaser or third person due to defective condition of premises, 48 ALR3d 1027.

Products liability: proof of defect under doctrine of strict liability in tort, 51 ALR3d 8.

Products liability: necessity and sufficiency of identification of defendant as manufacturer or seller of product alleged to have caused injury, 51 ALR3d 1344.

Liability for injury to or death of passenger from accident due to physical condition of carrier's employee, 53 ALR3d 669.

Presumption of negligence and application of res ipsa loquitur doctrine in action for injury or damage caused by accidental starting up of parked car, 55 ALR3d 1260.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 ALR3d 1128.

Liability of innkeeper to guest for injury due to fire, 60 ALR3d 1217.

Liability of owner or operator for injury caused by door of automatic passenger elevator, 63 ALR3d 893.

Liability for injury caused by fall of person into shaft, or by abrupt drop, sudden movement, or stopping between floors, of automatic passenger elevator, 64 ALR3d 950.

Liability of installer or maintenance company for injury caused by door of automatic passenger elevator, 64 ALR3d 1005.

Liability of owner or operator for injury caused by failure of automatic elevator to level at floor, 64 ALR3d 1020.

Res ipsa loquitur as applied to accident resulting from wheel or part thereof becoming detached from motor vehicle, 79 ALR3d 346.

Products liability: liability for injury or death allegedly caused by defective tires, 81 ALR3d 318.

Products liability: liability for injury or death allegedly caused by defect in snowmobile or other recreational-purpose vehicle, 81 ALR3d 394.

Products liability: liability for injury or

death allegedly caused by defect in mobile home or trailer, 81 ALR3d 421.

Liability of power company for injury or death resulting from contact of radio or television antenna with electrical line, 82 ALR3d 113.

Liability of manufacturer, seller, or installer for personal injury caused by door glass, 84 ALR3d 877.

Res ipsa loquitur as applicable in actions for damage to property by the overflow or escape of water, 91 ALR3d 186.

Application of res ipsa loquitur doctrine to accidents incurred by passenger while boarding or alighting from a carrier, 93 ALR3d 776.

Applicability of res ipsa loquitur doctrine in action for injury to patron of beauty salon, 93 ALR3d 897.

Products liability: toys and games, 95 ALR3d 390.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

Liability for injury on, or in connection with, escalator, 1 ALR4th 144.

Products liability: liability of manufacturer or seller for injury or death caused by defect in boat or its parts, supplies, or equipment, 1 ALR4th 411.

Products liability: industrial accidents involving conveyor belts or systems, 2 ALR4th 262.

Products liability: defective vehicular windows, 3 ALR4th 489.

Products liability: farm machinery, 4 ALR4th 13.

Products liability: elevators, 7 ALR4th 852.

Products liability: stud guns, staple guns, or parts thereof, 8 ALR4th 70.

Products liability: transformer and other electrical equipment, 10 ALR4th 854.

Products liability: cranes and other lifting apparatuses, 13 ALR4th 476.

Products liability: cement and concrete, 15 ALR4th 1186.

Products liability: tire rims and wheels, 16 ALR4th 137.

Products liability: firefighting equipment, 19 ALR4th 326.

Destruction of ampoule used in alcohol breath test as warranting suppression of result of test, 19 ALR4th 509.

Res ipsa loquitur as to cause of or liability for real-property fires, 21 ALR4th 929.

Res ipsa loquitur in aviation accidents, 25 ALR4th 1237.

Products liability: stud guns, staple guns, or parts thereof, 33 ALR4th 1189.

Applicability of res ipsa loquitur in case of multiple, nonmedical defendants — modern status, 59 ALR4th 201.

Products liability: building and construction lumber, 61 ALR4th 121.

Strict products liability: product malfunction or occurrence of accident as evidence of defect, 65 ALR4th 346.

Liability for injury incurred in operation of power golf cart, 66 ALR4th 622.

Applicability of res ipsa loquitur in case of multiple medical defendants — modern status, 67 ALR4th 544.

Products liability: industrial refrigerator equipment, 72 ALR4th 90.

Products liability: scaffolds and scaffolding equipment, 74 ALR4th 904.

Products liability: tractors, 75 ALR4th 312.

Products liability: bicycles and accessories, 76 ALR4th 117.

Products liability: exercise and related equipment, 76 ALR4th 145.

Products liability: trampolines and similar devices, 76 ALR4th 171.

Products liability: competitive sports equipment, 76 ALR4th 201.

Products liability: skiing equipment, 76 ALR4th 256.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial — modern criminal cases, 76 ALR4th 812.

Adverse presumption or inference based on party's failure to produce or question examining doctor — modern cases, 77 ALR4th 463.

Products liability: general recreational equipment, 77 ALR4th 1121.

Products liability: mechanical amusement rides and devices, 77 ALR4th 1152.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney — modern cases, 78 ALR4th 571.

Adverse presumption or inference based on party's failure to produce or

examine witness who was occupant of vehicle involved in accident — modern cases, 78 ALR4th 616.

Liability of proprietor of private gymnasium, reducing salon, or similar health club for injury to patron, 79 ALR4th 127.

Adverse presumption or inference based on party's failure to produce or examine spouse — modern cases, 79 ALR4th 694.

Adverse presumption or inference based on party's failure to produce or examine friend — modern cases, 79 ALR4th 779.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse — modern cases, 80 ALR4th 337.

Adverse presumption or inference based on party's failure to produce or examine witness with employment relationship to party — modern cases, 80 ALR4th 405.

Adverse presumption or inference based on state's failure to produce or examine informant in criminal prosecution — modern cases, 80 ALR4th 547.

Products liability: lubricating products and systems, 80 ALR4th 972.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel — modern cases, 81 ALR4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue — modern cases, 81 ALR4th 939.

Admissibility of DNA identification evidence, 84 ALR4th 313.

Products liability: Mechanical amusement rides and devices, 3 ALR5th 851.

Malpractice in diagnosis and treatment of male urinary tract and related organs, 48 ALR5th 575.

Products liability: ladders, 81 ALR5th 245.

ARTICLE 2

PRESUMPTIONS AND ESTOPPEL

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-14-20. Presumptions of law and of fact distinguished.

Presumptions are either of law or of fact. Presumptions of law are conclusions and inferences which the law draws from given facts. Presumptions of fact shall be exclusively questions for the jury, to be decided by the ordinary test of human experience. (Code 1981, § 24-14-20, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For comment discussing the right to present evidence for the purposes of rebutting, in light of Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), see 10 Ga. St. B.J. 484 (1974).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
SPECIFIC PRESUMPTIONS

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3699, former Code 1873, § 3752, former Code 1882, § 3752, former Civil Code 1895, § 5149, former Penal Code 1895, § 988, former Civil Code 1910, § 5735, former Penal Code 1910, § 1014, former Code 1933, § 38-113, and former O.C.G.A. § 24-4-20 are included in the annotations for this Code section.

Constitutionality. — Presumption that allowed, but did not require, the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that placed no burden of any kind on the defendant was not inherently unconstitutional, but was to be tested by a "rational connection" test asking if the ultimate fact to be presumed was more likely than not to flow from the proved fact. Whisenhunt v. State, 152 Ga. App. 829, 264 S.E.2d 271 (1979), cert. denied, 449 U.S. 886, 101 S. Ct. 241, 66 L. Ed. 2d 112 (1980) (decided under former Code 1933, § 38-113).

For a statutory presumption to pass constitutional muster, it must be shown with "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980), aff'd in part and vacated in part on other grounds, 678 F.2d 511 (5th Cir. 1982), vacated, 463 U.S. 1222, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983) (remanded for further consideration in light of Jones v. United States, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983) (decided under former Code 1933, § 38-113)).

Discussion of relationship of presumptions to due process. — See Williamson v. State, 248 Ga. 47, 281 S.E.2d 512 (1981) (decided under former Code 1933, § 38-113).

Presumption was an inference as to the existence of a fact not actually known arising from its necessary or usual connection with others which were known. Ivey v. State, 23 Ga. 576 (1857) (decided under former law).

Presumptions of fact are different from presumptions of law. Continental Assurance Co. v. Rothell, 121 Ga. App. 868, 176 S.E.2d 259 (1970), aff'd in part and rev'd in part on other grounds, 227 Ga. 258, 181 S.E.2d 283, vacated on other grounds, 123 Ga. App. 423, 181 S.E.2d 541 (1971) (decided under former Code 1933, § 38-113).

Presumptions of law and fact distinguished. — Presumptions of fact were founded on actual probability, but it was impossible to sustain the doctrine of presumptions of law on the theory that they rest on a probability of fact. Morris v. State, 47 Ga. App. 792, 171 S.E. 555 (1933) (decided under former Penal Code 1910, § 1014).

Presumption of fact was same as inference. Carpenter v. State, 140 Ga. App. 368, 231 S.E.2d 97 (1976) (decided under former Code 1933, § 38-113).

Permissive inference almost identical to presumption of fact. — No reversible error occurred when a trial court charged the jury in language of permissive inference rather than presumption of fact. A thin line exists at best between a permissible inference of fact and a rebuttable presumption of fact. Pouncey v. Adams, 206 Ga. App. 126, 424 S.E.2d 376 (1992) (decided under former O.C.G.A. § 24-4-20).

Inference drawn by common sense. — Presumptions of fact are inferences as to the existence of some fact drawn from the existence of some other fact, inferences which common sense draws from circumstances usually occurring in such cases. Morris v. State, 47 Ga. App. 792, 171 S.E. 555 (1933) (decided under former Penal Code 1910, § 1014).

Derivation of presumptions of law. — Presumptions of law were inferences or positions established for the most part, by the common law, but occasionally by statute, which were obligatory alike on judges and juries. Morris v. State, 47 Ga. App. 792, 171 S.E. 555 (1933) (decided under former O.C.G.A. § 24-4-20).

Function of presumption of law. — Presumptions of law were rules which, in certain cases, either forbid or dispense with any further inquiry. Morris v. State, 47 Ga. App. 792, 171 S.E. 555 (1933) (decided under former Code 1933, § 38-113).

General Consideration (Cont'd)

If presumption was mandatory, it was irrelevant whether other evidence was in the record in addition to basic facts from which presumption was drawn. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512 (1981) (decided under former Code 1933, § 38-113).

When ultimate fact was element of crime charged, it may not rest on mandatory presumption. This was true in a case where presumption was the only proof of ultimate fact, and it was true in a case when there was additional proof of ultimate fact apart from presumption. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512 (1981) (decided under former Code 1933, § 38-113).

Reliance on permissive presumption in criminal case. — If the prosecution relied on permissive presumption as evidence of defendant's guilt, but offered other evidence of defendant's guilt, it may rely on all of evidence in the record to meet the standard of proof beyond a reasonable doubt. There need be only substantial assurance that the presumed fact was more likely than not to flow from the proved fact on which it was made to depend. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512 (1981) (decided under former Code 1933, § 38-113).

When permissive presumption was sole and sufficient basis for finding of guilt, it was not enough that presumption met "more-likely-than-not" test. The presumed fact must follow from proved fact beyond a reasonable doubt in such cases. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512 (1981) (decided under former Code 1933, § 38-113).

Court or jury drawing inference. — When there was a legal presumption, the law did the reasoning, and drew the inference; when presumptions of fact were involved, the jury was left to do the reasoning, and to make an inference or not as the jury believed the premises warrant. Mitchell v. Mayor of Rome, 49 Ga. 19, 15 Am. R. 669 (1873) (decided under former Code 1868, § 3699); Jenkins v. Jenkins, 83 Ga. 283, 9 S.E. 541, 20 Am. St. R. 316 (1889) (decided under former Code 1882, § 3752).

Unrebutted presumption prevails. — While a legal presumption was only prima facie true and may be rebutted, if it was not rebutted the law draws the conclusion. Good v. Tuggle, 52 Ga. App. 510, 183 S.E. 850 (1936) (decided under former Code 1933, § 38-113); Continental Assurance Co. v. Rothell, 121 Ga. App. 868, 176 S.E.2d 259 (1970), aff'd in part and rev'd in part on other grounds, 227 Ga. 258, 181 S.E.2d 283, vacated on other grounds, 123 Ga. App. 423, 181 S.E.2d 541 (1971) (decided under former Code 1933, § 38-113); Strother Ford, Inc. v. First Nat'l Bank, 132 Ga. App. 268, 208 S.E.2d 25 (1974) (decided under former Code 1933, § 38-113).

Testimony outweighs presumption. — Bare presumptions of law give way to testimony, which may shift the burden of proof or of proceeding to the opposite party, who was not then entitled to prevail upon the presumption alone. Jarvis v. State, 71 Ga. App. 617, 31 S.E.2d 673 (1944) (decided under former Code 1933, § 38-113).

Presumption yields to direct evidence. — Prima facie presumption that negotiable paper is issued for a valuable consideration yields to direct, uncontradicted, and unimpeached evidence that there was in fact no consideration. Goldstein v. Drexler, 102 Ga. App. 90, 115 S.E.2d 744 (1960) (decided under former Code 1933, § 38-113).

Presumption of fact for jury. — Presumptions of fact are exclusively questions for the jury. Kinnebrew v. State, 80 Ga. 232, 5 S.E. 56 (1887) (decided under former Code 1882, § 3752); Templeton v. Kennesaw Life & Accident Ins. Co., 216 Ga. 770, 119 S.E.2d 549 (1961) (decided under former Code 1933, § 38-113); Belch v. Gulf Life Ins. Co., 219 Ga. 823, 136 S.E.2d 351 (1964) (decided under former Code 1933, § 38-113).

Choice among inferences. — When a given state of facts bears several different interpretations, it is the function of the jury to say which one of the facts should be adopted, but when only one reasonable inference can be drawn therefrom, the question resolves itself into one of law, and may be determined by the court. Callaway v. Barmore, 32 Ga. App. 665, 124 S.E. 382 (1924) (decided under former

Civil Code 1910, § 5735).

Rebuttal for jury. — Whether a presumption has been successfully rebutted with testimony is ordinarily a question for the jury. Jarvis v. State, 71 Ga. App. 617, 31 S.E.2d 673 (1944) (decided under former Code 1933, § 38-113).

Jury determination of rebutted presumption. — Pest Masters, Inc. v. Callaway, 133 Ga. App. 123, 210 S.E.2d 243 (1974) is overruled to the extent it holds that "the facts arising from presumption, although rebutted by uncontradicted evidence, must be determined by a jury." Allen Kane's Major Dodge, Inc. v. Barnes, 243 Ga. 776, 257 S.E.2d 186, aff'd, 151 Ga. App. 835, 262 S.E.2d 643 (1979) (decided under former Code 1933, § 38-113).

Presumptions in civil cases have an effect at two stages during a jury trial: when a party moves for a directed verdict; and when the trial court instructs the jury. Under Georgia law, a rebuttable presumption of law generally does not vanish when the opposing party introduces evidence contrary to the presumption, and it does not matter how much counter evidence the opponent has presented to rebut the presumed fact, the presumption remains alive through jury instructions and can only disappear if the jury decides to discount it. Beach v. Lipham, 276 Ga. 302, 578 S.E.2d 402 (2003) (decided under former O.C.G.A. § 24-4-20).

Rebuttal of valid marriage presumption. — Presumption as to the validity of a marriage can only be negatived by disproving every reasonable possibility. State Hwy. Bd. v. Lewis, 46 Ga. App. 162, 167 S.E. 219 (1932) (decided under former Civil Code 1910, § 5735).

Verdict not disturbed. — When there is proof of facts or circumstances to support the presumption, and the evidence as a whole is conflicting, a verdict in favor of either party will not be disturbed upon general grounds. Jarvis v. State, 71 Ga. App. 617, 31 S.E.2d 673 (1944) (decided under former Code 1933, § 38-113).

Specific Presumptions

No presumption of marriage. — There was no presumption of law or fact that a given person was married or single. Neil v. State, 117 Ga. 14, 43 S.E. 435 (1903) (decided under former Civil Code 1895, § 5149).

Doctrine of presumption of continuity. — Whether the doctrine of presumption of continuity — a state of things once existing is presumed to continue until a change occurs — holds true in a particular case is a question for jury determination. Mattison v. Travelers Indem. Co., 157 Ga. App. 372, 277 S.E.2d 746 (1981) (decided under former Code 1933, § 38-113).

Continuation of marriage. — Marriage once shown to exist, nothing more appearing, was presumed to continue in existence until rebutted by proof of the marriage's dissolution. Walker v. Hall, 123 Ga. App. 457, 181 S.E.2d 508 (1971) (decided under former Code 1933, § 38-113).

Dissolution of first marriage. — When a second marriage by a person is established, and it is shown that he or she had previously married another person, who was living at the time of the second marriage, the presumption is that the first marriage had been dissolved by a decree of divorce, and the burden is upon the person attacking the validity of the second marriage to show that a divorce had not been granted. State Hwy. Bd. v. Lewis, 46 Ga. App. 162, 167 S.E. 219 (1932) (decided under former Penal Code 1910, § 5735).

Presumption of death. — When a person moves from this state to a point in another state, and, upon inquiry at such point in the other state, ascertains that the person has been gone and is unaccounted for and unheard of for the past seven years or longer, the presumption of the continuance of life ceases, and a legal presumption as to the person's death at the end of the seven years arises. Goode v. Tuggle, 52 Ga. App. 510, 183 S.E. 850 (1936) (decided under former Code 1933, § 38-113).

Presumption against suicide. — While proof of death alone, no other facts appearing, is sufficient to raise a presumption against suicide, it is necessary that not only death be shown, but also that death be caused by violent and external means in order to raise a presumption of accidental death. Continental Assurance Co. v. Rothell, 121 Ga. App. 868, 176

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S.E.2d 259 (1970), aff'd in part and rev'd in part on other grounds, 227 Ga. 258, 181 S.E.2d 283, vacated on other grounds, 123 Ga. App. 423, 181 S.E.2d 541 (1971) (decided under former Code 1933, § 38-113).

Qualification of officer. — When it appeared from the minutes of the court that a named person was selected as bailiff, a presumption arose that the person was duly sworn and qualified to act in that capacity. Zeigler v. State, 2 Ga. App. 632, 58 S.E. 1066 (1907) (decided under former Civil Code 1895, § 5149). See also Bird v. State, 53 Ga. 602 (1875) (decided under former Code 1873, § 3752).

Duties of officers. — All officers are presumed to have properly discharged their sworn official duties. Kirk v. State, 73 Ga. 620 (1884) (decided under former Code 1882, § 3752); Nixon v. Lehman, 137 Ga. 516, 73 S.E. 747 (1912) (decided under former Penal Code 1910, § 1014); Alston v. Mobley, 42 Ga. App. 98, 155 S.E. 81 (1930) (decided under former Penal Code 1910, § 1014); Jarrett v. City of Boston, 209 Ga. 530, 74 S.E.2d 549 (1953) (decided under former Code 1933, § 38-113).

Officer within authority. — It will be presumed that an officer has not exceeded the officer's authority, unless some showing to the contrary is made. Jones v. McCrary, 123 Ga. 282, 51 S.E. 349 (1905) (decided under former Penal Code 1895, § 988); Jarrett v. City of Boston, 209 Ga. 530, 74 S.E.2d 549 (1953) (decided under former Code 1933, § 38-113).

Genuineness of deed. — Deed attested by three witnesses, one of whom is an officer authorized by law to attest deeds, and recorded is admissible in evidence without further proof of the deed's execution, and all presumptions are in favor of its genuineness. Guthrie v. Gaskins, 171 Ga. 303, 155 S.E. 185 (1930) (decided under former Civil Code 1910, § 5735).

Honesty. — Law presumed all men honest in their dealings. Eaves v. Fears, 131 Ga. 820, 64 S.E. 269 (1909) (decided under former Civil Code 1895, § 5149).

Physical and mental soundness. — There was a general presumption that the ordinary human facilities were possessed by every individual and in the absence of proof the law presumed soundness both as to mental and bodily functions. Holcombe v. State, 5 Ga. App. 47, 62 S.E. 647 (1908) (decided under former Civil Code 1895, § 5149).

Legality of warrant. — Nothing to the contrary appearing, the presumption is that the warrant was regularly and legally issued. Hilburn v. State, 121 Ga. 344, 49 S.E. 318 (1904) (decided under former Penal Code 1895, § 3988).

Indictment not presumed lawful. — Indictment will not be presumed regularly returned into court when no return was entered on minutes at term indictment was found. Bowen v. State, 81 Ga. 482, 8 S.E. 736 (1889) (decided under former Code 1882, § 3752).

Interlineations proper. — Interlineations appearing in an accusation will be presumed to have been made at the proper time and by the proper authority. Crawford v. State, 4 Ga. App. 789, 62 S.E. 501 (1908) (decided under former Civil Code 1895, § 5149).

Influence of juror. — When a juror overheard remarks prejudicial to the accused, the juror was presumed to be influenced thereby. Downer v. State, 10 Ga. App. 827, 74 S.E. 301 (1912) (decided under former Penal Code 1910, § 1014).

Stolen goods. — Unsatisfactorily explained possession of stolen goods raises a presumption of guilt against their possessor. This presumption, however, is one of fact, and not of law. Holliday v. State, 23 Ga. App. 400, 98 S.E. 386 (1919) (decided under former Penal Code 1910, § 1910); Morris v. State, 47 Ga. App. 792, 171 S.E. 555 (1933) (decided under former Code 1933, § 38-113); Stevenson v. State, 143 Ga. App. 813, 240 S.E.2d 123 (1977) (decided under former Code 1933, § 38-113).

Recent unexplained possession of stolen goods was a circumstance sufficient to authorize a jury to find that the accused was guilty as charged (assuming other elements of the crime were proved) but it did not create a presumption of law against the accused, and it was not of itself necessarily proof of the accused's guilt. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512 (1981) (decided under former Code 1933, § 38-113).

While it was the rule that recent unexplained possession of stolen property permitted the jury to infer that the accused committed the theft, it should be emphasized that recent unexplained possession created only a permissible inference of guilt of a "presumption of fact" in terms of former Code 1933, § 38-113 which the jury may or may not draw. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512 (1981) (decided under former Code 1933, § 38-113).

To convict a accused, the state must prove that: (1) goods in accused's possession were recently stolen; and (2) someone committed the crime. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512 (1981) (decided under former Code 1933, § 38-113).

Theft. — Nearer the possession to the time of theft, the stronger will be the inference of guilt; and question of result of lapse of time was for jury. Williamson v. State, 248 Ga. 47, 281 S.E.2d 512 (1981) (decided under former Code 1933, § 38-113).

Confinement to chain gang lawful. — When a person was confined to the chain gang, the presumption was that the person was lawfully confined there. Williford v. State, 121 Ga. 173, 48 S.E. 962 (1904) (decided under former Penal Code 1895, § 988).

Medical negligence and due care pattern jury instructions. — Although the presumption of due care pattern jury instructions was a correct statement of the law, in discussing the presumption that health care professionals exercise due care, the pattern jury instruction needs to explain more clearly the presumption's relationship to the plaintiff's burden of proof and the defendant's standard of care. The jury needs to be instructed that: (1) the law presumes that physicians or other medical professionals perform medical services in an ordinarily skillful manner; (2) the person claiming an injury may overcome this legal presumption by introducing evidence that the physician did not treat the patient in an ordinarily skillful manner; (3) expert medical testimony is required to overcome the presumption; and (4) the plaintiff's burden in proving the physician's lack of due care and skill is by the preponderance of the evidence. These suggested changes are intended to uphold the tradition of having physicians judged by their peers while ensuring that jurors are instructed that the due-care presumption does not change the plaintiff's burden of proof in medical negligence cases. Beach v. Lipham, 276 Ga. 302, 578 S.E.2d 402 (2003) (decided under former O.C.G.A. § 24-4-20).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 7, 198.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 103.

C.J.S. — 31A C.J.S., Evidence, § 173 et seq.

ALR. — Presumption from derailment as requiring submission of carrier's negligence to jury in action by passenger, notwithstanding uncontradicted evidence negativing negligence, 23 ALR 1214.

Presumption and burden of proof as to carrier's responsibility for goods received in good condition and delivered to consignee in bad condition, 53 ALR 996; 106 ALR 1156.

Presumption and burden of proof as to loss from failure of pledgee to sell or collect choses in action pledged, 53 ALR 1075.

Province of court and jury respectively as to construction of written contract where extrinsic evidence as to intention has been introduced, 65 ALR 648.

Governing law as regards presumption and burden of proof, 78 ALR 883; 168 ALR 191.

Voluntariness of confession admitted by court as question for jury, 85 ALR 870; 170 ALR 567.

Constitutionality of statutes or ordinances making one fact presumptive or prima facie evidence of another, 86 ALR 179; 162 ALR 495.

Rebuttal of presumption of receipt of letter properly mailed and addressed, 91 ALR 161.

Presumption and burden of proof of

settlement in action by one town or poor district against another for support of pauper, 99 ALR 457.

Presumption of ownership of automobile by one in whose name it is registered or whose license plates it bears, 103 ALR 138.

Presumption against suicide as evidence, 103 ALR 185; 158 ALR 747.

Construction, application, and effect of provision of statute or policy which raises a presumption of total and permanent disability of insured after continuation of disability for a specified period, 110 ALR 631.

Presumption of death as evidence, 115 ALR 404.

Distinction between effect of fact to create presumption of further fact and its effect as prima facie evidence of the further fact in determining burden of proof and weight of evidence, 121 ALR 1078.

Presumption and burden of proof regarding mitigation of damages, 134 ALR 242.

Presumption that description by reference to highway carries fee to center thereof, as affected by presence of water system or other apparatus under highway, 147 ALR 667.

Statute which places burden of proof as to contributory negligence on defendant or creates a presumption against contributory negligence as applicable to actions by one person for consequential damages resulting from injury to another, 147 ALR 726.

May presumption rest upon admission by opponent's pleading without proof of constituent fact, 153 ALR 1106.

Presumption and burden of proof as regards continuance or revocation of will produced for probate, 165 ALR 1188.

Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile, 5 ALR2d 196.

Inference of malice or intent to kill where killing is by blow without weapon, 22 ALR2d 854.

Validity of legislation creating presumption of intoxication or the like from presence of specified percentage of alcohol in blood, 46 ALR2d 1176.

Judicial notice of intoxicating quality, and the like, of a liquor or particular liquid, from its name, 49 ALR2d 764.

Spontaneity of declaration sought to be admitted as part of res gestae as question for court or ultimately for jury, 56 ALR2d 372.

Presumption against suicide as overcome as a matter of law by physical facts related to death in action on accident or life insurance policy, 85 ALR2d 722.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption, 5 ALR3d 100.

Relation back of presumption of continuance of condition of property, 7 ALR3d 1302.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 ALR3d 1128.

Presumption of payment as applicable to bank deposit, 69 ALR3d 1311.

Amnesiac as entitled to presumption of due care, 88 ALR3d 622.

24-14-21. Rebuttable presumptions of law.

Certain presumptions of law, such as the presumption of innocence, in some cases the presumption of guilt, the presumption of continuance of life for seven years, the presumption of a mental state once proved to exist, and all similar presumptions, may be rebutted by proof. (Code 1981, § 24-14-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — Presumption of death of missing person, § 53-9-1 et seq.

Law reviews. — For note, "Commitment and Release of Persons Found Not

Guilty by Reason of Insanity: A Georgia Perspective," see 15 Ga. L. Rev. 1065 (1981).

For comment regarding denial of due process through statute involving administration of estate of absentee minor, in light of Payne v. Home Sav. Bank, 193 Ga. 406, 18 S.E.2d 770 (1942), see 5 Ga. B.J. 62 (1943). For comment discussing the right to present evidence for the purposes of rebutting presumption, in light of Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), see 10 Ga. St. B.J. 484 (1974).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1863, § 3677, former Code 1882, § 3754, former Civil Code 1910, § 5740, former Penal Code 1910, § 1016, former Code 1933, § 38-118, and former O.C.G.A. § 24-4-21 are included in the annotations for this Code section.

Constitutionality. — For a statutory presumption to pass constitutional muster, it must be shown with substantial assurance that the presumed fact was more likely than not to flow from the proved fact on which it was made to depend. Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980), aff'd in part and vacated in part on other grounds, 678 F.2d 511 (5th Cir. 1982), vacated, 463 U.S. 1222, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983) (remanded for further consideration in light of Jones v. United States, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983) (decided under former Code 1933, § 38-118)).

Former Code 1933, § 38-118 (see now O.C.G.A. § 24-4-21) was not violative of the due process and equal protection guarantees of U.S. Const., amend. 14. Evans v. State, 159 Ga. App. 776, 285 S.E.2d 235 (1981) (decided under former Code 1933, § 38-118).

Presumption of negligence against a railroad company, when property was injured by the running of its trains, was a disputable presumption, and could be rebutted like other such presumptions. Savannah, Florida & Western Ry. v. Gray, 77 Ga. 440, 3 S.E. 158 (1886) (decided under former Code 1882, § 3754).

Presumption of valuable consideration yielded to direct evidence. — Prima facie presumption that negotiable paper was issued for a valuable consideration yielded to direct, uncontradicted and unimpeached evidence that there was in fact no consideration. In such a case, the plaintiff could not recover on the presumption alone, but would have to carry the whole case by virtue of a preponderance of the evidence. Goldstein v. Drexler, 102 Ga. App. 90, 115 S.E.2d 744 (1960) (decided under former Code 1933, § 38-118).

Instruction on presumption of intended consequences. — No unconstitutional shift of the burden of persuasion occurred when court's instruction on presumption of intended consequences was given with an instruction that a person was not presumed to act with criminal intent and that the presumption of intended consequence could be rebutted. Williams v. State, 157 Ga. App. 494, 277 S.E.2d 781 (1981) (decided under former Code 1933, § 38-118).

When uncontradicted and unimpeached evidence was produced as to the real facts, any inference to the contrary disappeared, and did not create a conflict in the evidence so as to require its submission to a jury. International Computer Group, Inc. v. Data Gen. Corp., 159 Ga. App. 169, 283 S.E.2d 12 (1981) (decided under former

General Consideration (Cont'd)

Code 1933, § 38-118).

Performance of official and social duties. — Unless and until there be facts or circumstances to indicate to the contrary, it will be presumed that every person obeys the mandates of law and performs all of the person's official and social duties. Strother Ford, Inc. v. First Nat'l Bank, 132 Ga. App. 268, 208 S.E.2d 25 (1974) (decided under former Code 1933, § 38-118).

Jury determination of rebutted presumption. — Presumptions in civil cases have an effect at two stages during a jury trial; when a party moves for a directed verdict; and when the trial court instructs the jury. Under Georgia law, a rebuttable presumption of law generally does not vanish when the opposing party introduces evidence contrary to the presumption, and it does not matter how much counter evidence the opponent has presented to rebut the presumed fact; the presumption remains alive through jury instructions and can only disappear if the jury decides to discount the presumption. Beach v. Lipham, 276 Ga. 302, 578 S.E.2d 402 (2003) (decided under former O.C.G.A. § 24-4-21).

Most rational hypothesis. — Presumption of law was merely a circumstantial inference selected by the law as the most rational hypothesis from given facts, and may or may not be rebutted according to the quality of evidence introduced. Jefferson Std. Life Ins. Co. v. Bentley, 55 Ga. App. 272, 190 S.E. 50 (1937) (decided under former Code 1933, § 38-118); Continental Assurance Co. v. Rothell, 121 Ga. App. 868, 176 S.E.2d 259 (1970), aff'd in part and rev'd in part on other grounds, 227 Ga. 258, 181 S.E.2d 283, vacated on other grounds, 123 Ga. App. 423, 181 S.E.2d 541 (1971) (decided under former Code 1933, § 38-118).

Presumption yields to proved facts. — Presumption of law yields to direct, positive, and uncontradicted evidence, i.e., it gives way to proved facts. Jefferson Std. Life Ins. Co. v. Bentley, 55 Ga. App. 272, 190 S.E. 50 (1937) (decided under former Code 1933, § 38-118); Continental Assurance Co. v. Rothell, 121 Ga. App. 868, 176 S.E.2d 259 (1970), aff'd in part and rev'd in part on other grounds, 227 Ga. 258, 181 S.E.2d 283, vacated on other grounds, 123 Ga. App. 423, 181 S.E.2d 541 (1971) (decided under former Code 1933, § 38-118).

Presumption of continuity. — Under the doctrine known as the presumption of continuity, a status, when proved to exist, will be presumed to have continued to exist. Strother Ford, Inc. v. First Nat'l Bank, 132 Ga. App. 268, 208 S.E.2d 25 (1974) (decided under former Code 1933, § 38-118).

Presumption of demand for possession yields to direct evidence. — While the defendant may not deny in the defendant's counter-affidavit that a demand for possession had been made upon the defendant by the plaintiff prior to the issuance of the dispossessory warrant, and defendant's failure to do so raises a presumption of law that such a demand was made, still such presumption must give way to the direct and positive testimony of the defendant on the trial that no demand was made upon the defendant for possession by anyone prior to the issuance of the dispossessory warrant. Bare presumptions of law give way to testimony, which may shift the burden of proof or of proceeding to the opposite party, and one is then not entitled to prevail upon the presumption alone. Ginn v. Johnson, 74 Ga. App. 35, 38 S.E.2d 753 (1946) (decided under former Code 1933, § 38-118).

Medical negligence and due care pattern jury instructions. — Although the presumption of due care pattern jury instructions was a correct statement of the law in discussing the presumption that health care professionals exercise due care, the pattern jury instruction needs to explain more clearly the presumption's relationship to the plaintiff's burden of proof and the defendant's standard of care. The jury needs to be instructed that: (1) the law presumes that physicians or other medical professionals perform medical services in an ordinarily skillful manner; (2) the person claiming an injury may overcome this legal presumption by introducing evidence that the physician did not treat the patient in an ordinarily skillful manner; (3) expert med-

ical testimony is required to overcome the presumption; and (4) the plaintiff's burden in proving the physician's lack of due care and skill is by the preponderance of the evidence. These suggested changes are intended to uphold the tradition of having physicians judged by their peers while ensuring that jurors are instructed that the due-care presumption does not change the plaintiff's burden of proof in medical negligence cases. Beach v. Lipham, 276 Ga. 302, 578 S.E.2d 402 (2003) (decided under former O.C.G.A. § 24-4-21).

Innocence. — Every person charged with crime is presumed innocent until proven guilty by competent evidence. Thigpen v. State, 11 Ga. App. 846, 76 S.E. 596 (1912) (decided under former Penal Code 1910, § 1016).

Continuity of domicile. — Until evidence is introduced to the contrary, it is presumed that a person has not changed the person's residence or domicile. Strother Ford, Inc. v. First Nat'l Bank, 132 Ga. App. 268, 208 S.E.2d 25 (1974) (decided under former Code 1933, § 38-118).

Presumptions Regarding Death

Life. — One of the presumptions of law in this state is "continuance of life for seven years." Poole v. State, 22 Ga. App. 248, 95 S.E. 935 (1918) (decided under former Civil Code 1910, § 5740); Gantt v. American Nat'l Ins. Co., 173 Ga. 323, 160 S.E. 345 (1931) (decided under former Civil Code 1910, § 5740).

Presumption of life was not statutory. — There was no express statutory provision in this state making absence from the state for seven years the ground of the presumption of death. The only provision in the Code with reference of such presumption was former Civil Code 1910, § 5740 (see now O.C.G.A. § 24-4-21). There being no statutory provision, therefore, making mere absence from the state the ground of the presumption, the common-law rule must be applied, which was as ruled in Hansen v. Owens, 132 Ga. 648, 64 S.E. 800 (1909). Rudulph v. Brown, 150 Ga. 147, 103 S.E. 251 (1920) (decided under former Civil Code 1910, § 5740).

Presumption of continuation of life ends. — Presumption of the duration of life, with respect to people of whom no account can be given, ends at the expiration of seven years from the time when the people were last known to be living. Doe v. Roe, 1 Ga. 538 (1846) (decided under former law); Doe v. Roe & Benson, 26 Ga. 582 (1858) (decided under former law); Executors of Adams v. Administrator of Jones, 39 Ga. 479 (1869) (decided under former Code 1863, § 3677). See also Poole v. State, 22 Ga. App. 248, 95 S.E. 935 (1918) (decided under former Civil Code 1910, § 5740); Gantt v. American Nat'l Ins. Co., 41 Ga. App. 627, 154 S.E. 213 (1930), rev'd on other grounds, 173 Ga. 323, 160 S.E. 345 (1931) (decided under former Civil Code 1910, § 5740); Pilgrim Health & Life Ins. Co. v. Shows, 60 Ga. App. 872, 5 S.E.2d 585 (1939) (decided under former Code 1933, § 38-118).

Death occurring after seven years. — In the absence of facts or circumstances tending to establish the date of death, death was presumed to have occurred at the expiration of seven years. Gantt v. American Nat'l Ins. Co., 173 Ga. 323, 160 S.E. 345 (1931) (decided under former Civil Code 1910, § 5740); Gantt v. American Nat'l Ins. Co., 53 Ga. App. 425, 186 S.E. 458 (1936) (decided under former Code 1933, § 38-118); Pfenning v. Life Ins. Co. of Va., 60 Ga. App. 706, 4 S.E.2d 682 (1939) (decided under former Code 1933, § 38-118); Payne v. Home Sav. Bank, 193 Ga. 406, 18 S.E.2d 770 (1942) (decided under former Code 1933, § 38-118); Georgia Cas. & Sur. Co. v. Bloodworth, 120 Ga. App. 313, 170 S.E.2d 433 (1969) (decided under former Code 1933, § 38-118).

Time of death must be proved. — Presumption of law related only to the fact of death; the time of death, whenever it was material, must be a subject of distinct proof. Gantt v. American Nat'l Ins. Co., 41 Ga. App. 627, 154 S.E. 213 (1930), rev'd on other grounds, 173 Ga. 323, 160 S.E. 345 (1931) (decided under former Civil Code 1910, § 5740).

Presumption of death established by probate court. — Order of probate court under former Code 1933, § 113-2601 (see now O.C.G.A. § 53-9-1) establishing presumption of death of in-

Presumptions Regarding Death (Cont'd)

sured constituted a rebuttable presumption of law in later case involving action on life insurance policy. Ritter v. Prudential Ins. Co. of Am., 538 F. Supp. 398 (N.D. Ga. 1982) (decided under former Code 1933, § 38-118).

Presumption of death of one moving to another state. — In order to raise a presumption of the death of a person who moves from this state to a named point in another state, inquiry must be made at the last known domicile of the absentee at which the absentee resided in the other state; and it must be shown, by those who would be most likely to hear from the absentee, that the absentee was absent and unheard of in the last place of residence for seven years. Rudulph v. Brown, 150 Ga. 147, 103 S.E. 251 (1920) (decided under former Penal Code 1910, § 1016); National Life & Accident Ins. Co. v. Hankerson, 49 Ga. App. 350, 175 S.E. 590 (1934) (decided under former Code 1933, § 38-118); Pilgrim Health & Life Ins. Co. v. Shows, 60 Ga. App. 872, 5 S.E.2d 585 (1939) (decided under former Code 1933, § 38-118).

Evidence of absence of person from one's original place of residence will not raise the presumption of death, when it appears that the person has moved to another place and there located. National Life & Accident Ins. Co. v. Hankerson, 49 Ga. App. 350, 175 S.E. 590 (1934) (decided under former Code 1933, § 38-118).

Issue of life or death for jury. — When the presumption from absence is relied upon to show death, the issue as to life or death would be for the jury when the evidence tending to rebut the legal presumption is merely circumstantial, or when, notwithstanding direct or circumstantial rebuttal evidence, the bare legal presumption of death is itself supported by direct or circumstantial proof. But the mere legal presumption is completely overcome by positive, uncontradicted evidence that the person is in fact alive, and even by competent proof of the person's existence within the seven-year period. National Life & Accident Ins. Co. v. Hankerson, 49 Ga. App. 350, 175 S.E. 590 (1934) (decided under former Code 1933, § 38-118).

No presumption of survival. — When a family was absent for over seven years there would be no presumption that a husband survived his wife and daughter, or that he had no other children whom he survived. Cock v. Lipsey, 148 Ga. 322, 96 S.E. 628 (1918) (decided under former Civil Code 1910, § 5740).

Insanity

Presumption of insanity not unconstitutionally irrebuttable. — Construction of presumptions in former O.C.G.A. § 24-4-21 did not create a de facto irrebuttable (and, therefore, unconstitutional) presumption of insanity because the fact-finders duty not to disregard expert testimony applied to cases presuming sanity or insanity, and the court's standard of review and the findings and conclusions required for that review, ensure that the presumption of insanity cannot be applied irrebuttably. Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993) (decided under former O.C.G.A. § 24-4-21).

Presumption of continuing insanity applied prospectively to future acts of the defendant, not retroactively to past behavior. Vanderpool v. State, 244 Ga. App. 804, 536 S.E.2d 821 (2000), cert denied, 532 U.S. 996, 121 S. Ct. 1658, 149 L. Ed. 2d 640 (2001) (decided under former O.C.G.A. § 24-4-21).

To be constitutionally committed, the insanity-acquittee was entitled, as matter of equal protection, to a judicial determination which attained a greater degree of certainty than that generated by a scientifically unsupported presumption of insanity. Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980), aff'd in part and vacated in part on other grounds, 678 F.2d 511 (5th Cir. 1982), vacated, 463 U.S. 1222, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983) (remanded for further consideration in light of Jones v. United States, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983) (decided under former Code 1933, § 38-118)).

Presumption of continuation of a mental state comported with due process, because it was rational to assume that, once a mental state was proven to

exist, that mental state continued to do so in the absence of evidence to the contrary. Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980) (decided under former Code 1933, § 38-118).

Continuation of mental condition. — Mental condition, once proved to exist, was presumed to continue. Carter v. State, 225 Ga. 310, 168 S.E.2d 158 (1969) (decided under former Code 1933, § 38-118); Boyd v. State, 207 Ga. 567, 63 S.E.2d 394 (1951), overruled on other grounds, 234 Ga. 608, 216 S.E.2d 855 (1975) (decided under former Code 1933, § 38-118).

Continuation of insanity. — There was a presumption of continuation of insanity, once insanity was proved to exist. Dicken v. Johnson, 7 Ga. 484 (1849) (decided under former law); Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423 (1852) (decided under former law); Stanfield v. Hursey, 36 Ga. App. 394, 136 S.E. 826 (1927) (decided under former Civil Code 1910, § 5740).

Defendant failed to carry the defendant's burden of showing by a preponderance of the evidence that the defendant was sane after the defendant was found not guilty by reason of insanity on two stalking charges and was ordered into a civil commitment to a mental health facility; the verdict of not guilty by reason of insanity established both that the defendant committed the criminal offense and that the defendant did so because of a mental illness, and once the defendant was ruled insane, a presumption existed under former O.C.G.A. § 24-4-21 that the insanity existed thereafter, and the defendant put on very little evidence to the contrary. Bonney v. State, 295 Ga. App. 706, 673 S.E.2d 102 (2009) (decided under former O.C.G.A. § 24-4-21).

Trial court erred in denying a recommendation filed by the Department of Behavioral Health with Developmental Disabilities that a patient be moved to a group home for outpatient involuntary treatment because the preponderance of the evidence supported a finding that the patient overcame the presumption under former O.C.G.A. § 24-4-21 of a continued need for inpatient involuntary treatment, and there was no evidence to support the trial court's finding that under O.C.G.A. § 37-3-1(9.1), the patient posed a substantial risk of imminent harm to the patient or others or was so unable to care for the patient's own physical health and safety as to create an imminently life-endangering crisis; the group home would have only two other suitable patient occupants, both of whom would be under the supervision of live-in supervisors and would have little opportunity to pressure the patient into misconduct, the patient would not be permitted to leave the group home unsupervised, the manager of the group home testified that as soon as patients were admitted into the group home and evaluated, an individualized service plan was created, and there was no statutory requirement that a plan existed prior to release. Nelor v. State, 309 Ga. App. 165, 709 S.E.2d 904 (2011) (decided under former O.C.G.A. § 24-4-21).

Insanity of insanity-acquittee. — When there has been a previous adjudication finding a defendant not guilty by reason of defendant's insanity, a presumption of such insanity exists at the commencement of a hearing to secure defendant's release. Pennewell v. State, 148 Ga. App. 611, 251 S.E.2d 832 (1979) (decided under former Code 1933, § 38-118); Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980) (decided under former Code 1933, § 38-118).

Presumption of continued insanity for release applications. — In deciding applications for release, the court may rely on the presumption of continued insanity and is not bound by the opinions of either lay or expert witnesses. Gross v. State, 210 Ga. App. 125, 435 S.E.2d 496 (1993) (decided under former O.C.G.A. § 24-4-21).

Effect of release. — Administrative release canceled the continuing presumption of insanity, although the prior adjudication was evidence tending to show mental condition and could be considered by the fact-finder to rebut the presumption of sanity. Gilbert v. State, 235 Ga. 501, 220 S.E.2d 262 (1975) (decided under former Code 1933, § 38-118).

Denial of release held proper. — Rational trier of fact could have found that appellant failed to prove by a preponderance of the evidence that the appellant

Insanity (Cont'd)

was no longer insane and should be released from civil commitment since experts testified that the appellant became violently "psychotic" when the appellant engaged in substance abuse and that, although appellant might not exhibit violently "psychotic" behavior so long as the appellant underwent the regimen of "forced abstinence" in a hospital setting, there was nothing to show that, once released from that setting and regimen, the appellant would not again engage in substance abuse and commit yet another violent "psychotic" act. Nagel v. State, 264 Ga. 150, 442 S.E.2d 446 (1994) (decided under former O.C.G.A. § 24-4-21).

Sanity after release from mental institution. — Presumption of sanity prevailed even after a commitment to a mental institution if the accused had been released from that institution. Durham v. State, 239 Ga. 697, 238 S.E.2d 334 (1977) (decided under former Code 1933, § 38-118).

Rebuttal not automatic. — Presentation of evidence to the contrary did not automatically dissipate the presumption of sanity which existed by law. Moses v. State, 245 Ga. 180, 263 S.E.2d 916, cert. denied, 449 U.S. 849, 101 S. Ct. 138, 66 L. Ed. 2d 60 (1980), overruled on other grounds, Nagel v. State, 262 Ga. 888, 427 S.E.2d 490 (1993) (decided under former Code 1933, § 38-118).

Court may presume insanity despite witnesses' opinions. — Superior court, in deciding applications for release of a person committed upon a plea of insanity, may rely on the presumption of continued insanity and is not bound by the opinions of either lay or expert witnesses. The court also may take judicial notice of the evidence at trial pursuant to O.C.G.A. § 17-7-131(e). Butler v. State, 258 Ga. 344, 369 S.E.2d 252 (1988) (decided under former O.C.G.A. § 24-4-21).

Verdict of not guilty by reason of insanity reflected two crucial factual determinations. First, such verdict indicated a determination beyond reasonable doubt by a finder of fact that the defendant committed the crime in question. Secondly, this verdict indicated finding that it had been demonstrated by a preponderance of the evidence that the defendant, at the time the criminal act was committed, met the criteria for civil commitment. Under former Code 1933, § 38-118 (see now O.C.G.A. § 24-4-21), this mental state was presumed to continue so that the burden of proof in a release proceeding under former Code 1933, § 27-1503 (see now O.C.G.A. § 17-7-131) rested on the insanity acquittee. Whitfield v. State, 158 Ga. App. 660, 281 S.E.2d 643 (1981) (decided under former Code 1933, § 38-118).

Marriage

Continuation of marriage. — Marriage once shown to exist, nothing more appearing, was presumed to continue in existence until rebutted by proof of the marriage's dissolution. Walker v. Hall, 123 Ga. App. 457, 181 S.E.2d 508 (1971) (decided under former Code 1933, § 38-118).

Prior marriage dissolved by death. — Presumption that a first marriage was dissolved by death prevailed whether the time elapsing between the date the former spouse was last heard of and the second marriage was ten months or ten years. Longstreet v. Longstreet, 205 Ga. 255, 53 S.E.2d 480 (1949) (decided under former Code 1933, § 38-118).

Ownership by husband. — Husband is recognized by law as the head of his family and where he and wife reside together, the legal presumption is that the house and all the household effects, belong to the husband as the head of the family; this presumption of course is rebuttable. Kreutz v. State, 53 Ga. App. 219, 185 S.E. 371 (1936) (decided under former Code 1933, § 38-118).

Conflicting presumptions. — When the presumption of the validity of a marriage conflicts with the presumption of the continued life of a former spouse of one of the parties, if neither is aided by proof of facts or circumstances corroborating it, the presumption of the validity of the second marriage will prevail over the presumption of the continuance of life of the former spouse. Longstreet v. Longstreet, 205 Ga. 255, 53 S.E.2d 480 (1949) (decided under former Code 1933, § 38-118); Baker v. Musa, 170 Ga. App. 77, 316 S.E.2d 178

(1984) (decided under former O.C.G.A. § 24-4-21).

Officers

Officer's duties. — All officers are presumed to have properly discharged their sworn official duties. Kirk v. State, 73 Ga. 620 (1884) (decided under former Code 1882, § 3754); Brantley v. Thompson, 216 Ga. 164, 115 S.E.2d 533 (1960) (decided under former Code 1933, § 38-118).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 212.

Am. Jur. Pleading and Practice Forms. — 8A Am. Jur. Pleading and Practice Forms, Death, § 168.

ALR. — Validity of by-law of mutual benefit association preventing recovery upon presumption of death from seven years' absence, 17 ALR 418; 21 ALR 1346; 36 ALR 982; 40 ALR 1274.

Circumstances justifying inference of death of insured before the lapse of seven years from his disappearance, 34 ALR 1389; 61 ALR 1327.

Ownership of automobile as prima facie evidence of responsibility for negligence of person operating it, 42 ALR 898; 74 ALR 951; 96 ALR 634.

Constitutionality of statutes or ordinances making one fact presumptive or prima facie evidence of another, 51 ALR 1139; 86 ALR 179; 162 ALR 495.

Statutory or contractual limitation where presumption of death of the insured from seven years' absence is relied upon, 61 ALR 686; 119 ALR 1308.

Presumption of death from seven years' absence as affected by domestic troubles, 64 ALR 1288.

Conclusiveness of uncontradicted testimony of interested witness where opposed to presumption, 72 ALR 94.

Presumption of death of insured in relation to time of death as affecting failure to pay premiums during seven-year period, 75 ALR 630.

Presumption of innocence as evidence, 94 ALR 1042; 152 ALR 626.

When finding or adjudication as to one's mental condition by official or body not clearly judicial is conclusive evidence or has effect of a judgment as regards legal mental status, 108 ALR 47.

Insanity as affecting presumption against suicide, 112 ALR 1278.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 ALR 1510.

Direct evidence as to what took place at time of accident as displacing presumption arising from instinct of self-preservation that one was acting with concern for own safety, 116 ALR 340.

Effect of words "value received" or similar words in written instrument, other than negotiable instrument or sealed instrument, to create presumption or make prima facie case of consideration, 116 ALR 545.

Distinction between effect of fact to create presumption of further fact and its effect as prima facie evidence of the further fact in determining burden of proof and weight of evidence, 121 ALR 1078.

Administration of estate of one the fact of whose death rests upon presumption or circumstantial evidence, 140 ALR 1403.

Validity of marriage celebrated while spouse by former marriage of one of the parties was living and undivorced, in reliance upon presumption from lapse of time of death of such spouse, 144 ALR 747.

Presumption against suicide as evidence, 158 ALR 747.

Presumption and burden of proof as regards continuance or revocation of will produced for probate, 165 ALR 1188.

Form and sufficiency of proof of death in case of insured's disappearance, 26 ALR2d 1073.

Judicial notice of intoxicating quality, and the like, of a liquor or particular liquid, from its name, 49 ALR2d 764.

Validity, construction, and effect of statutes or regulations making possession of fish or game, or of specified hunting or fishing equipment, prima facie evidence of violation, 81 ALR2d 1093.

Necessity and sufficiency of showing of

search and inquiry by one relying on presumption of death from seven years' absence, 99 ALR2d 307.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption, 5 ALR3d 100.

Relation back of presumption of continuance of condition of property, 7 ALR3d 1302.

Application of res ipsa loquitur doctrine to accidents incurred by passenger while boarding or alighting from a carrier, 93 ALR3d 776.

Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records, 69 ALR4th 906.

24-14-22. Presumption from failure to produce evidence.

If a party has evidence in such party's power and within such party's reach by which he or she may repel a claim or charge against him or her but omits to produce it or if such party has more certain and satisfactory evidence in his or her power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against such party is well founded; but this presumption may be rebutted. (Code 1981, § 24-14-22, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-4-422, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Mitchell v. State, 71 Ga. 128 (1883); First Nat'l Bank v. Atlanta Rubber Co., 77 Ga. 781 (1886); Savannah, Florida & Western Ry. v. Gray, 77 Ga. 440, 3 S.E. 158 (1887); and Stevenson v. State, 83 Ga. 575, 10 S.E. 234 (1889).

Law reviews. — For article, "Spoliation of Evidence," see 8 Ga. St. B.J. 12 (2003).

For comment on Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964), see 1 Ga. St. B.J. 550 (1965). For comment discussing the right to present evidence for the purposes of rebutting presumption, in light of Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), see 10 Ga. St. B.J. 484 (1974).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5163, former Penal Code 1895, § 989, former Civil Code 1910, § 5749, former Penal Code 1910, § 1015, and former O.C.G.A. § 24-4-22 are included in the annotations for this Code section.

In general. — When a party had evidence within the party's power or control by which the party may rebut a claim against the party and failed to produce that evidence, a presumption arose that the evidence would be unfavorable or harmful to the party failing to produce the evidence. Maloy v. Dixon, 127 Ga. App. 151, 193 S.E.2d 19 (1972) (decided under former Code 1933, § 38-119).

Rebuttable presumption in former O.C.G.A. § 24-4-22 applied when both parties fail to produce evidence as conclusive and satisfactory as appeared to be

within their respective control. Eddie Parker Interests, Inc. v. Booth, 160 Ga. App. 15, 285 S.E.2d 753 (1981) (decided under former Code 1933, § 38-119).

Constitutionality. — Former statute violated the fundamental principle of criminal law that the guilt of the accused must be shown by competent evidence before a conviction could be legally had. Sokolic v. State, 228 Ga. 788, 187 S.E.2d 822 (1972) (decided under former Code 1933, § 38-119).

Former O.C.G.A. § 24-4-22 was violative of a defendant's right to be convicted by evidence establishing guilt beyond a reasonable doubt. Radford v. State, 251 Ga. 50, 302 S.E.2d 555 (1983) (decided under former O.C.G.A. § 24-4-22).

Test for constitutionality. — For a statutory presumption to pass constitutional muster, it must be shown with "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980), aff'd in part and vacated in part on other grounds, 678 F.2d 511 (5th Cir. 1982), vacated, 463 U.S. 1222, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983) (remanded for further consideration in light of Jones v. United States, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983) (decided under former Code 1933, § 38-119)).

Not applicable in criminal case. — See Harper v. State, 129 Ga. 770, 59 S.E. 792 (1907) (decided under former Penal Code 1895, § 989); Davis v. State, 4 Ga. App. 441, 61 S.E. 843 (1908) (decided under former Penal Code 1895, § 989); Mills v. State, 133 Ga. 155, 65 S.E. 368 (1909) (decided under former Penal Code 1895, § 989); Wilson v. State, 8 Ga. App. 816, 70 S.E. 193 (1911) (decided under former Penal Code 1910, § 1015); Worley v. State, 136 Ga. 231, 71 S.E. 153 (1911) (decided under former Penal Code 1910, § 1015); Williamson v. State, 9 Ga. App. 442, 71 S.E. 509 (1911) (decided under former Penal Code 1910, § 1015); Whitley v. State, 14 Ga. App. 577, 81 S.E. 797 (1914) (decided under former Penal Code 1910, § 1015); Waller v. State, 164 Ga. 128, 138 S.E. 67 (1927) (decided under former Penal Code 1910, § 1015); Summerville v. State, 65 Ga. App. 11, 14 S.E.2d 574 (1941) (decided under former Code 1933, § 38-119); Bond v. State, 68 Ga. App. 15, 21 S.E.2d 866 (1942) (decided under former Code 1933, § 38-119); Clay v. State, 122 Ga. App. 677, 178 S.E.2d 331 (1970) (decided under former Code 1933, § 38-119); Sokolic v. State, 228 Ga. 788, 187 S.E.2d 822 (1972) (decided under former Code 1933, § 38-119); Lyle v. State, 131 Ga. App. 8, 205 S.E.2d 126 (1974) (decided under former Code 1933, § 38-119); Peters v. State, 131 Ga. App. 513, 206 S.E.2d 623 (1974) (decided under former Code 1933, § 38-119); Perryman v. State, 139 Ga. App. 655, 229 S.E.2d 131 (1976) (decided under former Code 1933, § 38-119); Joseph v. State, 149 Ga. App. 296, 254 S.E.2d 383 (1979) (decided under former Code 1933, § 38-119); Brown v. State, 150 Ga. App. 831, 258 S.E.2d 641 (1979) (decided under former Code 1933, § 38-119); Tiller v. State, 159 Ga. App. 557, 284 S.E.2d 63 (1981) (decided under former Code 1933, § 38-119); Radford v. State, 251 Ga. 50, 302 S.E.2d 555 (1983) (decided under former Code 1933, § 38-119); Drummond v. State, 173 Ga. App. 337, 326 S.E.2d 787 (1985) (decided under former Code 1933, § 38-119); Jacobs v. State, 201 Ga. App. 57, 410 S.E.2d 320 (1991) (decided under former O.C.G.A. § 24-4-22); Clayton v. State, 203 Ga. App. 843, 418 S.E.2d 610, cert. denied, 203 Ga. App. 905, 418 S.E.2d 610 (1992) (decided under former O.C.G.A. § 24-4-22); Williams v. State, 239 Ga. App. 30, 521 S.E.2d 27 (1999) (decided under former O.C.G.A. § 24-4-22).

Charge on spoliation of evidence based upon former O.C.G.A. § 24-4-22 was not appropriate in a criminal case; thus, the trial court did not err in not giving such a charge. Doyal v. State, 287 Ga. App. 667, 653 S.E.2d 52 (2007) (decided under former O.C.G.A. § 24-4-22).

Former O.C.G.A. § 24-4-22 not applicable in criminal case. — Trial counsel was not ineffective for failing to request a jury charge under former O.C.G.A. § 24-4-22 addressing the state's failure to preserve a child molestation victim's pajamas because the trial court stated it would not have given the charge if requested, and former § 24-4-22 was not appropriate

General Consideration (Cont'd)

in a criminal case. Cline v. State, 300 Ga. App. 615, 685 S.E.2d 501 (2009) (decided under former O.C.G.A. § 24-4-22).

Jury may not be charged on failure to produce evidence in criminal case but may draw conclusion therefrom. — While the jury may not be instructed to infer that if the defendant had evidence by which defendant might repel or rebut the charge against the defendant and failed to introduce the evidence the presumption arises that the defendant is guilty, the jury may be apprised of the facts from which it arrives at the same conclusion. Pritchard v. State, 160 Ga. App. 105, 286 S.E.2d 338 (1981) (decided under former Code 1933, § 38-119).

Instruction only in exceptional cases. — Principle set forth in former O.C.G.A. § 24-4-22 applied only in cases when it was shown that a party withheld evidence within the party's power and control, and an instruction on that principle should be given only in exceptional cases. Hendley v. Evans, 319 Ga. App. 310, 734 S.E.2d 548 (2012) (decided under former O.C.G.A. § 24-4-22).

Intention of legislature was to penalize either party by a presumption of fact against either party for withholding evidence within their power to produce, and relying on evidence of a weaker nature. Fields v. Yellow Cab Co., 80 Ga. App. 569, 56 S.E.2d 845 (1949) (decided under former Code 1933, § 38-119).

Limited application. — It may be conceded that this principle cannot be safely given as a charge except in a very limited class of cases, but it cannot be said to be improper in all cases. Cotton States Fertilizer Co. v. Childs, 179 Ga. 23, 174 S.E. 708 (1934) (decided under former Code 1933, § 38-119).

Application in divorce case as to financial worth. — In divorce case when one of the issues in the case was the financial worth of the defendant, when the plaintiff introduced documentary evidence showing that the defendant received about $24,000 in cash from a certain business venture and the defendant did not offer any written evidence to substantiate defendant's contention that only a small portion of the sum received was profit, there was no error in charging on the presumption arising from failure to produce evidence, or the strongest evidence. West v. West, 199 Ga. 378, 34 S.E.2d 545 (1945) (decided under former Code 1933, § 38-119).

Presumption of fact. — Presumption against a party withholding or suppressing evidence within the party's control or reach was not one of law, but of fact and it could be rebutted. Savannah, Florida & Western Ry. v. Gray, 77 Ga. 440, 3 S.E. 158 (1886) (decided under former law); Brothers v. Horne, 140 Ga. 617, 79 S.E. 468 (1913) (decided under former Code 1933, § 38-119); Cocroft v. Cocroft, 158 Ga. 714, 124 S.E. 346 (1924) (decided under former Code 1933, § 38-119); Cotton States Fertilizer Co. v. Childs, 179 Ga. 23, 174 S.E. 708 (1934) (decided under former Code 1933, § 38-119); Burns v. Colonial Stores, Inc., 90 Ga. App. 492, 83 S.E.2d 259 (1954) (decided under former Code 1933, § 38-119); Independent Life & Accident Ins. Co. v. Craton, 102 Ga. App. 78, 115 S.E.2d 636 (1960) (decided under former Code 1933, § 38-119); Gulf Life Ins. Co. v. Belch, 108 Ga. App. 480, 133 S.E.2d 622 (1963), rev'd on other grounds, 219 Ga. 823, 136 S.E.2d 351 (1964) (decided under former Code 1933, § 38-119); Glynn Plymouth, Inc. v. Davis, 120 Ga. App. 475, 170 S.E.2d 848 (1969), aff'd, 226 Ga. 221, 173 S.E.2d 691 (1970) (decided under former Code 1933, § 38-119).

Burden of proof irrelevant. — Former statute applied irrespective of the burden of proof. Shiver & Barnett v. Firemens Ins. Co., 60 Ga. App. 57, 2 S.E.2d 760 (1939) (decided under former Code 1933, § 38-119).

No evidence held back. — When it did not appear that the party held back evidence within the party's power to produce the non-production of more full and definite evidence than the party presented raised no presumption against the party and it was error to charge the former provisions. Schnell v. Toomer, 56 Ga. 168 (1876) (decided under former law); Western & A.R.R. v. Morrison, 102 Ga. 319, 29 S.E. 104, 66 Am. St. R. 173, 40 L.R.A. 84 (1897) (decided under former Civil Code 1895, § 5163); Central of Ga. Ry. v.

Bernstein, 113 Ga. 175, 38 S.E. 394 (1901) (decided under former Civil Code 1895, § 5163); Shields v. Georgia Ry. & Elec. Co., 1 Ga. App. 97, 57 S.E. 980 (1907) (decided under former Civil Code 1895, § 5163); Alabama Great Southern Ry. v. Hamby, 56 Ga. App. 215, 192 S.E. 467 (1937) (decided under former Code 1933, § 38-119); Howard v. Obie, 190 Ga. 394, 9 S.E.2d 666 (1940) (decided under former Code 1933, § 38-119); Brosnan v. Long, 75 Ga. App. 837, 44 S.E.2d 809 (1947) (decided under former Code 1933, § 38-119); Maloy v. Dixon, 127 Ga. App. 151, 193 S.E.2d 19 (1972) (decided under former Code 1933, § 38-119).

Trial court did not err when the court failed to preclude defendants from putting on evidence that contradicted an estate administrator's version of events due to the defendants' alleged failure to produce a video recording of a parking lot where an incident occurred pursuant to former O.C.G.A. § 24-4-22 as the administrator waived that claim. Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 715 S.E.2d 728 (2011) (decided under former O.C.G.A. § 24-4-22).

Proving assertions without calling other witness. — No presumption will ever arise prejudicial to the party failing to produce the witness, provided the jury was satisfied from the evidence before the jury that the party who had such witness accessible had nevertheless proved the party's claim or established the party's defense. Weinkle & Sons v. Brunswick & W.R.R., 107 Ga. 367, 33 S.E. 471 (1899), overruled on other grounds, 238 Ga. 559, 234 S.E.2d 24 (1977) (decided under former Civil Code 1895, § 5163); Howard v. Obie, 190 Ga. 394, 9 S.E.2d 666 (1940) (decided under former Code 1933, § 38-119).

Proving a negative. — When the means of proving a negative are not within the power of one of the parties, but all the proof on the subject is within the control of the other, who, if the negative is not true, can disprove it at once, the truth of the negative averment can be presumed from the fact that the party who has within the party's power proof (if such exists) that the negative is not true still withholds or does not produce such proof. Hyer v. Holmes & Co., 12 Ga. App. 837, 79 S.E. 58 (1913) (decided under former Civil Code 1910, § 5749); Mayo v. Owen, 208 Ga. 483, 67 S.E.2d 709 (1951) (decided under former Code 1933, § 38-119).

All witnesses need not testify. — It never was the intention of the former statutory provisions of this statute to require that all witnesses to a scene of a collision, the nature of which was in question, should be summoned and used as witnesses. Fields v. Yellow Cab Co., 80 Ga. App. 569, 56 S.E.2d 845 (1949) (decided under former Code 1933, § 38-119).

Former O.C.G.A. § 24-4-22 (see now O.C.G.A. § 24-4-22) did not require a party actually to produce all possible witnesses, but merely provided that an adverse presumption may arise from a failure to so produce. Jacobs v. State, 201 Ga. App. 57, 410 S.E.2d 320 (1991) (decided under former O.C.G.A. § 24-4-22).

If all witnesses not produced. — Party was not required to produce all witnesses; a party may rest one's case upon one witness, though another be accessible, but that party subjects oneself to presumption arising from failure to so produce. Shiver & Barnett v. Firemens Ins. Co., 60 Ga. App. 57, 2 S.E.2d 760 (1939) (decided under former Code 1933, § 38-119); Trammell v. Williams, 97 Ga. App. 31, 101 S.E.2d 887 (1958) (decided under former Code 1933, § 38-119).

Calling one of two witnesses. — Fact that a party called only one of two witnesses who had an equal opportunity to know the facts which it was sought to establish did not authorize an inference that the other witness would have testified differently, or warrant an instruction under the former statutory provisions to the jury. Bank of Emanuel v. Smith, 32 Ga. App. 606, 124 S.E. 114 (1924) (decided under former Civil Code 1910, § 5749).

Evidence under power and control of party. — Charging former statutory provisions was error since there was nothing to show that the absent witness was in any way under the power and control of the defendant, or that as a witness, if the witness were accessible at all, the witness was not as much so to the plaintiff as to the defendant. Anderson v. Southern Ry., 107 Ga. 500, 33 S.E. 644 (1899) (decided

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under former Civil Code 1895, § 5163); Brothers v. Horne, 140 Ga. 617, 79 S.E. 468 (1913) (decided under former Civil Code 1910, § 5749); Cocroft v. Cocroft, 158 Ga. 714, 124 S.E. 346 (1924) (decided under former Civil Code 1910, § 5749); Trammell v. Atlanta Coach Co., 51 Ga. App. 705, 181 S.E. 315 (1935); Atlanta Baggage & Cab Co. v. Atlanta Taxicabs, Inc., 104 Ga. App. 89, 121 S.E.2d 175 (1961) (decided under former Code 1933, § 38-119).

Witness accessible to both parties. — When witness was present at the trial, equally accessible to both parties, it was error for the judge to give in charge the former statutory provisions. Bank of Emanuel v. Smith, 32 Ga. App. 606, 124 S.E. 114 (1924) (decided under former Civil Code 1910, § 5749).

Examining physician was equally available as a witness to both parties; no presumption could arise against either party for failure to produce the physician as a witness. Bradford v. Parrish, 111 Ga. App. 167, 141 S.E.2d 125 (1965) (decided under former Code 1933, § 38-119).

Failure of both parties to produce evidence. — When both parties failed to produce as conclusive and satisfactory evidence as appeared to be within their respective control, the charge of the former statute was appropriate. Davidson v. Consolidated Quarries Corp., 99 Ga. App. 359, 108 S.E.2d 495 (1959) (decided under former Code 1933, § 38-119).

Failure of defendant to appear in court and the failure to offer evidence raised a presumption against the defendant that the charges against the defendant were true. Mitchell v. Hayden, Stone, Inc., 225 Ga. 711, 171 S.E.2d 280 (1969) (decided under former Code 1933, § 38-119).

Failure of party to testify. — Provisions of former statutory were not applicable to the failure of a party defendant to testify at the party's trial. Ramirez v. Mansour, 104 Ga. App. 651, 122 S.E.2d 594 (1961) (decided under former Code 1933, § 38-119); Maloy v. Dixon, 127 Ga. App. 151, 193 S.E.2d 19 (1972) (decided under former Code 1933, § 38-119).

Failure to testify at former trial. — It was admissible to show that the defendant, since deceased, who was present at a former trial and competent as a witness, failed to testify concerning the transaction in issue, of which the defendant had peculiar knowledge; the bona fides of which was attacked by the plaintiffs. Wood v. Wilson, 145 Ga. 256, 88 S.E. 980 (1916) (decided under former Civil Code 1910, § 5749).

Documentary evidence. — Former statute applied equally to documentary evidence. Oliver v. Fair Jewelers, Inc., 104 Ga. App. 392, 121 S.E.2d 787 (1961) (decided under former Code 1933, § 38-119).

Medical exam under court order. — Former statutory presumption arising from failure to produce evidence was not applicable in a personal injury action when there could be no additional medical evidence available until after an examination was had under court order. Bradford v. Parrish, 111 Ga. App. 167, 141 S.E.2d 125 (1965) (decided under former Code 1933, § 38-119).

Refusal to submit to physical examination. — Evidence that the plaintiff in a case of personal injury refused to allow a physical examination was admissible. City of Cedartown v. Brooks, 2 Ga. App. 583, 59 S.E. 836 (1907) (decided under former Civil Code 1895, § 5163).

Failure to produce testimony is badge of fraud, since the bona fides of the transaction is in issue, and witnesses who ought to be able to explain the transaction are in reach. Cotton States Fertilizer Co. v. Childs, 179 Ga. 23, 174 S.E. 708 (1934) (decided under former Code 1933, § 38-119); State Banking Co. v. Miller, 185 Ga. 653, 196 S.E. 47 (1938) (decided under former Code 1933, § 38-119).

Spoliation of evidence raises a presumption against the spoliator. Glynn Plymouth, Inc. v. Davis, 120 Ga. App. 475, 170 S.E.2d 848 (1969), aff'd, 226 Ga. 221, 173 S.E.2d 691 (1970) (decided under former Code 1933, § 38-119).

Rules of spoliation triggered. — After the collision between a tractor trailer and a vehicle towing a car, the defendants were aware of contemplated litigation based on: (1) the letter from the plaintiffs' attorney; (2) the defendants' investiga-

tion; and (3) the defendants' knowledge that every such highway collision could result in claims. This was sufficient to automatically trigger the rules of spoliation under former O.C.G.A. § 24-4-22. Sentry Select Ins. Co. v. Treadwell, 318 Ga. App. 844, 734 S.E.2d 818 (2012) (decided under former O.C.G.A. § 24-4-22).

Destruction of evidence. — When a party has destroyed evidence which may be material to ensuing litigation, the trial judge may be authorized to dismiss the case or prevent the party's expert witness from testifying in any respect about the evidence. Chapman v. Auto Owners Ins. Co., 220 Ga. App. 539, 469 S.E.2d 783 (1996) (decided under former O.C.G.A. § 24-4-22).

Argument to jury. — Failure to produce witnesses who are accessible to a party will authorize counsel of the opposite party to argue before the jury that, if they are in doubt as to the truth of the transaction, they would be authorized to infer that, if the absent witnesses had testified, the testimony would have been prejudicial to the party who might most easily have produced them. City of Atlanta v. Feeney, 42 Ga. App. 135, 155 S.E. 370 (1930) (decided under former Civil Code 1910, § 5749); Howard v. Obie, 190 Ga. 394, 9 S.E.2d 666 (1940) (decided under former Code 1933, § 38-119).

Comment on defendant's failure to produce evidence was not a comment on the defendant's failure to testify as prohibited by the former statute. Wood v. State, 234 Ga. 758, 218 S.E.2d 47 (1975) (decided under former Code 1933, § 38-119).

Comment on failure to present certain witnesses in criminal cases. — Defense counsel in a criminal case is not barred from commenting, when appropriate, on the failure of the opposing side to present certain witnesses; while no legal presumption may arise from such failure, it is proper for counsel to draw an inference of fact from such failure and comment on such failure to the jury when there is competent evidence before the jury that the missing witness has knowledge of material and relevant facts. Morgan v. State, 267 Ga. 203, 476 S.E.2d 747 (1996) (decided under former O.C.G.A. § 24-4-22).

Evidentiary value. — Fact that the accused failed to produce evidence had some evidentiary value and counsel could comment on it to the jury. Hunt v. State, 81 Ga. 140, 7 S.E. 142 (1888) (decided under former law); Morgan v. State, 124 Ga. 442, 52 S.E. 748 (1905) (decided under former Penal Code 1895, § 989); Saffold v. State, 11 Ga. App. 329, 75 S.E. 338 (1912) (decided under former Penal Code 1910, § 1015).

Question for jury. — It was not error for court to charge that if either party in this case had in the party's power or control any evidence that would have illustrated any issue in the case and such party failed to produce that evidence, the jury might infer it would have been against the party so failing to produce it, in the event the jury saw fit to do so; the charge left it for the jury to determine whether or not there existed a state of facts from which the presumption would arise and did not have the effect of invading the province of the jury. Beardsley v. Suburban Coach Co., 83 Ga. App. 381, 63 S.E.2d 911 (1951) (decided under former Code 1933, § 38-119).

Charge demanding inference. — When a stated set of circumstances will demand a particular inference, it is not error for the court to instruct the jury to that effect, provided the question of whether the circumstances do in fact exist is left open for determination by the jury. Cotton States Fertilizer Co. v. Childs, 179 Ga. 23, 174 S.E. 708 (1934) (decided under former Code 1933, § 38-119); Shiver & Barnett v. Firemens Ins. Co., 60 Ga. App. 57, 2 S.E.2d 760 (1939) (decided under former Code 1933, § 38-119).

There was no reversible error shown in the trial court's exercise of the court's discretion to charge the jury on the rebuttable presumption arising from spoliation, as opposed to instructing the jury that the jury had to accept as true an estate administrator's description of a fatal assault on the administrator's decedent as there was no authority cited that mandated the former instruction in the circumstances. Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 715 S.E.2d 728 (2011) (decided under former O.C.G.A.§ 24-2-2).

Harmless error. — When the former statute was not applicable to the facts of a

General Consideration (Cont'd)

case, the court did not err in failing to give the former statute in a charge to the jury. Especially was this true when there was no written request for the charge. Shields v. Georgia Ry. & Elec. Co., 1 Ga. App. 172, 57 S.E. 980 (1907) (decided under former Civil Code 1895, § 5163).

Although the former statute was charged in a case where it was not applicable, in absence of harm or injury to one side, the charge did not require a reversal. Goldstein v. Ipswich Hosiery Co., 104 Ga. App. 500, 122 S.E.2d 339 (1961) (decided under former Code 1933, § 38-119).

Defendant admitted liability and did not produce the accident report and pictures of the truck involved; since the withheld evidence went to liability and not damages, any error in giving a "withheld evidence" charge to the jury was harmless. AT Sys. Southeast, Inc. v. Carnes, 272 Ga. App. 671, 613 S.E.2d 150 (2005) (decided under former O.C.G.A. § 24-4-22).

Exclusion of explanation harmless error. — Party should be permitted to explain the absence of witnesses which the evidence shows have knowledge of facts material to the case, so as to avoid the application of this statute, but the exclusion of testimony of explanation, if error, is harmless error, since the evidence of such witness or witnesses would be merely cumulative of the testimony of the complaining party, and which testimony the verdict of the jury shows the jury accepted. Gray v. General Fin. Corp., 108 Ga. App. 586, 134 S.E.2d 58 (1963) (decided under former Code 1933, § 38-119).

Illustrations

When husband of plaintiff was in court, summoned there by the plaintiff, and it appeared that he knew a great deal about the infirmities of his wife before the crash which was the subject of the suit, and about her condition after such collision, there was sufficient evidence to authorize a charge setting forth the principles of law set forth in the former statute. Price v. Whitley Constr. Co., 91 Ga. App. 257, 85 S.E.2d 528 (1954) (decided under former Code 1933, § 38-119).

Since appellant father had knowledge of his own financial situation and of the needs of his son, who was living with him at that time, his failure to produce evidence of such to refute or amplify the appellee's showing, raised a rebuttable presumption that the appellee's showing was accurate. Ritchea v. Ritchea, 242 Ga. 524, 250 S.E.2d 435 (1978) (decided under former Code 1933, § 38-119).

When eyewitness to homicide, and to the vital incidents and circumstances leading up thereto, was present in court, and the plaintiff nevertheless relied entirely upon evidence of a weaker and inferior nature, consisting of secondary evidence in the form of testimony as to the declarations made by the defendant, and which were not altogether certain or clear as to their proper import, the court was altogether justified in giving in charge the principle of law set forth by the former statute. Blanchard v. Ogletree, 41 Ga. App. 4, 152 S.E. 116 (1929) (decided under former Civil Code 1910, § 5749).

Written offer. — When plaintiff failed to introduce in evidence written offer in plaintiff's possession to buy defendant's property, but instead relied on oral testimony to prove such offer, the court erred in refusing defendant's instruction on drawing adverse inference on party's omission to produce evidence within the defendant's reach to repel charge against the defendant. Steinmetz v. Draper-Owens Co., 71 Ga. App. 814, 32 S.E.2d 417 (1944) (decided under former Code 1933, § 38-119).

Destruction of driver's log book raised a presumption against truck company-employer that driver was compelled to drive with insufficient rest. J.B. Hunt Transport, Inc. v. Bentley, 207 Ga. App. 250, 427 S.E.2d 499 (1992) (decided under former O.C.G.A. § 24-2-2).

Witnesses listed on indictment. — When the state called as witnesses seven of the 11 persons whose names appeared on the indictment, and there was nothing in the record which disclosed that the other four witnessed the homicide or that those witnesses were present at the trial or even accessible to the state, no presumption unfavorable to the state would arise from a failure to introduce those

individuals as witnesses. Lucear v. State, 221 Ga. 572, 146 S.E.2d 316 (1965) (decided under former Code 1933, § 38-119).

Inability to question defense witnesses precludes judgment. — In a negligence action, the court erred in granting summary judgment before the plaintiff was able to question two key defense witnesses who avoided plaintiff's discovery attempts, but who filed affidavits in support of the defendant's motion. This judgment deprived the plaintiff of an opportunity to develop proof which may have well given rise to triable issues of fact, and also overlooked the rule that, when a party fails to produce evidence, the charge or claim against the party is presumed to be well founded. Shipley v. Handicaps Mobility Sys., 222 Ga. App. 101, 473 S.E.2d 533 (1996) (decided under former O.C.G.A. § 24-2-2).

In petition for custody, former husband's evidence charging the wife with misconduct and illicit relations with a named individual did not require the wife to procure from such individual a statement that the charge was not true. Waller v. Waller, 202 Ga. 535, 43 S.E.2d 535 (1947) (decided under former Code 1933, § 38-119).

In a products liability action, because defendant manufacturer failed to produce evidence as required under the notice to produce, it was not improper to allow the jury to make an adverse inference from the defendant's apparent initial attempt to hide evidence or avoid discovery. Uniroyal Goodrich Tire Co. v. Ford, 218 Ga. App. 248, 461 S.E.2d 877 (1995), aff'd, 276 Ga. 226, 476 S.E.2d 565 (1996) (decided under former O.C.G.A. § 24-4-22).

In a medical malpractice action, the court did not err in refusing to instruct the jury with regard to spoliation of evidence by the defendant physician since it was undisputed that the physician's chart was missing vital signs data for the 15-minute period during which the physician was attempting to provide the plaintiff's decedent with oxygen and that a monitor recorded this information, but the plaintiff did not point to any evidence which suggested what might have been proven with the missing data and, when questioned at trial, the plaintiff's medical expert acknowledged that when the expert reviewed the case and developed an opinion, the expert did not have any problem with the defendant's charting. Johnson v. Riverdale Anesthesia Assocs., P.C., 249 Ga. App. 152, 547 S.E.2d 347 (2001), aff'd, 275 Ga. 240, 563 S.E.2d 431, 2002 Ga. LEXIS 383 (2002) (decided under former O.C.G.A. § 24-4-22).

In a Dram Shop Act suit, given proof of spoliation under former O.C.G.A. § 24-4-22, the trial court erred in granting summary judgment to an injured party's guardian as the tavern's manager was aware of the potential for litigation and failed to preserve whatever videotaped evidence might have been captured as to whether one of the tavern's intoxicated patron's would soon be driving; hence, a rebuttable presumption arose against the tavern that the evidence destroyed would have been harmful to the tavern, rendering summary judgment inappropriate. Baxley v. Hakiel Indus., 282 Ga. 312, 647 S.E.2d 29 (2007) (decided under former O.C.G.A. § 24-4-22).

Workers' compensation. — When an employer in a workers' compensation action offers no evidence, and testimony of the employee further shows that the employer's doctors examined the employee and were fully conversant with the employee's physical condition, the presumption arises that if the employer had produced the doctors as witnesses, the doctors' testimony would have corroborated that of the employee. GMC v. Craig, 91 Ga. App. 239, 85 S.E.2d 441 (1954) (decided under former Code 1933, § 38-119).

When the defendant offered no testimony in defendant's own behalf in a workers' compensation case and failed to produce defendant's employment records although the plaintiff had issued a subpoena in an effort to obtain those records, a presumption adverse to the defendant was authorized. Hearing v. Johnson, 105 Ga. App. 408, 124 S.E.2d 655 (1962) (decided under former Code 1933, § 38-119).

Material witness in slip and fall case. — In a slip and fall case, after the defendant submitted an affidavit stating the store policy on sweeping, but did not

Illustrations (Cont'd)

submit affidavits from the employees who actually carried out the purported inspections and sweeping on the date in question, former O.C.G.A. § 24-4-22 allowed an inference to be drawn that the employees' testimony would show that the employees did have actual or constructive knowledge of the hazard but negligently refused to remove the hazard. Straughter v. J.H. Harvey Co., 232 Ga. App. 29, 500 S.E.2d 353 (1998) (decided under former O.C.G.A. § 24-4-22).

Recording over videotape justified sanction. — In a premises liability case brought by a customer against a retailer, the trial court did not exceed the court's authority in excluding testimony about a videotape sought to be admitted by the retailer that would have purportedly contradicted the customer's and the customer's parent's recollections of what had been recorded with regard to the customer being carjacked and shot in the retailer's parking lot as the retailer was on notice, or should have been aware, that the customer was contemplating litigation based on correspondence to the retailer. The retailer knew of the importance of the tape, which depicted the robbery; failed to follow the retailer's own policy as to retaining tapes for seven years; and the trial court was within the court's discretion to have been "disturbed" that the retailer destroyed the tape by having other recordings made on top of the recording of the incident. Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 659 S.E.2d 905 (2008) (decided under former O.C.G.A.§ 24-4-22).

E-mail equally available to both parties. — Permittee alleged the Environmental Protection Division of the Georgia Department of Natural Resources (EPD) violated former O.C.G.A. § 24-4-22 by intentionally destroying email correspondence between the permittee and EPD which was favorable to the former. As the permittee was equally in a position to produce the evidence since the alleged email exchange took place between the permittee and EPD, it was not prejudiced as a result of the alleged destruction of the evidence. Agri-Cycle LLC v. Couch, 284 Ga. 90, 663 S.E.2d 175 (2008) (decided under former O.C.G.A.§ 24-4-22).

Failure to report elevator accident. — Trial court erred in granting a directed verdict to a landlord in tenants' claims that the tenants were injured in a malfunctioning elevator. The landlord failed to report the incident and inspect the elevator as required by O.C.G.A. § 8-2-106, giving rise to the spoliation presumption under former O.C.G.A. § 24-4-22 that the evidence would have favored the tenants. Beach v. B.F. Saul Prop. Co., 303 Ga. App. 689, 694 S.E.2d 147 (2010) (decided under former O.C.G.A.§ 24-4-22).

Charging former provisions authorized in the following cases. — See Fountain v. Fuller E. Callaway Co., 144 Ga. 550, 87 S.E. 651 (1916) (decided under former Civil Code 1910, § 5749); Cocroft v. Cocroft, 158 Ga. 714, 124 S.E. 346 (1924) (decided under former Civil Code 1910, § 5749); Layfield v. O'Neill, 37 Ga. App. 265, 139 S.E. 924 (1927) (decided under former Civil Code 1910, § 5749); Murray v. Fitzgerald Convenient Ctrs., Inc., 239 Ga. App. 799, 521 S.E.2d 915 (1999) (decided under former O.C.G.A. § 24-4-22).

Sanction for spoliation of evidence was erroneous. — In a personal injury case, the trial court erred by imposing the most extreme sanction of striking the defendants' answer as a sanction for spoliation of evidence under former O.C.G.A. § 24-4-22 that included logbooks, data, and the results of an investigation. Because the plaintiff cited no evidence showing that the allegedly destroyed hard brake information was ever available and the defendants' provided expert testimony showing that the data was not available, the trial court relied on erroneous findings in fashioning the appropriate sanction. Sentry Select Ins. Co. v. Treadwell, 318 Ga. App. 844, 734 S.E.2d 818 (2012) (decided under former O.C.G.A. § 24-4-22).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 259 et seq.

Am. Jur. Proof of Facts. — Intentional Spoliation of Evidence, 18 POF3d 515.

C.J.S. — 31A C.J.S., Evidence, § 239.

ALR. — Validity of statute making concealment of or failure to produce books or papers presumptive evidence, 4 ALR 471.

Constitutionality of statutes or ordinances making one fact presumptive or prima facie evidence of another, 51 ALR 1139; 86 ALR 179; 162 ALR 495.

Adverse inference from failure of party to produce available witness or evidence, as affirmative or substantive proof, 70 ALR 1326.

Presumption of death as evidence, 115 ALR 404.

Presumption or inference from party's failure to produce witnesses within his control, as affected by his introduction of some evidence on the matter in question, 135 ALR 1375.

Presumption and burden of proof as regards continuance or revocation of will produced for probate, 165 ALR 1188.

Admissibility of evidence of party's refusal to permit examination or inspection of property or person, 175 ALR 234.

Relationship between party and witness as giving rise to or affecting presumption or inference from failure to produce or examine witness, 5 ALR2d 893.

Effect of presumption as evidence or upon burden of proof, where controverting evidence is introduced, 5 ALR3d 19.

Modern status of the rules against basing an inference upon an inference or a presumption upon a presumption, 5 ALR3d 100.

Hospital's liability for injuries sustained by patient as a result of restraints imposed on movement, 25 ALR3d 1450.

Propriety and prejudicial effect of comment or instruction by court with respect to party's refusal to permit introduction of privileged testimony, 34 ALR3d 775.

Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial—modern criminal cases, 76 ALR4th 812.

Adverse presumption or inference based on party's failure to produce or question examining doctor—modern cases, 77 ALR4th 463.

Adverse presumption or inference based on party's failure to produce or examine that party's attorney—modern cases, 78 ALR4th 571.

Adverse presumption or inference based on party's failure to produce or examine witness who was occupant of vehicle involved in accident—modern cases, 78 ALR4th 616.

Adverse presumption or inference based on party's failure to produce or examine spouse—modern cases, 79 ALR4th 694.

Adverse presumption or inference based on party's failure to produce or examine friend—modern cases, 79 ALR4th 779.

Adverse presumption or inference based on party's failure to produce or examine family member other than spouse—modern cases, 80 ALR4th 337.

Adverse presumption or inference based on state's failure to produce or examine law enforcement personnel — modern cases, 81 ALR4th 872.

Adverse presumption or inference based on party's failure to produce or examine transferor, transferee, broker, or other person allegedly involved in transaction at issue — modern cases, 81 ALR4th 939.

Effect of spoliation of evidence in tort actions other than product liability actions, 121 ALR5th 157.

Electronic spoliation of evidence, 3 ALR6th 13.

24-14-23. Presumption from failure to answer business letter.

In the ordinary course of business, when good faith requires an answer, it is the duty of the party receiving a letter from another to answer within a reasonable time. Otherwise, the party shall be pre-

sumed to admit the propriety of the acts mentioned in the letter of the party's correspondent and to adopt them. (Code 1981, § 24-14-23, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-4-23, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in McLendon v. Wilson, Callaway & Co., 52 Ga. 42 (1874) and Bray & Bro. v. Gunn, 53 Ga. 144 (1874).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5741, former Code 1933, § 38-120, and former O.C.G.A. § 24-4-23 are included in the annotations for this Code section.

Constitutionality. — For a statutory presumption to pass constitutional muster, it must be shown with "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980), aff'd in part and vacated in part on other grounds, 678 F.2d 511 (5th Cir. 1982), vacated, 463 U.S. 1222, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983) (remanded for further consideration in light of Jones v. United States, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983) (decisions under former Code 1933, § 38-120)).

Principle of former Code 1933, § 38-120 was the same as that expressed more generally in former Code 1933, § 38-409 (see now O.C.G.A. § 24-8-801): "acquiescence or silence, when the circumstances require an answer or denial or other conduct, may amount to an admission." Metropolitan Life Ins. Co. v. Shalloway, 151 F.2d 548 (5th Cir. 1945) (decisions under former Code 1933, § 38-120).

Former O.C.G.A. § 24-4-23 was applicable only when two parties have carried on mutual correspondence in reference to a particular matter, and one of the parties had written a letter to the other making statements concerning a subject of which the latter had knowledge, and which the latter would naturally deny if true. Defendants could not rely upon their unilateral actions to establish a mutual correspondence. Smith v. Freeport Kaolin Co., 687 F. Supp. 1550 (M.D. Ga. 1988) (decisions under former O.C.G.A. § 24-4-23).

Question was whether the evidence showed a due course of business as to warrant the application of former O.C.G.A. § 24-4-23; the phrase "due course of business" was construed to apply to those cases where two parties have carried on a mutual correspondence in reference to a particular matter, and one of the parties wrote a letter concerning a matter which the other would naturally deny if not true. Godwin v. Caldwell, 231 Ga. App. 523, 500 S.E.2d 49 (1998) (decisions under former O.C.G.A. § 24-4-23).

Rebuttable presumption of fact. — Presumption of this former statute was not an irrebuttable presumption of law, but one of fact, and the failure to reply was subject to explanation. Metropolitan Life Ins. Co. v. Shalloway, 151 F.2d 548 (5th Cir. 1945) (decisions under former Code 1933, § 38-120); Whitaker v. Paden, 78 Ga. App. 145, 50 S.E.2d 774 (1948) (decisions under former Code 1933, § 38-120); Georgia Health Care, Inc. v. Loeb, 151 Ga. App. 350, 259 S.E.2d 734 (1979) (decisions under former Code 1933, § 38-120).

Presumption arising from a failure to answer a letter was not a presumption of law, but one of fact, and subject to explanation. Godwin v. Caldwell, 231 Ga. App. 523, 500 S.E.2d 49 (1998) (decisions under former O.C.G.A. § 24-4-23).

Excuses for not answering. — Fact that plaintiff failed to answer a letter written to plaintiff by agent of an insurance company being in evidence, it was competent for plaintiff to explain why plaintiff did not answer, though a part of the explanation was that plaintiff's coun-

sel advised plaintiff not to answer. Travelers Ins. Co. v. Sheppard, 85 Ga. 751, 12 S.E. 18 (1890) (decisions under former law).

An exchange of several letters was not always necessary to establish mutual correspondence; thus, plaintiff contractor's letter which mentioned outstanding invoices and which followed two letters from defendant concerning problems with the contractor's product and requesting service was sent in the ordinary course of business and a charge under former O.C.G.A. § 24-4-23 was warranted. Crotts Enters., Inc. v. John Payne Co., 219 Ga. App. 173, 464 S.E.2d 844 (1995) (decisions under former O.C.G.A. § 24-4-23).

Silence regarding terms of agreement. — Physician had a duty and obligation to respond to limitations on the physician's privileges set forth in an agreement with a hospital, and when the physician silently exercised the privileges for several years, the physician waived the physician's right to insist on compliance with other procedural requirements pertaining to the physician's termination. St. Mary's Hosp. v. Cohen, 216 Ga. App. 761, 456 S.E.2d 79 (1995) (decisions under former O.C.G.A. § 24-4-23).

Construction of lease agreement. — When a lessee informed the lessor, by means of three annual letters, of the construction the lessee was placing on a provision of the lease agreement, and received no reply from the lessor, the lessor was precluded from relying on a different interpretation, since it was incumbent upon the lessor to advise the lessee that the lessor disagreed with the lessee's construction of the agreement. Wiggins v. Engelhard Minerals & Chems. Corp., 328 F. Supp. 33 (M.D. Ga. 1970), aff'd, 443 F.2d 1358 (5th Cir. 1971) (decisions under former Code 1933, § 38-120).

Settlement agreement. — Trial court erred in granting the insureds' motion to enforce a settlement agreement a parent and an administrator allegedly reached with an insurer because the insurer's tender was not sufficient to constitute acceptance of the settlement offer; the attorney for the mother and the administrator was not silent but stated the intent to consult with the parent and the administrator, the attorney committed to no deadline for responding, and the terms of the offer were in writing and equally known to all parties. Kitchens v. Ezell, 315 Ga. App. 444, 726 S.E.2d 461 (2012) (decisions under former O.C.G.A.§ 24-4-23).

Letter memorializing a conversation, to which recipient failed to respond, was admissible as an admission by silence. — Trial court did not err in allowing an attorney to read a letter memorializing a conversation between the attorney and a decedent because the out-of-court statement of the decedent referenced in the letter was admissible as an admission by silence of the executor when the attorney mailed a package containing closing documents to the executor, including a receipt the decedent had executed, and the executor mailed a check to the attorney based on the erroneous assumption that the executor needed to do so in order to pay off the advance that had been received and was referenced in the receipt; the attorney mailed the letter to the executor, returned the check, and set forth the conversation with the decedent concerning the intent behind the receipt, and the executor's failure to respond could be construed as an acquiescence to the construction of the receipt set forth in the letter. Jerkins v. Jerkins, 300 Ga. App. 703, 686 S.E.2d 324 (2009) (decisions under former O.C.G.A. § 24-4-23).

Instructions. — It was not error for the court to fail to give in charge to the jury the provisions of the former statute, there having been no timely written request of such instructions. White Crown Fruit Jar Co. v. Cox Co., 19 Ga. App. 195, 91 S.E. 245 (1917) (decisions under former Civil Code 1910, § 5741).

Trial court properly charged a jury regarding the former O.C.G.A. § 24-3-36 (see now O.C.G.A. § 24-8-801) evidentiary presumption arising from a limited liability company's (LLC's) agent's failure to reply to a corporation's invoices because the LLC admitted receiving some of the corporation's goods and services, only disputing the amount due, and the failure to respond to an invoice was not a declaration against the LLC's interest pursuant to O.C.G.A. § 10-6-64; in addi-

tion, the charge was supported by former O.C.G.A. § 24-4-23. Forrest Cambridge Apts., LLC v. Redi-Floors, Inc., 295 Ga. App. 840, 673 S.E.2d 318 (2009) (decisions under former O.C.G.A. § 24-4-23).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 815.

ALR. — Admissibility in favor of writer of unanswered letter not part of mutual correspondence, 8 ALR 1163; 34 ALR 560; 55 ALR 460.

Presumption as to delivery of letter from mailing other than at post office or in street letter box, 63 ALR 931.

Character and sufficiency of evidence to show that letter was mailed, 86 ALR 541.

Rebuttal of presumption of receipt of letter properly mailed and addressed, 91 ALR 161.

24-14-24. Presumption of occupancy of railroad right of way.

In any proceeding to establish a right, title, or interest in or to real property that is a part of a railroad right of way, including a right of ingress or egress, where such proceeding is based upon occupancy of the railroad right of way by a person or entity other than the railroad corporation or railroad company, there shall be a presumption that any such occupancy of the railroad right of way is with the permission of the railroad corporation or railroad company. Such presumption may be rebutted. (Code 1981, § 24-14-24, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-14-25. Presumption of payment of check.

(a) As used in this Code section:

(1) "Bank" means any person engaged in the business of banking and includes, in addition to a commercial bank, a savings and loan association, savings bank, or credit union.

(2) "Check" means a draft, other than a documentary draft, payable on demand and drawn on a bank, even though it is described by another term, such as "share draft" or "negotiable order of withdrawal."

(b) In any dispute concerning payment by means of a check, a duplicate of the check produced in accordance with Code Section 24-10-1003, together with the original bank statement that reflects payment of the check by the bank on which it was drawn or a duplicate thereof produced in the same manner, shall create a presumption that the check has been paid. (Code 1981, § 24-14-25, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-14-26. Estoppels defined; enumeration generally.

(a) Conclusive presumptions of law are termed estoppels; averments to the contrary of such presumptions shall not be allowed. Estoppels are not generally favored.

(b) Estoppels include presumptions in favor of:

(1) A record or judgment unreversed;

(2) The proper conduct of courts and judicial officers acting within their legitimate spheres;

(3) The proper conduct of other officers of the law after the lapse of time has rendered it dangerous to open the investigation of their acts in regard to mere formalities of the law;

(4) Ancient deeds and other instruments more than 30 years old, when they come from proper custody and possession has been held in accordance with them;

(5) Recitals in deeds, except payment of purchase money, as against a grantor, sui juris, acting in his or her own right, and his or her privies in estate, in blood, and in law;

(6) A landlord's title as against his or her tenant in possession;

(7) Solemn admissions made in judicio; or

(8) Admissions upon which other parties have acted, either to their own injury or to the benefit of the persons making the admissions.

Estoppels also include all similar cases where it would be more unjust and productive of evil to hear the truth than to forbear investigation. (Code 1981, § 24-14-26, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article on the effect of judicial estoppel on nolo contendere plea, see 13 Ga. L. Rev. 723 (1979).

JUDICIAL DECISIONS

Analysis

General Consideration
Estoppel by Judgment
Estoppel by Deed
Equitable Estoppel
1. Solemn Admissions in Judicio
2. Estoppel by Other Conduct

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3700, former Code 1873, § 3753, former Code 1882, § 3753, former Civil Code 1895, § 5150, former Civil Code 1910, § 5736, former Code 1933, § 38-114, and former

General Consideration (Cont'd)

O.C.G.A. § 24-4-24 are included in the annotations for this Code section.

An estoppel is a preclusion in law, which prevents a person from alleging or denying a fact, in consequence of the person's own previous act, allegation, or denial of a contrary tenor. Davis v. Collier & Beers, 13 Ga. 485 (1853) (decided under former law).

Presumptions of law are sometimes conclusive, and an averment to the contrary will not be allowed. These are termed estoppels. Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787 (1924) (decided under former Civil Code 1910, § 5736).

Difference between waiver and estoppel is slight but there is a difference. Boston Ins. Co. v. Barnes, 120 Ga. App. 585, 171 S.E.2d 626 (1969) (decided under former Code 1933, § 38-114).

Estoppels rarely resorted to. — Estoppels are never resorted to, except when it would be more unjust and more productive of evil to hear the truth than to forbear the investigation. Patterson v. Collier, 75 Ga. 419, 54 Am. R. 472 (1885) (decided under former Code 1882, § 3753); Globe & Rutgers Fire Ins. Co. v. Atlantic & Gulf Shipping Co., 51 Ga. App. 904, 181 S.E. 310 (1935) (decided under former Code 1933, § 38-114); Hollins v. State, 133 Ga. App. 183, 210 S.E.2d 354 (1974) (decided under former Code 1933, § 38-114).

Estoppels are not favored. Wilkinson & Wilson v. Thigpen, 71 Ga. 497 (1883) (decided under former Code 1882, § 3753); Corporation of Royal Exch. Assurance v. Franklin, 158 Ga. 644, 124 S.E. 172, 38 A.L.R. 626 (1924) (decided under former Civil Code 1910, § 5736); Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787 (1924) (decided under former Civil Code 1910, § 5736).

Essential ingredient of estoppel is detriment or prejudice to one who asserts the estoppel. There must be inducement to change one's position for the worse. United States v. Ferguson, 409 F. Supp. 393 (S.D. Ga. 1975), aff'd, 529 F.2d 999 (5th Cir. 1976) (decided under former Code 1933, § 38-114).

Reliance by invoking party. — In order to create an estoppel as authorized, the evidence must show that the party relying on such estoppel acted on the conduct of the opposite party to the relying party's detriment. Swift & Co. v. Hall, 94 Ga. App. 239, 94 S.E.2d 145 (1956) (decided under former Code 1933, § 38-114); State Farm Mut. Auto. Ins. Co. v. Penrow, 142 Ga. App. 463, 236 S.E.2d 275 (1977) (decided under former Code 1933, § 38-114).

Representation inducing injury. — An estoppel arises when one makes representations to another concerning a matter, about which the other acts to one's injury or to the benefit of the person making the representations. Gostin v. Scott, 80 Ga. App. 630, 56 S.E.2d 778 (1949) (decided under former Code 1933, § 38-114); Usry v. Hadden, 87 Ga. App. 710, 75 S.E.2d 275 (1953) (decided under former Code 1933, § 38-114); Walker v. Sutton, 222 Ga. App. 638, 476 S.E.2d 34 (1996) (decided under former O.C.G.A. § 24-4-24).

Good faith and reasonable diligence. — Since the whole doctrine of estoppel is a creature of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence; otherwise, no equity will arise in that party's favor. Bachrodt Realty Corp. v. Walker, 237 Ga. 696, 229 S.E.2d 455 (1976) (decided under former Code 1933, § 38-114).

Strangers not bound. — Estoppels must be mutual. Strangers can neither take advantage of, nor be bound by an estoppel. Its binding effect is between the immediate parties, their privies in blood, in law and by estate. Howard v. Perkins, 229 Ga. 279, 191 S.E.2d 46 (1972) (decided under former Code 1933, § 38-114).

Legislative act. — Party is not estopped from denying any fact which is recited in a legislative act. Dougherty v. Bethune, 7 Ga. 90 (1849) (decided under former Code 1933, § 38-114); Thornton v. Lane, 11 Ga. 459 (1852) (decided under former Code 1933, § 38-114).

Unconstitutional act. — As between individuals, when no question of the general welfare of society or public policy is involved, the principle of estoppel runs

throughout the law. Although an act be unconstitutional and void, it will operate as an estoppel upon the party applying for the estoppel, and procuring the estoppel's passage and accepting the estoppel's benefits. Christopher v. Christopher, 198 Ga. 361, 31 S.E.2d 818 (1944) (decided under former Code 1933, § 38-114).

Statute of frauds. — Summary judgment in favor of a psychiatrist in a consultant's breach of an oral contract claim was proper as the oral assumption by the psychiatrist of the debts of the medical practice that the psychiatrist purchased, including the consultant's fees, was barred by the Statute of Frauds, O.C.G.A. § 13-5-30(2), because it was not in writing; further, as it was conceded that the agreement was secondary in nature and not an original undertaking, claims that it was established pursuant to former O.C.G.A. § 24-4-24 lacked merit. Grumet v. Bunt, 279 Ga. App. 728, 632 S.E.2d 486 (2006) (decided under former O.C.G.A. § 24-4-24).

Waiver or estoppel defense is not available in a case involving only violations of Georgia and/or federal securities laws. Jones v. Miles, 656 F.2d 103 (5th Cir. 1981) (decided under former Code 1933, § 38-114).

Estoppel by Judgment

Scope of estoppel. — Doctrine of estoppel by judgment is applied only as to such matters within the scope of the pleadings in the previous litigation as necessarily had to be adjudicated in order for the previous judgment or decree to be rendered, or as to such matters within the scope of the pleadings as might or might not have been adjudicated, but which are shown by aliunde proof to have been actually litigated and determined. Slaughter v. Slaughter, 190 Ga. 229, 9 S.E.2d 70 (1940) (decided under former Code 1933, § 38-114); Mimms v. Sisk Decorating Co., 156 Ga. App. 572, 275 S.E.2d 148 (1980) (decided under former Code 1933, § 38-114).

Estoppel by judgment occurs only as to such matters as were necessarily or actually adjudicated in the former litigation. Greyhound Lines v. Cobb County, 523 F. Supp. 422 (N.D. Ga. 1981), aff'd, 681 F.2d 1327 (11th Cir. 1982) (decided under former O.C.G.A. § 24-14-26).

Res judicata and estoppel distinguished. — Under the doctrine of res judicata, whenever there has been a judgment by a court of competent jurisdiction in a former litigation between the same parties, based upon the same cause of action as a pending litigation, the litigants are bound to the extent of all matters put in issue or which under the rules of law might have been put in issue by the pleadings in the previous litigation. A somewhat different rule applies in regard to the doctrine of estoppel by judgment since the latter doctrine has reference to previous litigation between the same parties based upon a different cause of action. In the latter case, there is an estoppel by judgment only as to such matters as were necessarily or actually adjudicated in the former litigation; that is to say, there is an estoppel by judgment only as to such matters within the scope of the previous pleadings as necessarily had to be adjudicated in order for the previous judgment to be rendered, or as to such matters, within the scope of those pleadings, as might or might not have been adjudicated, but which are shown by aliunde proof to have been actually litigated and determined. Harvey v. Wright, 80 Ga. App. 232, 55 S.E.2d 835 (1949) (decided under former Code 1933, § 38-114).

To whom applicable. — Estoppels apply only as between parties and privies to the suit or litigation. Wilkinson & Wilson v. Thigpen, 71 Ga. 497 (1883) (decided under former Code 1882, § 3753).

Not binding on nonparty. — One who was physically present at a trial, but took no part therein, was not bound by a judgment in a case to which one was not a party. Calhoun v. Williamson, 76 Ga. App. 91, 45 S.E.2d 87 (1947) (decided under former Code 1933, § 38-114).

Validity of conviction and sentence. — There is a presumption in favor of the validity of a conviction and sentence imposed upon the accused and the burden of overcoming that presumption in a habeas corpus proceeding is on the accused. Cobb v. Dutton, 222 Ga. 11, 148 S.E.2d 399 (1966) (decided under former Code 1933, § 38-114); Dutton v. Parker, 222 Ga. 532,

Estoppel by Judgment (Cont'd)

150 S.E.2d 833 (1966) (decided under former Code 1933, § 38-114); Dutton v. Morris, 222 Ga. 595, 151 S.E.2d 125 (1966) (decided under former Code 1933, § 38-114); Beavers v. Smith, 227 Ga. 344, 180 S.E.2d 717 (1971) (decided under former Code 1933, § 38-114); Smith v. Brown, 228 Ga. 584, 187 S.E.2d 142 (1972) (decided under former Code 1933, § 38-114); Brown v. Holland, 228 Ga. 628, 187 S.E.2d 246 (1972) (decided under former Code 1933, § 38-114); Burton v. Caldwell, 228 Ga. 795, 187 S.E.2d 900 (1972) (decided under former Code 1933, § 38-114); Caldwell v. Beard, 232 Ga. 701, 208 S.E.2d 564 (1974) (decided under former Code 1933, § 38-114).

Absence of transcript on appeal. — When the defendant does not request that the transcript of evidence of the trial be sent up on appeal, the verdict and judgment are presumed to be valid. Hiller v. Culbreth, 139 Ga. App. 351, 228 S.E.2d 374 (1976) (decided under former Code 1933, § 38-114).

Criminal defendant's absence during trial. — Defendant's testimony that defendant was not present during defendant's trial but was in the judge's office was not sufficient to overcome the presumption in favor of the conviction as the able counsel representing the defendant may have with defendant's consent or in defendant's presence waived defendant's presence in the courtroom, which the defendant could have done; or the prisoner may have voluntarily absented oneself from the courtroom during the trial, in which case the defendant would not be allowed to take advantage of defendant's own laches. Dutton v. Morris, 222 Ga. 595, 151 S.E.2d 125 (1966) (decided under former Code 1933, § 38-114).

Burden of proof in habeas corpus proceeding. — Presumption can no longer be indulged that since there is a presumption in favor of the validity of a sentence, especially when based on a plea of guilty, the burden of overcoming this is upon the prisoner. Purvis v. Connell, 227 Ga. 764, 182 S.E.2d 892 (1971) (decided under former Code 1933, § 38-114).

Burden of proof. — When a judgment is relied on to establish an estoppel, the burden is on the party relying on the former judgment to prove that the judgment is valid, and that the particular matter in controversy was necessarily or actually determined in the former litigation. Hunter v. Associated Mtg. Cos., 183 Ga. 506, 188 S.E. 700 (1936) (decided under former Code 1933, § 38-114); Gormley v. Cleaveland, 187 Ga. 457, 200 S.E. 793 (1939) (decided under former Code 1933, § 38-114); South Am. Managers, Inc. v. Reeves, 220 Ga. 493, 140 S.E.2d 201 (1965) (decided under former Code 1933, § 38-114); Allen v. Smith, 223 Ga. 265, 154 S.E.2d 605 (1967) (decided under former Code 1933, § 38-114).

Admissibility of decree. — When a decree is offered in evidence to establish any particular state of facts, or as an adjudication upon the subject matter, such decree is admissible only when accompanied by the entire record of the suit in which the decree was rendered. Holcombe v. Jones, 197 Ga. 825, 30 S.E.2d 903 (1944) (decided under former Code 1933, § 38-114).

Recital in final order. — When the final order upon an appraiser's return recites that notice has been published "as required by law," and the entire record with respect to the year's support is on its face full and complete, the recital must be accepted as true, in the absence of aliunde evidence conclusively showing that it is in fact untrue. Southern Oldsmobile Co. v. Baker, 25 Ga. App. 580, 103 S.E. 826 (1920) (decided under former Civil Code 1910, § 5736).

Consent decree. — Decree made with the consent and at the instance of a party cannot be set aside by the party by bill of review, unless, by clerical error something has been inserted therein as by consent which had not been consented to. Murphy v. Mayor of Savannah, 73 Ga. 263 (1884) (decided under former Code 1882, § 3753).

Mandamus order. — Under the doctrine of estoppel by judgment, a mandamus order requiring the defendants to issue to the plaintiff a permit to operate taxicabs, which on review by the Supreme Court was affirmed, is conclusive against the defendants in a subsequent proceeding for contempt. Settle v. McWhorter, 203

Ga. 93, 45 S.E.2d 210 (1947) (decided under former Code 1933, § 38-114).

Workers' compensation. — Doctrines of res judicata and estoppel by judgment are applicable to awards of the State Board of Workers' Compensation on all questions of fact in matters in which the board has jurisdiction. Mimms v. Sisk Decorating Co., 156 Ga. App. 572, 275 S.E.2d 148 (1980) (decided under former Code 1933, § 38-114).

Rescission of contract of sale. — When the petition under consideration in the second suit arising from the same occurrence has already been held by the Court of Appeals on a previous appeal to state a cause of action for rescission of a contract of sale of a car based upon the fraud and deceit of the defendant, which judgment was not vacated, reversed, or modified and when the contents of the petition in the second suit are substantially the same as that of the previous action in which the plaintiff was nonsuited, it is error to dismiss the case on the ground that the plaintiff has made inconsistent elections as to the affirmance or repudiation of the contract in issue. McBurney v. Woodward, 86 Ga. App. 629, 72 S.E.2d 89 (1952) (decided under former Code 1933, § 38-114).

Name of firm. — Defendants were estopped from denying the character and name under which the defendants traded and obtained credit after judgment had been rendered against the defendants covering the transaction. Georgia Ice Co. v. Porter & Meakin, 70 Ga. 637 (1883) (decided under former Code 1882, § 3753).

Regularity of judicial proceedings. — There is a presumption in favor of the regularity and legality of all proceedings in the superior court. Johnson v. Cleveland, 131 Ga. App. 560, 206 S.E.2d 704 (1974) (decided under former Code 1933, § 38-114); Bennett v. Adel Banking Co., 144 Ga. App. 282, 241 S.E.2d 23 (1977) (decided under former Code 1933, § 38-114); Key v. State, 147 Ga. App. 800, 250 S.E.2d 527 (1978) (decided under former Code 1933, § 38-114).

Judicial officer acting legally. — Presumption of law is that a judicial officer, or court, has acted legally within the officer's proper sphere. Nashville, C. & St. L. Ry. v. Ham, 78 Ga. App. 403, 50 S.E.2d 831 (1948) (decided under former Code 1933, § 38-114).

Presumption of proper conduct of trial judge's duties. — In the absence of any evidence to the contrary, it is presumed that a trial judge's conduct in performing the judge's official duties was proper. Riggins v. State, 159 Ga. App. 791, 285 S.E.2d 579 (1981) (decided under former Code 1933, § 38-114).

Juror excused properly. — In the absence of any evidence in the record as to who actually excused a juror in question and whether the person who excused the juror was one of the two persons authorized to do so, it is presumed that the trial court and the court's officers performed their duties properly. Thomas v. State, 174 Ga. App. 560, 330 S.E.2d 777 (1985) (decided under former O.C.G.A. § 24-4-24).

Judgment supported by facts. — In reviewing judgments of the lower court, the Court of Appeals presumes that such order or judgment is supported by every fact essential to make it valid and binding. Pichulik v. Simpson, 123 Ga. App. 604, 181 S.E.2d 925 (1971) (decided under former Code 1933, § 38-114); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols, 138 Ga. App. 593, 226 S.E.2d 742 (1976) (decided under former Code 1933, § 38-114).

Ministerial acts by judicial officer. — There is a presumption in favor of the regularity and legality of all proceedings in the courts, but circumstances attending a purely ministerial act may be investigated, even though the person performing the act is a judicial officer. Vaughan v. Car Tapes, Inc., 135 Ga. App. 178, 217 S.E.2d 436 (1975) (decided under former Code 1933, § 38-114).

Rebuttable presumption. — Presumption in favor of the regularity of judgments and proper conduct of courts and judicial officers set forth in statute is rebuttable; the ordinary rules of evidence apply in such rebuttal. Balkcom v. Vickers, 220 Ga. 345, 138 S.E.2d 868 (1964), overruled on other grounds, Reed v. State, 291 Ga. 10, 727 S.E.2d 112 (2012) (decided under former Code 1933, § 38-114).

Estoppel by Deed

Estoppel cannot be basis of title to land. — Davis v. Auerbach, 78 Ga. App. 575, 51 S.E.2d 527 (1949) (decided under former Code 1933, § 38-114).

Although former prohibits O.C.G.A. § 24-4-24 prohibits a grantor from denying recitals contained within the grantor's deed, it was insufficient to establish title. Yaali, Ltd. v. Barnes & Noble, Inc., 269 Ga. 695, 506 S.E.2d 116 (1998) (decided under former O.C.G.A. § 24-4-24).

Parties bound. — Recitals in deeds bind not only the parties thereto, but their privies in estate. Atlanta Land & Loan Co. v. Haile, 106 Ga. 498, 32 S.E. 606 (1899) (decided under former Code 1882, § 3753); Wyley Loose Leaf Co. v. Bird, 159 Ga. 246, 125 S.E. 496 (1924) (decided under former Civil Code 1910, § 5736); Doe v. Newton, 171 Ga. 418, 156 S.E. 25 (1930) (decided under former Civil Code 1910, § 5736); Williams v. Harris, 207 Ga. 576, 63 S.E.2d 386 (1951) (decided under former Code 1933, § 38-114); Bell v. Studdard, 220 Ga. 756, 141 S.E.2d 536 (1965) (decided under former Code 1933, § 38-114).

Administrator bound. — When the grantor filed a sworn bill, alleging that the grantor made an instrument as a deed, and that the instrument was procured by fraud, and sought to have the instrument canceled or reformed, after the grantor's death, the grantor's administrator, who was made a party in the grantor's stead, was estopped from denying the character of the paper as a deed. Youngblood v. Youngblood, 74 Ga. 614 (1885) (decided under former Code 1882, § 3753).

Specificity of recital. — In order to create an estoppel, the recital in the deed must be specific, and an estoppel by a recital in a deed will not extend beyond the specific fact contained in the recital. Toland v. Brewster, 144 Ga. 236, 86 S.E. 1089 (1915) (decided under former Civil Code 1910, § 5736); Doe v. Newton, 171 Ga. 418, 156 S.E. 25 (1930) (decided under former Civil Code 1910, § 5736).

Conclusiveness of recital as to consideration. — When the statement in a deed as to its consideration is merely by way of recital, the actual consideration of the deed is subject to explanation; but if the consideration is referred to in the deed in such a way as to make it one of the terms or conditions of the contract, it cannot be varied by parol. Sikes v. Sikes, 162 Ga. 302, 133 S.E. 239 (1926) (decided under former Civil Code 1910, § 5736); Shapiro v. Steinberg, 179 Ga. 18, 175 S.E. 1 (1934) (decided under former Code 1933, § 38-114).

Recital of payment of the purchase-money in a deed or other contract does not estop the maker from denying the fact and proving the contrary. McCann v. Glynn Lumber Co., 199 Ga. 669, 34 S.E.2d 839 (1945) (decided under former Code 1933, § 38-114).

Recital of administrator. — Former statute would not allow an administrator to dispute the truth of a solemn recital contained in the administrator's deed that the property was exposed for sale and that the highest bid was a stated sum, and that the administrator held the property therefor. The administrator may deny that the administrator received the proceeds of the sale, but cannot deny the truth of the recital that the property was sold at public outcry for a stated sum. Gammage v. Perry, 29 Ga. App. 427, 116 S.E. 126 (1923) (decided under former Civil Code 1910, § 5736).

Collection of proceeds of sale by executrix. — An executrix who duly and legally advertises and sells the land of an estate and makes a deed thereto in accordance with the sale cannot avoid liability to the heirs or creditors of the estate by showing that the executrix did not in fact collect the proceeds of the sale. Carder v. Arundel Mtg. Co., 47 Ga. App. 309, 170 S.E. 312 (1933) (decided under former Civil Code 1910, § 5736).

Usurious note secured by deed. — One who makes a usurious note and secures the note's payment by executing a deed to realty, the usury not appearing upon the face of the papers is, as against another whom one induces to purchase the note by representing that it and the deed "are valid and all right" (the purchase being made in good faith and in ignorance of the usury), estopped from setting up the usury in the transaction. Henry v. McAllister, 99 Ga. 557, 26 S.E. 469 (1896) (decided under former Civil Code 1895, § 5150).

Restrictive covenants. — Plaintiff was not estopped by acquiescence from seeking to enjoin violations of restrictive covenants by defendants merely because the same covenants were previously violated by other and different parties, by more remote sales. Dooley v. Savannah Bank & Trust Co., 199 Ga. 353, 34 S.E.2d 522 (1945) (decided under former Code 1933, § 38-114).

Easement. — Grantee who accepts a deed to the property granted is estopped to deny the truth of a recital that the grantor had previously granted an easement or interest in the property to another person. Toland v. Brewster, 144 Ga. 236, 86 S.E. 1089 (1915) (decided under former Civil Code 1910, § 5736).

Reliance on plat. — When an owner of land sells a part of the land in lots for residential purposes, the sales being made with reference to a plat by which another part of the land is designated as a park, and when the purchasers in buying rely upon the plat, the seller is estopped from asserting a claim adverse to the right of the purchasers, or their assigns, to have the land restricted to use as a park and to share such use. Caffey v. Parris, 186 Ga. 303, 197 S.E. 898 (1938) (decided under former Code 1933, § 38-114).

Reacquisition of property. — When the grantor in a first security deed reacquired the property by purchasing the property at a sale under a power contained in such deed, a junior security deed made to another by the same grantor immediately attached as a first claim upon the property, and constituted an encumbrance thereon as against a subsequent grantee of such purchaser, notwithstanding the second security deed may show upon the deed's face that the deed is a junior deed. Federal Land Bank v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d 9 (1941) (decided under former Code 1933, § 38-114).

Mortgagee. — If claimant at time of execution of mortgage stated to the mortgagee that property belonged to her husband, the mortgagor, and he acted thereon in making the loan and taking the mortgage, she would be estopped from asserting her title to the property as against the plaintiff, the mortgagee. Tanner v. Tanner, 52 Ga. App. 460, 183 S.E. 666 (1936) (decided under former Code 1933, § 38-114).

Exception of interest in land contained in a deed is notice to the grantee and the grantee's successors. Brown v. Mathis, 201 Ga. 740, 41 S.E.2d 137 (1947) (decided under former Code 1933, § 38-114).

No title to easement defeated claim of title by estoppel. — Because at the time the appellee executed the deed to the appellant the appellee had no title to the easement which the appellee attempted to convey to appellant, the appellant's claim of title by estoppel was completely without merit. Elrod v. Elrod, 272 Ga. 188, 526 S.E.2d 339 (2000) (decided under former O.C.G.A. § 24-4-24).

Equitable Estoppel

1. Solemn Admissions in Judicio

Admission in judicio conclusively binding. — Solemn admission in judicio is, at least until withdrawn after notice, conclusively binding upon the parties thereto. Tribble v. State, 89 Ga. App. 593, 80 S.E.2d 711 (1954) (decided under former Code 1933, § 38-114); Spector v. Model Constr. Co., 95 Ga. App. 14, 96 S.E.2d 900 (1957) (decided under former Code 1933, § 38-114); State Farm Mut. Auto. Ins. Co. v. Anderson, 107 Ga. App. 348, 130 S.E.2d 144, cert. dismissed, 219 Ga. 211, 132 S.E.2d 556 (1963) (decided under former Code 1933, § 38-114); McDonald v. Hester, 115 Ga. App. 740, 155 S.E.2d 720 (1967) (decided under former Code 1933, § 38-114).

Daughter who admitted that assets she took from her grandmother still belonged to her grandmother was not allowed to subsequently claim that she received the assets as a loan, and the probate court properly denied the daughter's motion for an order requiring the grandmother's guardian to return assets the guardian seized from the daughter, based on the daughter's claim that she has a legal right to the property. In re McCool, 267 Ga. App. 445, 600 S.E.2d 403 (2004) (decided under former O.C.G.A. § 24-4-24).

Applicable to facts in particular case. — Admissions in judicio apply only

Equitable Estoppel (Cont'd)
1. Solemn Admissions in Judicio (Cont'd)

to facts in litigations in a particular case. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980) (decided under former Code 1933, § 38-114).

Inconsistent positions. — When a person has assumed a certain position in a litigation, and has succeeded in maintaining that position through a judgment or decision of the court, or through the acquiescence of the opposite party, to the detriment of that party, the person will not be permitted to assume a contrary position in a subsequent suit between the parties relating to the same subject-matter. Florence, Phillips & Co. v. Newsome, 26 Ga. App. 501, 106 S.E. 619 (1921) (decided under former Civil Code 1910, § 5736).

Testimony in case between other parties. — Admissions made in one suit do not estop a witness from testifying differently in a case between other parties. Wilkinson & Wilson v. Thigpen, 71 Ga. 497 (1883) (decided under former Code 1882, § 3753).

Admission in pleadings. — Party to a suit or proceeding will not be allowed to disprove an admission made in the party's pleadings, without withdrawing the pleading from the record. Duke v. Ayers, 163 Ga. 444, 136 S.E. 410 (1927) (decided under former Civil Code 1910, § 5736); Anderson v. Oakley, 133 Ga. App. 758, 212 S.E.2d 875 (1975) (decided under former Code 1933, § 38-114).

Admission not withdrawn. — Trial court properly granted a seller's motion for partial summary judgment, and denied the escrow agent's motion to dismiss, in the seller's suit to recover the earnest money deposited by the buyers as the buyers admitted in their answer that the buyers knew the identity and location of the property, and although the buyers later amended their answer to raise a Georgia Statute of Frauds, O.C.G.A. § 13-5-30, defense, the buyers never withdrew their admission, and the buyers and the escrow agent were bound by the admission; the admission constituted a solemn admission in judicio under former O.C.G.A. § 24-4-24(b)(7), and created a conclusive presumption of law under former § 24-4-24(a). Nhan v. Wellington Square, LLC, 263 Ga. App. 717, 589 S.E.2d 285 (2003) (decided under former O.C.G.A. § 24-4-24).

Admissions in forfeiture complaint. — District attorney was bound by an admission in judicio in a forfeiture complaint since the complaint admitted that the claimants were the purported owners or interest holders of real and personal property sought to be forfeited, and went on to recite the recordation of the book and page of the deed in the superior court clerk's records that listed claimants as owners of the property. Bell v. State, 234 Ga. App. 693, 507 S.E.2d 535 (1998) (decided under former O.C.G.A. § 24-4-24).

Civil Practice Act did not wipe out or destroy the law in Georgia to the effect that a party to an action is bound by material allegations made in the party's pleadings so long as the allegations remain in the party's pleadings, and the plaintiff's contradictory pleadings, if any, are to be construed in favor of the defendant. Anderson v. Oakley, 133 Ga. App. 758, 212 S.E.2d 875 (1975) (decided under former Code 1933, § 38-114).

Parties and privies bound. — Estoppels by admissions made in pleading apply only between parties and privies to the suit or litigation in which the admissions relied on as an estoppel were made. Murray County v. Pickering, 198 Ga. 354, 31 S.E.2d 722 (1944) (decided under former Code 1933, § 38-114).

Admissions contained in stricken plea may be introduced in evidence by the opposite party. Such admissions when thus made are to be taken as true, because the admissions are asserted by the party personally; and while the party may withdraw the admissions formally from the pleadings, the party cannot by a mere withdrawal avoid the effect of the admissions since the admissions may still be used as evidence against the party. Stallings v. Britt, 204 Ga. 250, 49 S.E.2d 517 (1948) (decided under former Code 1933, § 38-114).

Admission of prima facie case. — Defendant who in a plea has admitted a prima facie case in favor of the plaintiff for

the purpose of obtaining the opening and conclusion in the case cannot, after having failed to carry the burden thus assumed, make an amendment withdrawing such admission and thus preclude the plaintiff from the right to rely upon the admission contained in the original plea. Fisher v. George S. Jones Co., 108 Ga. 490, 34 S.E. 172 (1899) (decided under former Civil Code 1895, § 5150).

An agreed statement of facts entered into between the parties to an action for the purpose of dispensing with proof on some or all of the issues presented by the pleadings constitutes a solemn admission in judicio, and so long as the admission remains in the case, the admission is conclusive so as to preclude either party from introducing evidence to disprove or contradict the admission. United States Fid. & Guar. Co. v. Clarke, 187 Ga. 774, 2 S.E.2d 608 (1939) (decided under former Code 1933, § 38-114); State Farm Mut. Auto. Ins. Co. v. Anderson, 107 Ga. App. 348, 130 S.E.2d 144, cert. dismissed, 219 Ga. 211, 132 S.E.2d 556 (1963) (decided under former Code 1933, § 38-114); McDonald v. Hester, 115 Ga. App. 740, 155 S.E.2d 720 (1967) (decided under former Code 1933, § 38-114); Holland-America Line v. United Coops., 124 Ga. App. 375, 183 S.E.2d 620 (1971) (decided under former Code 1933, § 38-114).

Criminal defendant's agreed statement of facts. — In criminal cases, the defendant's agreed statement of facts upon which a case is to be tried constitutes a solemn admission in judicio and direct evidence of the fact stated. Tribble v. State, 89 Ga. App. 593, 80 S.E.2d 711 (1954) (decided under former Code 1933, § 38-114).

Defendant's stipulation to the elements of the criminal charge against defendant, including venue, reserving for appeal only the issue of the sufficiency of the search warrant affidavit, was conclusively binding upon defendant and waived defendant's right to raise the issue of venue on appeal. Sanders v. State, 252 Ga. App. 609, 556 S.E.2d 505 (2001) (decided under former O.C.G.A. § 24-4-24).

Repudiation of stipulations from former trial. — On a new trial of a case, either party may, as a matter of right, withdraw from and repudiate an agreed statement of facts had at the former trial, by giving proper and timely notice of such intended action to the opposite party, provided the opposite party has not been injured thereby. In such case, the agreed statement of facts is admissible in evidence against the party making the statement, in favor of the opposite party. It is not, however, absolutely binding and conclusive upon the party by whom the statement was signed, but it is that party's right to disprove, rebut, or explain any statement therein contained. United States Fid. & Guar. Co. v. Clarke, 187 Ga. 774, 2 S.E.2d 608 (1939) (decided under former Code 1933, § 38-114).

Statements of counsel during the trial of a case may be regarded as admissions in judicio. Gregory v. Star Enters., Inc., 122 Ga. App. 12, 176 S.E.2d 241 (1970) (decided under former Code 1933, § 38-114).

Alleged admission in judicio by investor's attorney in prior action that investor's note and agreement were enforceable did not harm investor's case as the investor presented evidence that the investor owed nothing under the note and agreement; also, the corporation could not rely on that admission since issue preclusion based upon admissions in judicio was based on the equitable doctrine of estoppel and the alleged statement was made in reliance on fraudulent representations made by the three individual principals to which equity did not apply. Kothari v. Patel, 262 Ga. App. 168, 585 S.E.2d 97 (2003) (decided under former O.C.G.A. § 24-4-24).

Suggestions of counsel. — If, in discussing a case, every suggestion or passing statement of each attorney touching what might be the effect of a deed, will, or other instrument would irrevocably fix that construction upon it, the courts might be much hampered in placing a proper judicial construction on the paper and might sometimes be compelled to construe the same clause in very conflicting ways, none of which might be the correct way. The eloquence of the advocate may sometimes soar a little without being weighted down with the fear of estoppel. Orkin Exterminating Co. v. Gill, 222 Ga.

Equitable Estoppel (Cont'd)
1. Solemn Admissions in Judicio (Cont'd)

760, 152 S.E.2d 411 (1966) (decided under former Code 1933, § 38-114).

Unfavorable testimony of party. — Party testifying in the party's own behalf is not entitled to a finding in the party's favor if that version of the party's testimony which is most unfavorable to the party shows that the party is not entitled to recover. Norair Eng'r Corp. v. Saint Joseph's Hosp., 147 Ga. App. 595, 249 S.E.2d 642 (1978) (decided under former Code 1933, § 38-114).

Confession. — Complete confession from the witness stand of participation in the crime provides more than sufficient evidence to convict. Jenkins v. State, 237 Ga. 493, 228 S.E.2d 877 (1976) (decided under former Code 1933, § 38-114).

Mandamus. — When in a mandamus proceeding plaintiffs in error took position that bill of exceptions was certified conditionally in order that the trial court might have jurisdiction to sign another certificate, plaintiffs are later estopped to contend that the certificate is unconditional. NAACP v. Williams, 98 Ga. App. 74, 104 S.E.2d 923 (1958), cert. denied, 359 U.S. 550, 79 S. Ct. 947, 3 L. Ed. 2d 1023 (1959) (decided under former Code 1933, § 38-114).

Condemnation. — Once the assessor has made the award in a condemnation proceeding the condemnor is estopped from taking a position contrary to its solemn admissions in judicio and dismissing the suit. Housing Auth. v. Mercer, 123 Ga. App. 38, 179 S.E.2d 275 (1970) (decided under former Code 1933, § 38-114).

Testimony of insured. — None of insured's testimony as to whether the nephew of the insured was covered by a motor vehicle policy at a time of the vehicle accident constituted an admission in judicio binding upon the insurer. Allstate Ins. Co. v. Sapp, 223 Ga. App. 443, 477 S.E.2d 869 (1996) (decided under former O.C.G.A. § 24-4-24).

2. Estoppel by Other Conduct

Elements. — In order to constitute estoppel by conduct, there must concur: first, a false representation or concealment of facts; second, it must be within the knowledge of the party making the one or concealing the other; third, the person affected thereby must be ignorant of the truth; fourth, the person seeking to influence the conduct of the other must act intentionally for that purpose; and, fifth, persons complaining shall have been induced to act by reason of such conduct of the other. Calhoun v. Williamson, 76 Ga. App. 91, 45 S.E.2d 87 (1947) (decided under former Code 1933, § 38-114).

Origin of estoppel in pais is found in the doctrine of equity that if a representation be made to another who deals upon the faith of the representation, the former must make the representation good if the former knew or was bound to know the representation to be false. Elliott v. Keith, 102 Ga. 117, 29 S.E. 155 (1897) (decided under former Civil Code 1895, § 5150); Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937) (decided under former Code 1933, § 38-114).

Basis of equitable estoppel is to promote the equity and justice of the individual case by preventing a party from asserting the party's rights under a general technical rule of law, when the party has so conducted oneself that it would be contrary to equity and good conscience for that party to allege and prove the truth. Davis v. Auerbach, 78 Ga. App. 575, 51 S.E.2d 527 (1949) (decided under former Code 1933, § 38-114).

Party invoking estoppel must show detriment and reliance. — One invoking the conduct of another as constituting an estoppel in pais must show that one has acted thereon to one's detriment, or has been hurt thereby, before one can successfully urge such conduct as an estoppel in pais. Tompkins v. Philips, 12 Ga. 52 (1852) (decided under former law); Gaither v. Gaither, 23 Ga. 521 (1857) (decided under former law); Rowe v. Sam Weichselbaum Co., 3 Ga. App. 504, 60 S.E. 275 (1908) (decided under former Civil Code 1895, § 5150); Hancock v. King, 133 Ga. 734, 66 S.E. 949 (1910) (decided under former Civil Code 1895, § 5150); Union Brokerage Co. v. Beall Bros., 30 Ga. App. 748, 119 S.E. 533 (1923) (decided under former Civil Code 1910, § 5736);

Kaufman v. Young, 32 Ga. App. 135, 122 S.E. 822 (1924) (decided under former Civil Code 1910, § 5736).

No creation of new right. — Operation of this principle is not direct so as to create a new right in the opposite party, but primarily indirect and negative against the party making the statement, precluding the party and the party's privies from denying the truth of the statement or basing a defense on the statement's untruth. Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787 (1924) (decided under former Civil Code 1910, § 5736); Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937) (decided under former Code 1933, § 38-114).

Estoppel cannot be waived. — While two contracting parties may agree that waivers must be in writing, there is no authority that holds the parties may agree that an estoppel may not arise against one or the other party if one's conduct is such as to amount to estoppel. Boston Ins. Co. v. Barnes, 120 Ga. App. 585, 171 S.E.2d 626 (1969) (decided under former Code 1933, § 38-114).

Pleading unnecessary. — While the general rule is that estoppel, to be relied on, must be pleaded yet there are well-recognized exceptions to this general rule. Thus, since it is unnecessary to file a replication, this rule does not apply when the plaintiff relies upon estoppel in order to defeat a defense raised by the defendant in the defendant's answer, and in such a case evidence in rebuttal of other evidence of the defendant is admissible for the plaintiff for the purpose of showing an estoppel, even though estoppel is not pleaded, nor, if the elements and facts of an estoppel are set out, is it necessary that the pleader should have used the word "estoppel." Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937) (decided under former Code 1933, § 38-114).

Estoppel is question for jury, unless it is unequivocally established. Tune v. Beeland, 131 Ga. 528, 62 S.E. 976 (1908) (decided under former Civil Code 1895, § 5150); Corporation of Royal Exch. Assurance v. Franklin, 158 Ga. 644, 124 S.E. 172, 38 ALR 626 (1924) (decided under former Civil Code 1910, § 5736); Calhoun v. Williamson, 76 Ga. App. 91, 45 S.E.2d 87 (1947) (decided under former Code 1933, § 38-114); Eiberger v. West, 247 Ga. 767, 281 S.E.2d 148 (1981) (decided under former Code 1933, § 38-114).

Estoppel is usually an issue of fact to be decided by the jury. Eiberger v. West, 247 Ga. 767, 281 S.E.2d 148 (1981) (decided under former Code 1933, § 38-114).

Changing reason for conduct after litigation begins. — Rule which prevents one who has given a reason for one's conduct and decision in a matter from placing one's conduct upon another and different ground after litigation has begun is but an application of the principle of estoppel in pais, and applies only when one's conduct has caused another to act respecting the matter to the injury and detriment of the latter, and when the latter would be placed at an inequitable disadvantage, should the former be allowed to rely upon a ground other than that first urged as a reason for one's conduct and decision in the matter. Globe & Rutgers Fire Ins. Co. v. Atlantic & Gulf Shipping Co., 51 Ga. App. 904, 181 S.E. 310 (1935) (decided under former Code 1933, § 38-114).

Silence. — When one under a duty to speak fails to do so, one is thereafter estopped to deny what one's silence imports. Cheek v. J. Allen Couch & Son Funeral Home, 125 Ga. App. 438, 187 S.E.2d 907 (1972) (decided under former Code 1933, § 38-114).

Estoppel of minor. — Admissions by one, upon which others have acted, either to their own injury or for the benefit of the person making the admissions, are deemed estoppels and even minors may be estopped by their admissions from denying the truth of the admissions, or by their silence when the circumstances call for a disclosure of their claims or their rights, provided the minor has arrived at those years of discretion when a fraudulent intent can be reasonably imputed to the minor; a married woman has no legal rights that can exempt her from this rule of law and justice; that is, the law of estoppel in pais. Wootten v. Braswell, 48 Ga. App. 312, 172 S.E. 679 (1934) (decided under former Code 1933, § 38-114).

Minority defense to contract. — Defendant is estopped from exercising one's

Equitable Estoppel (Cont'd)
2. Estoppel by Other Conduct (Cont'd)

privilege of avoiding a fair and reasonable contract upon the ground of defendant's minority at the time the agreement was made when it appears that the defendant has consumed the contract's irrestorable benefits; and when it appears that the plaintiff, dealing in good faith and being free from negligence was induced to act to plaintiff's injury by reason of the false and fraudulent representation of the defendant with respect to defendant's apparent majority. Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787 (1924) (decided under former Civil Code 1910, § 5736).

Existence or effect of contract. — Person may be estopped from questioning the existence or effect of a contract, the existence of which the person has asserted to the other party, to the person's own benefit or the injury of the other. Rieves v. Smith, 184 Ga. 657, 192 S.E. 372 (1937) (decided under former Code 1933, § 38-114).

Nonsuit by consent. — Party is estopped from complaint of the grant of the nonsuit when it appears, from the record, that a nonsuit was granted upon motion of the party's counsel. Patterson v. Sams, 2 Ga. App. 755, 59 S.E. 18 (1907) (decided under former Civil Code 1895, § 5150).

Validity of title to personalty. — False and fraudulent representations as to the validity of the title to personalty, acted on by another to that person's injury, will estop the maker of the representations from setting up title to the property. Roberts v. Davis, 72 Ga. 819 (1884) (decided under former Code 1882, § 3753).

Silence concerning purchase of chattel. — Mere silence by one who stands by and sees another make a gift to a third person of a chattel in which one has an interest will not alone estop one from asserting one's title against the donee. Hartz v. Hartz, 144 Ga. 98, 86 S.E. 220 (1915) (decided under former Civil Code 1910, § 5736).

Inducement to buy property. — One who by acts or declarations induces another to buy property, as the property of a third person, is thereby estopped from setting up title in themselves to that property; but to make such acts or declarations a bar, it should appear that the acts or declarations were known to the purchaser, and that the purchaser acted upon the acts or declarations, and not upon the purchaser's own knowledge or judgment. McCune v. McMichael, 29 Ga. 312 (1859) (decided under former Code 1882, § 3753).

Time of insisting on invalidity of instrument. — Though an instrument may be "absolutely void," this does not imply that there is no limit to the time within which its void character may be insisted upon. Truth is always precious, but it may become too late to assert it. It may be "more unjust and productive of more evil to hear the truth than to forbear the investigation". Sutton v. Aiken, 62 Ga. 733 (1879) (decided under former Code 1873, § 3753).

Acceptance of insurance premiums and placing the money in the general funds of the defendant insurer amounted to such an unconditional acceptance as to estop the defendant to contend that the insured's policy was not in force. Progressive Fire Ins. Co. v. Morrison, 72 Ga. App. 473, 34 S.E.2d 173 (1945) (decided under former Code 1933, § 38-114); Georgia Cas. & Sur. Co. v. Rainwater, 132 Ga. App. 170, 207 S.E.2d 610 (1974) (decided under former Code 1933, § 38-114).

Change in insurance policy. — Insurer may be estopped from relying on a provision in a policy that the agent or officer cannot waive or change the insurance unless by writing attached, when the agent consents to changes in the policy, but fails to make the writing. Corporation of Royal Exch. Assurance v. Franklin, 158 Ga. 644, 124 S.E. 172, 38 A.L.R. 626 (1924) (decided under former Civil Code 1910, § 5736).

Clause in insurance policy. — Insurer is estopped to deny coverage under a clause which provided that a lack of occupancy for more than 60 days would void coverage, since the insurer, through the insurer's agent, knew of the lack of occupancy when the building was first insured, and at all times thereafter. Boston Ins. Co. v. Barnes, 120 Ga. App. 585, 171

S.E.2d 626 (1969) (decided under former Code 1933, § 38-114).

Contesting amount of note. — Estoppel to contest the amount of a note does not result from paying part and obtaining an indefinite extension of time for payment of the balance. Long v. Lawson, 7 Ga. App. 460, 67 S.E. 123 (1910) (decided under former Civil Code 1895, § 5150).

Extension of time from holder of note. — Maker of promissory notes who obtained from the holder an extension of time for the payment of the principal due on each note and, as a consideration therefor, pays the interest due on each of the notes, was precluded thereby from setting up that the holder was not the owner thereof. Such agreement, it was true, did not change the real title to the notes, but it bared the maker from contesting the ownership with the holder. Yarbrough v. Seagraves, 47 Ga. App. 436, 170 S.E. 553 (1933) (decided under former Civil Code 1910, § 5736).

Estoppel can lie to bar defense of usury. Eiberger v. West, 247 Ga. 767, 281 S.E.2d 148 (1981) (decided under former Code 1933, § 38-114).

When note requiring usury was prepared by a borrower and presented to an unwary lender doctrine of estoppel was applicable. Eiberger v. West, 247 Ga. 767, 281 S.E.2d 148 (1981) (decided under former Code 1933, § 38-114).

Silence by guarantors at time of renewing of corporate obligations estops them as a matter of law from asserting defenses of which they then had knowledge. Citizens & S. Nat'l Bank v. Yeager Enters., 247 Ga. 797, 279 S.E.2d 674 (1981) (decided under former Code 1933, § 38-114).

Performance bond. — When there is no evidence that the makers of a performance bond acted on any conduct or declarations of the surety in releasing a third party from liability for the bond premium, the surety was not estopped from maintaining an action on an application signed by the makers whereby the makers obligated themselves to pay the premium on the bond. Loftis Plumbing & Heating Co. v. American Sur. Co., 74 Ga. App. 590, 40 S.E.2d 667 (1946) (decided under former Code 1933, § 38-114).

Sureties on government bond. — Sureties on county treasurer's bond are estopped from setting up by parol that the bond was delivered conditionally, the treasurer having a commission, and possession of the revenues in consequence of the bond. Lewis v. Board of Comm'rs, 70 Ga. 486 (1883) (decided under former Code 1882, § 3753).

Surety on bond to dissolve garnishment is estopped from denying that the garnishee had effects belonging to the defendants or that the garnishee was indebted to the defendants in a sum equal to the amount that might be recovered against the defendants. Nevin v. Fouche, 77 Ga. 47 (1886) (decided under former Code 1882, § 3753).

Delivery of assets to parties not entitled. — Delivery of assets to parties, who were not entitled, was, to that extent, a devastavit, and the party entitled is not estopped by the party's acts of consenting to the distribution, from claiming of the administrator the party's full rights as heir-at-law. Davis v. Bagley, 40 Ga. 181, 2 Am. R. 570 (1869) (decided under former Code 1868, § 3700).

When chattels are mistakenly delivered to the vendee of realty subsequent to the sale thereof upon the vendee's representation that the chattels were included in the sale, when in fact the chattels were not so included, such delivery is not a waiver of the rights of the plaintiff to a recovery of the chattels upon plaintiff's ascertainment of the true state of facts, nor is the plaintiff estopped thereby from asserting title to the personalty. Gostin v. Scott, 80 Ga. App. 630, 56 S.E.2d 778 (1949) (decided under former Code 1933, § 38-114).

Payment to general contractor. — When subcontractor and homeowner had an agreement subsequent to the original contract whereby subcontractor consented for homeowner to make payment for all work to the general contractor which payment was made, the subcontractor's action worked as an estoppel against the subcontractor. Hill v. Brooks, 133 Ga. App. 138, 210 S.E.2d 176 (1974) (decided under former Code 1933, § 38-114).

Violator of bylaw seeking benefit of bylaw. — One who borrows money from a

Equitable Estoppel (Cont'd)
2. Estoppel by Other Conduct (Cont'd)

building and loan association cannot set up, in defense to an action for the recovery of the money, that the loan was made in disregard of a bylaw prohibiting the making of loans to any persons other than those who have been members of the association for a stated period. Whatever may be the object of such a bylaw, one who obtains a benefit from a violation of the bylaw is estopped from taking any advantage of the fact that such violation occurred. Reynolds v. Georgia State Bldg. & Loan Ass'n, 102 Ga. 126, 29 S.E. 187 (1897) (decided under former Civil Code 1895, § 5150).

Sale for benefit of creditors. — Doctrine of estoppel would apply and forbid a dissatisfied creditor from in any manner interfering with or preventing the consummation of an agreement to turn a stock of goods over to a third person to sell for the benefit of creditors, to which one had been a consenting party. Stovall Co. v. Shepherd Co., 10 Ga. App. 498, 73 S.E. 761 (1912) (decided under former Civil Code 1910, § 5736).

Purchaser setting up invalidity of judicial sale. — In suit by a sheriff upon a bid at the sale of personalty, the bidder is estopped from setting up as a defense the invalidity of the sale when, after bidding off the property, the bidder was given possession of the property, and removed the property, so that the sheriff could not find the property to resell the property. McDonald v. Ellis, 17 Ga. App. 471, 87 S.E. 711 (1916) (decided under former Civil Code 1910, § 5736).

When year's support was set apart to a widow and minor children, and the widow, in order to obtain a loan upon the property, represented to the lender that she needed the loan as a support for herself and the children, and the loan was made upon the faith of such representation, and the lender was not negligent in failing to ascertain the truth, the lender is protected, and may enforce a security deed executed as a part of the transaction, whether or not the money was used, or was intended to be used, for a different purpose. Reynolds v. Baxter, 177 Ga. 849, 171 S.E. 706 (1933) (decided under former Code 1933, § 38-114).

Forfeiting dower. — While the right of dower is highly favored and carefully guarded by the courts, yet if the widow should practice fraud upon innocent purchasers, and induce them to become purchasers of land subject to her dower, under the impression that they were getting property free from such encumbrance, she would be estopped from setting up her right to dower in such land. Knox v. Higginbotham, 75 Ga. 699 (1885). (The right of dower is abolished. See O.C.G.A. § 53-1-1. See Code 1863, § 3676).

Purchase by wife on own account. — Admission by a wife that she is purchasing goods on her own account amounts to an estoppel; and, in a subsequent suit against her for the purchase price of the goods, it will preclude her from setting up the defense that it was the husband's debt. Wolff & Happ v. Hawes, 105 Ga. 153, 31 S.E. 425 (1898) (decided under former Civil Code 1895, § 5150).

Validity of election. — Although a constable, while occupying the constable's office and performing the duties thereof, entered as a candidate for the office in a void election and was defeated, this conduct would not estop the constable from attacking the validity of the election and claiming title to the office for the unexpired portion of the term for which the constable was elected and qualified at the regular election held two years previously. Motes v. Davis, 188 Ga. 682, 4 S.E.2d 597 (1939) (decided under former Code 1933, § 38-114).

Erroneous legal advice given by a person was not an "admission" within the meaning of the former statute, although such advice may have been acted upon to another's injury and to the benefit of the party giving it. This was especially true when it did not appear that the advice was given in bad faith or with intent to deceive or defraud. Lee v. Hill, 28 Ga. App. 312, 111 S.E. 211 (1922) (decided under former Civil Code 1910, § 5736).

Insufficient evidence of equitable estoppel. — Trial court did not err in awarding summary judgment to the State Medical Education Board, making a stu-

dent liable for both the amount of the scholarship received and attorney's fees as: (1) estoppels were unfavored under Georgia law; (2) the student came forward with no more than hearsay to support a claim that oral misrepresentations of fact were made regarding the scholarship; (3) the contract was not rescinded by either party; (4) no mutual mistake of fact was found; and (5) any impossibility in performing the contract was personal to the student. Calabro v. State Med. Educ. Bd., 283 Ga. App. 113, 640 S.E.2d 581 (2006) (decided under former O.C.G.A. § 24-4-24).

Court of appeals correctly reversed a trial court's grant of summary judgment to a driver and a corporation, which was based on a second driver's lack of diligence in serving the second driver's personal injury complaint in the driver's voluntarily dismissed original action because that driver was not equitably estopped from proceeding with the second driver's renewal action; the first driver and corporation did not allege an affirmative act of deception, and to the extent that the second driver had a duty to speak to them, it was to inform them of the lawsuit, but that duty was defined by the Georgia Code, which included the renewal statute, O.C.G.A. § 9-2-61. Robinson v. Boyd, 288 Ga. 53, 701 S.E.2d 165 (2010) (decided under former O.C.G.A. § 24-4-24).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, §§ 201, 219 et seq.

Am. Jur. Proof of Facts. — Equitable Adoption, 18 POF2d 531.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Estoppel and Waiver, § 4.

C.J.S. — 31A C.J.S., Evidence, §§ 183, 227.

ALR. — Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like, 9 ALR 634.

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like, 9 ALR 842.

Effect of filing affidavit of forgery against ancient deed, 18 ALR 908.

Rights and remedies of tenant who remains in possession of all or part of the premises against landlord for interfering with his possession or enjoyment, 20 ALR 1369; 28 ALR 1333; 64 ALR 900.

Dispensing with proof of proper custody as condition of admission of ancient document, 29 ALR 630.

Estoppel of mortgagor or seller to deny existence of property mortgaged or sold, 40 ALR 382.

Decree of divorce or pleadings or evidence in divorce suit as estoppel to deny marriage between the parties thereto, 45 ALR 925.

Waiver of or estoppel to assert lien by filing claim with or receiving dividend from assignee for creditors, 55 ALR 993.

Nature of conveyance or covenants which will create estoppel to assert after-acquired title or interest in real property, 58 ALR 345; 144 ALR 554.

Effect of intrusting another with stock certificate endorsed or assigned in blank to estop owner as against a bona fide purchaser or pledgee for value, 73 ALR 1405.

Estoppel by conduct during testator's life to dissent from or attack validity of will, 74 ALR 659.

Estoppel of one riparian owner to complain of diversion of water by another riparian owner, 74 ALR 1129.

Provision in sale contract to the effect that only conditions incorporated therein shall be binding, 75 ALR 1032; 127 ALR 132; 133 ALR 1360.

Estoppel by apparent acquiescence in or silence concerning improvements of real property to assert antagonistic title or interest, 76 ALR 304.

Estoppel of wife who permits record title to realty to remain in husband's name to assert her own title as against one extending credit to husband, 76 ALR 1501.

Waiver of, or estoppel to assert, debtor's exemption, by laches or delay, 82 ALR 648.

Right of a purchaser assuming a mortgage debt, with the authorization of the mortgagor, to set up usury in mortgage as a defense or rely upon it as a ground of relief in equity, 82 ALR 1153.

Estoppel by recitals in municipal bonds as to lawfulness of issue, 86 ALR 1057; 158 ALR 938.

Estoppel of municipal corporation or other political subdivision by recitals in its bonds to dispute their validity as affected by the character of the owner of bonds as an original holder or a transferee, 86 ALR 1129.

Distinction between judgment as bar to cause of action and as estoppel as to particular fact, 88 ALR 574.

Estoppel of municipality to deny that it gave its consent to street franchise, 89 ALR 619.

Rule of estoppel of tenant to deny landlord's title as applicable where landlord affirmatively asserts a title or interest beyond that essential to his right to create the tenancy, 89 ALR 1295.

Statement or estimate by mortgagee as to amount due or to become due, made to prospective purchaser or subsequent mortgagee of property, as basis of estoppel, 90 ALR 1432.

Voluntary payment or other relief by insurance carrier under Workmen's Compensation Act as estoppel to deny issuance of policy or that case is within coverage, 91 ALR 1530.

Estoppel by silence or delay, after knowledge, in disclosing forgery of guaranty, 96 ALR 379.

Personal liability of officer or his bond as affected by his failure to file return of his proceedings after seizing property under writ or process, 98 ALR 692.

Entrusting possession of securities to bank officer or employee who uses them to make a fraudulent showing of bank assets as estoppel of owner to reclaim them as against bank receivers, 100 ALR 679.

Estoppel to assert usury against innocent purchaser of usurious instrument, 110 ALR 451.

Acts done by executor or administrator in a representative capacity as estoppel in individual capacity, or vice versa, 110 ALR 599.

Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses, 111 ALR 742.

Reacquisition by mortgagor, or his grantee, of the title through foreclosure of first mortgage as affecting rights under a second mortgage to which the property was subject before the foreclosure, 111 ALR 1285.

Doctrine of election or estoppel as applicable as against beneficiary of will where provision for other beneficiary is invalid, not for reasons personal to former, but because of statute or public policy, 112 ALR 377.

Testimony or sworn statements in prior action or proceeding as basis of estoppel in favor of one not a party or privy thereto, 113 ALR 925.

Abandonment of appeal or right of appeal by commencement, or prosecution to judgment, of another action, 115 ALR 121.

Promissory estoppel, 115 ALR 152; 48 ALR2d 1069.

Tax exemption as affected by failure to claim or delay in claiming it for past years, 115 ALR 1484.

Judgment or order in connection with appointment of executor or administrator as res judicata, as law of the case, or as evidence, on questions other than the validity of the appointment, 119 ALR 594.

Conclusiveness of charter as regards character, kind, or purposes of corporation, 119 ALR 1012.

Judgment in action for personal injury or death as res judicata as to negligence or contributory negligence in subsequent action for death in same accident of person whose estate was represented by defendant in first action, 119 ALR 1469.

Pleading waiver, estoppel, and res judicata, 120 ALR 8.

Distinction between effect of fact to create presumption of further fact and its effect as prima facie evidence of the further fact in determining burden of proof and weight of evidence, 121 ALR 1078.

Estoppel as ground for holding defendant liable for negligence in conduct of business which appears to be his but which in fact belongs to another, 122 ALR 256.

Creditor's statement or assurance to debtor, not supported by a consideration, that payment need not be made at time due, as binding upon creditor by way of estoppel, 124 ALR 1248.

Doctrine of estoppel as applicable against one's right to hold a public office or his status as a public officer, 125 ALR 294.

Mistake as to date of lapse of policy in insurer's statement of reason for denial of claim under policy as affecting its right to insist upon lapse as defense, 125 ALR 1270.

Liability of one exercising the rights of an owner of realty for injuries due to its condition, as affected by want of legal title, 130 ALR 1525.

Waiver or estoppel predicated upon surviving partner's surrender of possession of partnership property to personal representative of deceased partner, 137 ALR 1024.

Estoppel to assert invalidity of decree of divorce for lack of domicil at divorce forum or failure to obtain jurisdiction of person of defendant, 140 ALR 914; 153 ALR 941; 175 ALR 538.

Estoppel of grantee or mortgagee as to amount of prior mortgage recited, 141 ALR 1184.

Ultimate fact, as distinguished from evidentiary fact, as regards effect of judgment as estoppel, 142 ALR 1243; 152 ALR 1193.

Falsity of representation or warranty as defense to action upon policy of insurance on life of infant, 143 ALR 331.

What amounts to waiver, estoppel, or loss of bank's right to set off depositor's indebtedness against deposit or to apply deposit upon indebtedness, 143 ALR 453.

Estoppel by silence or other conduct (other than failure to file) to assert against estate claim antedating decedent's death, 146 ALR 1179.

Estoppel of mechanic's lien claimant as predicable upon his representations to owner as to payment made to claimant by contractor or subcontractor, 155 ALR 350.

Estoppel of owner of tangible personal property who knowingly or voluntarily permits another to have possession of certificates or other evidences of title, endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge, or otherwise deal with, the property, 155 ALR 690.

Provision of life insurance policy limiting insurer's liability under specified conditions to return of premiums, as subject to waiver or estoppel by reason of agent's knowledge of breach of condition respecting insured's health, 163 ALR 691.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 ALR 1209.

Estoppel of intervenor to assert claim against original complainant, 166 ALR 911.

Construction and application of statute respecting estoppel of insurer where insured was examined by medical examiner, 172 ALR 143.

Right of tenant, as against landlord, to acquire or assert title based on foreclosure of lien or sale for tax or special assessment, 172 ALR 1181.

Acceptance by building or construction contractor of payments under his contract as a waiver of right of action upon implied warrant as to conditions affecting cost, 173 ALR 308.

Applicability of doctrine of estoppel against government and its governmental agencies, 1 ALR2d 338.

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 ALR2d 294.

Estoppel of mortgagee to contest the mortgagor's title, 11 ALR2d 1397.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 15 ALR2d 534.

Insurer's demand for additional or corrected proof of loss as waiver or estoppel as to right to assert contractual limitation provision, or as suspending running thereof, 15 ALR2d 955.

Conviction or acquittal as evidence of the facts on which it was based in civil action, 18 ALR2d 1287.

Estoppel of one selling or conveying property to dissolved or defunct corporation to deny its existence, 20 ALR2d 1084.

Renunciation of beneficial interest under inter vivos trust as condition of right to contest its validity, 21 ALR2d 1457.

Estoppel of United States, state, or political subdivision by deed or other instrument, 23 ALR2d 1419.

Estoppel to rely on statute of limitations, 24 ALR2d 1413.

Estoppel to contest will or attack its validity, 28 ALR2d 116.

Insurer's admission of liability, offers of settlement, negotiations, and the like, as waiver of, or estoppel to assert, contractual limitation provision, 29 ALR2d 636.

Insurer's admission of liability, offers of settlement, and negotiations for adjustment or settlement, as waiver of proof of property loss, 49 ALR2d 87.

Denial of liability as waiver of proofs of loss required by insurance policy, 49 ALR2d 161.

Presumption of consideration from revenue stamps on deed, 51 ALR2d 1004.

Estoppel by lease: effect of lessor's after-acquired title or interest during lease term, 51 ALR2d 1238.

Right to attack validity of statute, ordinance, or regulation relating to occupational or professional license as affected by applying for, or securing license, 65 ALR2d 660.

Estoppel of oil and gas lessee to deny lessor's title, 87 ALR2d 602.

Estoppel of one doing business with personal representative purporting to carry on decedent's business, to assert representative's personal liability, 3 ALR3d 757.

Modern status of doctrine of res judicata in criminal cases, 9 ALR3d 203.

Purchaser of real property as precluded from attacking validity of zoning regulations existing at the time of the purchase and affecting the purchased property, 17 ALR3d 743.

Judgment in action against seller or supplier of product as res judicata in action against manufacturer for injury from defective product, or vice versa, 34 ALR3d 518.

Liability of insurance agent, for exposure of insurer to liability, because of failure to cancel or reduce risk, 35 ALR3d 792.

Liability of insurance agent, for exposure of insurer to liability, because of failure to fully disclose or assess risk or to report issuance of policy, 35 ALR3d 821.

Liability of insurance agent, for exposure of insurer to liability, because of issuance of policy beyond authority or contrary to instructions, 35 ALR3d 907.

Judgment against parents in action for loss of minor's services as precluding minor's action for personal injuries, 41 ALR3d 536.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations, 45 ALR3d 630.

Delay caused by other litigation as estopping reliance on statute of limitations, 45 ALR3d 703.

Setting aside arbitration award on ground of interest or bias of arbitrators, 56 ALR3d 697.

Promissory estoppel as basis for avoidance of statute of frauds, 56 ALR3d 1037.

Automobile or motorcycle as necessary for infant, 56 ALR3d 1335.

Modern status of rules regarding materiality and effect of false statement by insurance applicant as to previous insurance cancellations or rejections, 66 ALR3d 749.

Modern status of law as to equitable adoption or adoption by estoppel, 97 ALR3d 347.

Estoppel of state or local government in tax matters, 21 ALR4th 573.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 ALR4th 1170.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder, 78 ALR4th 90.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 ALR5th 233.

Setting aside arbitration award on ground of interest or bias of arbitrators — commercial, business, or real estate transactions, 67 ALR5th 179.

24-14-27. Estoppel relating to real estate.

(a) Where an estoppel relates to the title to real estate, the party claiming to have been influenced by the other party's acts or declarations shall not only have been ignorant of the true title, but also ignorant of any convenient means of acquiring such knowledge.

(b) Where both parties have equal knowledge or equal means of obtaining the truth, there shall be no estoppel. (Code 1981, § 24-14-27, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-4-25, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decision in Wilkins v. McGhehee, 86 Ga. 764, 13 S.E. 84 (1891).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5151, former Civil Code 1910, § 5737, former Code 1933, § 38-115, and former O.C.G.A. § 24-4-25 are included in the annotations for this Code section.

In general. — Purchaser must be ignorant of the falsity of the alleged inducements and really act upon the inducements and not upon purchaser's own knowledge or judgment and have no convenient means of acquiring knowledge of title. Tune v. Beeland, 131 Ga. 528, 62 S.E. 976 (1908) (decided under former Civil Code 1895, § 5151); Stonecipher v. Kear, 131 Ga. 688, 63 S.E. 215, 127 Am. St. R. 248 (1908) (decided under former Civil Code 1895, § 5151); Wall v. Louisville & N.R.R., 143 Ga. 417, 85 S.E. 325 (1915) (decided under former Civil Code 1910, § 5737); Norman v. McMillan, 151 Ga. 363, 107 S.E. 325 (1921) (decided under former Civil Code 1910, § 5737); Jackson v. Lipham, 158 Ga. 557, 123 S.E. 887 (1924) (decided under former Civil Code 1910, § 5737).

Elements of estoppel. — In order to constitute estoppel by conduct, there must occur: (1) a false representation or concealment of facts; (2) it must be within the knowledge of the party making the one or concealing the other; (3) the person affected thereby must be ignorant of the truth; (4) the person seeking to influence the conduct of the other must act intentionally for that purpose; and (5) persons complaining shall have been induced to act by reason of such conduct of the other. Jones v. Tri-State Elec. Coop., 212 Ga. 577, 94 S.E.2d 497 (1956) (decided under former Code 1933, § 38-115).

Estoppels do not convey title in this state. Kennedy v. Hannans, 246 Ga. 55, 268 S.E.2d 646 (1980) (decided under former Code 1933, § 38-115).

Recovery of land. — If estoppel by acts or false declarations can in any case be the basis upon which to predicate the recovery of land, it fell clearly within the provisions of the former statute. Groover v. Simmons, 163 Ga. 778, 137 S.E. 237 (1927) (decided under former Civil Code 1910, § 5737).

Good faith and reasonable diligence. — Party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted in good faith and reasonable diligence; otherwise, no equity will arise in the party's favor. Travelodge Corp. v. Carwen Realty Co., 223 Ga. 821, 158 S.E.2d 378 (1967) (decided under former Code 1933, § 38-115).

Exercise of due diligence. — No estoppel defense is available when a party fails to exercise due diligence to obtain information concerning the title. Allen v. Bacon, 171 Ga. 479, 156 S.E. 20 (1930) (decided under former Civil Code 1910, § 5737).

No ignorance of true title. — When there was nothing in the evidence showing or tending to show that the defendant or any of its predecessors in title were ignorant of the true title when they purchased, the evidence failed to establish any estoppel which would preclude the plaintiff from asserting and recovering on plaintiff's legal title. Seaboard Air-Line Ry. v. Holliday, 165 Ga. 200, 140 S.E. 507 (1927) (decided under former Civil Code 1910, § 5737); Bank of Lenox v. Webb Naval Stores Co., 171 Ga. 464, 156 S.E. 30 (1930) (decided under former Civil Code 1910, § 5737).

Ignorance of true title. — Fact that a deed from a husband to his wife, under

which a wife claimed title, may have been based upon a valuable consideration and duly recorded would not necessarily prevent a subsequent purchaser, by security deed, from relying upon the principle of estoppel, if the subsequent purchaser was in fact ignorant of the true title. Roop Grocery Co. v. Gentry, 195 Ga. 736, 25 S.E.2d 705 (1943) (decided under former Code 1933, § 38-115).

Ignorance of adverse interest. — It must appear that the party to the deed was ignorant of the interest of the attesting witness. Duncan v. Beasley, 174 Ga. 28, 161 S.E. 829 (1931) (decided under former Civil Code 1910, § 5737).

No means of acquiring knowledge. — When the estoppel relates to real estate, it is essential to the application of the doctrine that the party claiming to have been influenced by the conduct of another was personally not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Bennett v. Davis, 201 Ga. 58, 39 S.E.2d 3 (1946) (decided under former Code 1933, § 38-115).

Means of knowing over extended period of time. — If a person having legal title to land, which fact the person does not know but has convenient means of knowing, and after a lapse of 27 years, during which time the person was under no legal disability, the person still has not learned the fact of the person's interest in the land, and in those circumstances the person induces one to buy the land from a third person by representations that the land is the property of such third person, the person's misrepresentations to the purchaser innocently made, coupled with the person's delay in ascertaining the truth, will amount to constructive fraud, and may be pleaded as an estoppel by the purchaser on the faith of the title of the person's vendor. Lanier v. Bryant, 180 Ga. 409, 179 S.E. 346 (1935) (decided under former Code 1933, § 38-115).

Equal means of knowledge. — Disclaimer of interest by a distributee, in ignorance, when the other party had equal means of knowledge, is no estoppel as to the distributee or the grantee. Peyton v. Stephens, 130 Ga. 338, 60 S.E. 563, 124 Am. St. R. 170 (1908) (decided under former Civil Code 1895, § 5151).

Contrary to a cotenant's contention, the cotenant's affidavit did not create an issue of fact as to whether heirs should have been estopped from challenging the cotenant's adverse possession claim relating to certain real estate; the cotenant had equal means to obtain the truth about the status of a probate case by which the cotenant claimed exclusive possession of the property at issue, and the consequences of letting the case languish. Ward v. Morgan, 280 Ga. 569, 629 S.E.2d 230 (2006) (decided under former O.C.G.A. § 24-4-25).

Prior recorded deed becomes constructive notice for subsequent purchasers and the holder of a prior recorded interest will not be subject to estoppel. Pressley v. Maxwell, 242 Ga. 360, 249 S.E.2d 49 (1978) (decided under former Code 1933, § 38-115).

Recorded deed as means of acquiring knowledge. — Recorded deed was not necessarily such "convenient means of acquiring knowledge" of title, within the contemplation of former Code 1933, § 38-115, as to abrogate the effect of former Code 1933, § 105-304 (see O.C.G.A. § 51-6-4) on one who remained silent while a third party represented to another that the third party owned certain property which in actuality belonged to the aphonic one. Anderson v. Manning, 221 Ga. 421, 144 S.E.2d 772 (1965) (decided under former Code 1933, § 38-115); Pressley v. Maxwell, 242 Ga. 360, 249 S.E.2d 49 (1978) (decided under former Code 1933, § 38-115).

Admission in favor of third person. — Admissions against one's title to land, and in favor of the title of a third person, will not be estopped in behalf of one to whom the admissions were not made, and who has merely heard of the admissions, it not appearing that the admissions were made for the purpose of being acted upon, or with any design or intention that the admissions should be acted upon. Randolph v. Merchants & Mechanics Banking & Loan Co., 181 Ga. 671, 183 S.E. 801 (1936) (decided under former Code 1933, § 38-115).

Agent's knowledge. — Estoppel did not result from an agent's knowledge

when a contract provided that knowledge must be brought directly to the principal by the opposite party. Sovereign Camp Woodmen of the World v. Griffin, 30 Ga. App. 217, 117 S.E. 261 (1923) (decided under former Civil Code 1910, § 5737).

Improvements. — One who has title to land and sees another who is in bona fide possession thereof place valuable improvements thereon, without giving notice of one's title, is not thereby subsequently estopped from asserting one's title. Owen v. Miller, 209 Ga. 875, 76 S.E.2d 772 (1953) (decided under former Code 1933, § 38-115).

Merely attesting deed will not work an estoppel. Duncan v. Beasley, 174 Ga. 28, 161 S.E. 829 (1931) (decided under former Civil Code 1910, § 5737).

Burden of proof rests upon the party asserting an estoppel to establish all the elements necessary to constitute an estoppel. Hartsfield Loan & Sav. Co. v. Garner, 184 Ga. 283, 191 S.E. 119 (1937) (decided under former Code 1933, § 38-115); Bennett v. Davis, 201 Ga. 58, 39 S.E.2d 3 (1946) (decided under former Code 1933, § 38-115).

Limitation on § 51-6-4. — Former Code 1933, § 36-115 limited former Code 1933, § 105-304 (see O.C.G.A. § 51-6-4) to purchasers without notice. Fuller v. Calhoun Nat'l Bank, 59 Ga. App. 419, 1 S.E.2d 86 (1939) (decided under former Code 1933, § 38-115).

Construction with § 51-6-4. — Principle stated in former Code 1933, § 105-304 (see O.C.G.A. § 51-6-4), did not depend for the principle's operation upon the existence or absence of mere constructive notice, nor would a recorded deed necessarily constitute a "convenient means of acquiring such knowledge," within the meaning of former Code 1933, § 38-115; this latter statute should have been construed in harmony with the former. Roop Grocery Co. v. Gentry, 195 Ga. 736, 25 S.E.2d 705 (1943).

RESEARCH REFERENCES

ALR. — Estoppel to assert title to real property by conduct subsequent to contract between third persons, 1 ALR 1482.

Estoppel of one not a party to a transaction involving real property by failure to disclose his interest in the property, 50 ALR 668.

Failure to record or delay in recording an instrument affecting real property as basis of estoppel in favor of creditors not directly within protection of recording Acts, 52 ALR 183.

Nature of conveyance or covenants which will create estoppel to assert after-acquired title or interest in real property, 58 ALR 345; 144 ALR 554.

Estoppel of one riparian owner to complain of diversion of water by another riparian owner, 74 ALR 1129.

Estoppel by apparent acquiescence in or silence concerning improvements of real property to assert antagonistic title or interest, 76 ALR 304.

Estoppel of wife who permits record title to realty to remain in husband's name to assert her own title as against one extending credit to husband, 76 ALR 1501.

Permitting record title to real property to stand in another's name as estopping owner to avail himself of statute or rule requiring authority to contract regarding real estate to be in writing, 78 ALR 588.

Right of a purchaser assuming a mortgage debt, with the authorization of the mortgagor, to set up usury in mortgage as a defense or rely upon it as a ground of relief in equity, 82 ALR 1153.

Rule of estoppel of tenant to deny landlord's title as applicable where landlord affirmatively asserts a title or interest beyond that essential to his right to create the tenancy, 89 ALR 1295.

Estoppel to question validity of proceedings extending boundaries of municipality, 101 ALR 581.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 ALR 1310.

Promissory estoppel, 115 ALR 152; 48 ALR2d 1069.

Estoppel of owner of tangible personal property who knowingly or voluntarily permits another to have possession of certificates or other evidences of title, endorsed in blank or otherwise showing

ownership in possessor, to deny latter's authority to sell, mortgage, pledge, or otherwise deal with, the property, 151 ALR 690.

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 ALR2d 294.

Renunciation of beneficial interest under inter vivos trust as condition of right to contest this validity, 21 ALR2d 1457.

Estoppel to rely on statute of limitations, 24 ALR2d 1413.

Estoppel of oil and gas lessee to deny lessor's title, 87 ALR2d 602.

Promissory estoppel as basis for avoidance of statute of frauds, 56 ALR3d 1037.

24-14-28. Trustees estopped to set up title adverse to trust.

Trustees and other representatives with custody of papers have ample opportunities to discover defects in the title of property in their care and shall be estopped from setting up title adverse to their trust. (Code 1981, § 24-14-28, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-4-26, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decisions in Benjamin v. Gill, 45 Ga. 110 (1872) and Allen v. Solomon, 54 Ga. 483 (1875).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5153, former Civil Code 1910, § 5739, former Code 1933, § 38-117, and former O.C.G.A. § 24-4-26 are included in the annotations for this Code section.

Executors. — When the plaintiff maintained a suit for specific performance of the contract alleged, in which plaintiff sought to have decreed in oneself title to the entire property owned by plaintiff's testatrix at the time of the testatrix's death, and devised by the testatrix and given to the executor (plaintiff) and other beneficiaries, it was held that plaintiff was estopped on the ground that plaintiff had the will probated and qualified as executor, and continued in the office of executor for two years, during which time plaintiff had discharged the duties of plaintiff's office and had paid out large sums of money; this conduct being inconsistent with plaintiff's claim of title to the entire estate of plaintiff's testatrix. Hardeman v. Ellis, 162 Ga. 664, 135 S.E. 195 (1926) (decided under former Civil Code 1910, § 5739); Scoggins v. Strickland, 265 Ga. 417, 456 S.E.2d 208 (1995) (decided under former O.C.G.A. § 24-4-26).

Multiple executors. — Rule which prohibits a person from suing oneself does not apply when there are two or more executors. Spratlin v. Spratlin, 216 Ga. 27, 114 S.E.2d 370 (1960) (decided under former Code 1933, § 38-117).

Ownership in estate. — When ownership was once shown to be in an estate, the executor cannot acquire title by adverse holding by reason of the former statute. Dozier v. McWhorter, 117 Ga. 786, 45 S.E. 61 (1903) (decided under former Civil Code 1895, § 5153).

Claim anterior to appointment. — Administrator who sold property at public outcry, executing a deed, and signing as administrator was estopped from setting up any title or interest, based upon a claim anterior to the administrator's appointment. Gammage v. Perry, 29 Ga. App. 427, 116 S.E. 126 (1923) (decided under former Civil Code 1910, § 5739).

Title not vested. — Rule of estoppel against an administrator does not operate if the legal title to land in controversy was not vested in the decedent at the time of death. Crummey v. Crummey, 190 Ga.

774, 10 S.E.2d 859 (1940) (decided under former Code 1933, § 38-117).

Mistake of law. — When claimant contended that the former statute should not be applied because claimant did not know at the time claimant was appointed administrator that claimant had title to the land, and testified that the claimant believed that when the claimant lost the claimant's deed the claimant's title had been killed, the claimant acted with full knowledge of the facts, but under a mistake of law as to the claimant's legal rights; such testimony was not sufficient to demand a finding that the claimant was not estopped under the former statute. Wright v. Thompson, 190 Ga. 173, 8 S.E.2d 640 (1940) (decided under former Code 1933, § 38-117).

Claim not setting up title. — There is nothing inimical in the principle that an heir, next of kin, or creditor is favored in the appointment of an administrator, and is not precluded from receiving proper share or claim from the assets of the estate, since such a claim does not have the legal effect of setting up a "title adverse to their trust." Crummey v. Crummey, 190 Ga. 774, 10 S.E.2d 859 (1940) (decided under former Code 1933, § 38-117).

Guardian. — Law will not permit a guardian to act in such way that the guardian's own personal interest may come in conflict with the interest of the guardian's ward with respect to the estate of the latter in the guardian's charge. Allen v. Wade, 203 Ga. 753, 48 S.E.2d 538 (1948) (decided under former Code 1933, § 38-117).

Trustee of corporations. — Principles apply to a trustee holding choses in action for a corporation. Caswell v. Vanderbilt, 35 Ga. App. 34, 132 S.E. 123 (1926) (decided under former Civil Code 1910, § 5739).

Inconsistent positions. — When one is in a situation in which one may elect between two inconsistent positions or proceedings, the choice of one's position or proceeding must be made before bringing suit. One cannot bring either action without selecting and determining to accept and occupy a position consistent with that action or position and inconsistent with the other. Spratlin v. Spratlin, 216 Ga. 27, 114 S.E.2d 370 (1960) (decided under former Code 1933, § 38-117).

RESEARCH REFERENCES

ALR. — Acts done by executor or administrator in a representative capacity as estoppel in individual capacity, or vice versa, 110 ALR 599.

Action by employee in reliance on employment contract which violates statute of frauds as rendering contract enforceable, 54 ALR3d 715.

24-14-29. Equitable estoppel.

In order for an equitable estoppel to arise, there shall generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by which another has been misled to his or her injury. (Code 1981, § 24-14-29, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-4-27, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decision in Wilkins v. McGhehee, 86 Ga. 764, 13 S.E. 84 (1891).

Law reviews. — For article, "The Legislative Process in Georgia Local Government Law," see 5 Ga. L. Rev. 1 (1971). For article, "Promissory Estoppel and the Georgia Statute of Frauds," see 15 Ga. L. Rev. 204 (1980).

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General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 5152, former Civil Code 1910, § 5738, former Code 1933, § 38-116, and former O.C.G.A. § 24-4-27 are included in the annotations for this Code section.

Elements. — In order to constitute estoppel by conduct, there must concur: (1) a false representation or concealment of facts; (2) it must be within the knowledge of the party making the one or concealing the other; (3) the person affected thereby must be ignorant of the truth; (4) the person seeking to influence the conduct of the other must act intentionally for that purpose; and (5) persons complaining shall have been induced to act by reason of such conduct of the other. Harris v. Abney, 208 Ga. 518, 67 S.E.2d 724 (1951) (decided under former Code 1933, § 38-116); Cobb County Rural Elec. Membership Corp. v. Board of Lights & Water Works, 211 Ga. 535, 87 S.E.2d 80 (1955) (decided under former Code 1933, § 38-116); Jones v. Tri-State Elec. Coop., 212 Ga. 577, 94 S.E.2d 497 (1956) (decided under former Code 1933, § 38-116).

Function of estoppel. — Estoppel may be used to prevent a party from denying at the time of litigation a representation that was made by that party and accepted and reasonably acted upon by another party with detrimental results to the party that acted thereon. Sabin Meyer Regional Sales Corp. v. Citizens Bank, 502 F. Supp. 557 (N.D. Ga. 1980) (decided under former Code 1933, § 38-116).

Estoppels are not favored by Georgia law. Cobb County Rural Elec. Membership Corp. v. Board of Lights & Water Works, 211 Ga. 535, 87 S.E.2d 80 (1955) (decided under former Code 1933, § 38-116).

Estoppels are rarely resorted to, except when it would be more unjust and more productive of evil to hear the truth than to forbear the investigation. Globe & Rutgers Fire Ins. Co. v. Atlantic & Gulf Shipping Co., 51 Ga. App. 904, 181 S.E. 310 (1935) (decided under former Code 1933, § 38-116).

Estoppel does not create new rights. — Doctrines of estoppel are primarily negative in their operation against the party making the statement or admission, rather than creative of any new rights in the opposite party. Sabin Meyer Regional Sales Corp. v. Citizens Bank, 502 F. Supp. 557 (N.D. Ga. 1980) (decided under former Code 1933, § 38-116).

Existing rights. — Estoppel in pais operates only upon existing rights, not upon rights subsequently acquired. Atlantic C.L.R.R. v. Williams, 50 Ga. App. 726, 179 S.E. 136 (1934) (decided under former Code 1933, § 38-116); Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800 (1978) (decided under former Code 1933, § 38-116).

Estoppel cannot legalize or vitalize that which the law declares unlawful and void. Macon Ambulance Serv., Inc. v. Snow Properties, Inc., 218 Ga. 262, 127 S.E.2d 598 (1962) (decided under former Code 1933, § 38-116).

Existing cause of action required. — Without some proper legal cause of action, establishing all the elements of equitable estoppel will not entitle plaintiff to relief. Sabin Meyer Regional Sales Corp. v. Citizens Bank, 502 F. Supp. 557 (N.D. Ga. 1980) (decided under former Code 1933, § 38-116).

Conduct of party. — Equitable estoppel arises from the conduct of a party, using the word "conduct" in the term's broadest meaning as including that party's spoken words, the party's positive acts, and the party's silence when there is a duty to speak, and proceeds on the consideration that the author of misfortune shall not personally escape the consequences and cast the burden on another. Accordingly, it holds a person to a repre-

sentation made or position assumed where otherwise inequitable consequences would result to another who, having the right to do so, under all the circumstances of the case, has in good faith relied thereon and been misled, to that person's injury. McArthur v. Southern Airways, Inc., 404 F. Supp. 508 (N.D. Ga. 1975), vacated on other grounds, 569 F.2d 276 (5th Cir. 1978) (decided under former Code 1933, § 38-116).

Contrary to equity and good conscience. — Equitable estoppel is an established principle of Georgia law and arises when a party has so acted that the party has by the party's conduct either gained some advantage for the party or caused some disadvantage to another by reason of which it would be contrary to equity and good conscience to permit the party to allege and prove the truth. A.S. Int'l Corp. v. Salem Carpet Mills, Inc., 441 F. Supp. 125 (N.D. Ga. 1977) (decided under former Code 1933, § 38-116).

Estoppel in pais. — Doctrine of estoppel in pais proceeds wholly on the theory that the party to be estopped has, by the party's declarations or conduct, misled another to the party's prejudice, so that it would be a fraud upon the party to allow the true state of the facts to be proved. Gainesville Glass Co. v. Don Hammond, Inc., 157 Ga. App. 640, 278 S.E.2d 182 (1981) (decided under former Code 1933, § 38-116).

No equitable estoppel arises when no harm or disadvantage is presented as injury is essential for an equitable estoppel. Blackburn v. Blackburn, 168 Ga. App. 66, 308 S.E.2d 193 (1983) (decided under former Code 1933, § 38-116).

Inducement and injury. — To assert an estoppel in pais one must show that one has lost or the other party gained something which makes it unjust for the latter to insist upon preexistent rights. There must be inducement by which one changes one's position for the worse. Injury is its essence. Meeks v. Adams La. Co., 49 F. Supp. 489 (S.D. Ga. 1943), modified sub nom., Meeks v. Taylor, 138 F.2d 458 (5th Cir. 1943), cert. denied, 321 U.S. 773, 64 S. Ct. 611, 88 L. Ed. 1067 (1944) (decided under former Code 1933, § 38-116).

Inducement to forego valuable right. — When a party by making an invalid agreement or promise induces another to forego a valuable legal right, one waives and is estopped to deny the right of the promisee to have the agreement carried out or the promise fulfilled. Pethel v. Waters, 220 Ga. 543, 140 S.E.2d 252 (1965) (decided under former Code 1933, § 38-116).

Injury or disadvantage. — When in a case no facts appear from which it can be said that a party has been injured or placed at any disadvantage by the conduct of the party allegedly estopped, no estoppel resulted therefrom. City of Atlanta v. Anglin, 209 Ga. 170, 71 S.E.2d 419, appeal dismissed, 344 U.S. 870, 73 S. Ct. 169, 97 L. Ed. 675 (1952) (decided under former Code 1933, § 38-116).

Changing reason for conduct. — Rule which prevents one who has given a reason for one's conduct and decision in a matter from placing one's conduct upon another and different ground after litigation has begun is but an application of the principle of estoppel in pais, and applies only where one's conduct has caused another to act respecting the matter to the injury and detriment of the latter, and if the latter would be placed at an inequitable disadvantage, should the former be allowed to rely upon a ground other than that first urged as a reason for one's conduct and decision in the matter. Globe & Rutgers Fire Ins. Co. v. Atlantic & Gulf Shipping Co., 51 Ga. App. 904, 181 S.E. 310 (1935) (decided under former Code 1933, § 38-116).

Good faith and reasonable diligence. — Party seeking the benefit of estoppel must not only have been free from fraud, but must have acted in good faith and reasonable diligence; otherwise no equity will arise in that party's favor. Tybrisa Co. v. Tybeeland, Inc., 220 Ga. 442, 139 S.E.2d 302 (1964) (decided under former Code 1933, § 38-116); Travelodge Corp. v. Carwen Realty Co., 223 Ga. 821, 158 S.E.2d 378 (1967) (decided under former Code 1933, § 38-116); Whitco Produce Co. v. Bonanza Int'l, Inc., 154 Ga. App. 92, 267 S.E.2d 627 (1980) (decided under former Code 1933, § 38-116).

Reliance. — Party claiming estoppel must have relied and acted upon declara-

General Consideration (Cont'd)

tions or conduct of the other party and not on one's own knowledge or judgment. Tybrisa Co. v. Tybeeland, Inc., 220 Ga. 442, 139 S.E.2d 302 (1964) (decided under former Code 1933, § 38-116).

Doctrine of estoppel by representation is ordinarily applicable only to representations as to facts either past or present, and not to promises concerning the future which, if binding at all, must be binding as contracts. Gainesville Glass Co. v. Don Hammond, Inc., 157 Ga. App. 640, 278 S.E.2d 182 (1981) (decided under former Code 1933, § 38-116).

Representation to invoking party. — General rule is that for an estoppel by misrepresentation to arise the false representation must be made to the person seeking the benefit of the estoppel or intended for communication to that person. James Talcott, Inc. v. Carder, 300 F.2d 654 (5th Cir. 1962) (decided under former Code 1933, § 38-116).

Contract by estoppel presupposes that one party has a defense to imposition of contractual liability but, by reason of one's conduct, is estopped to assert it. Gainesville Glass Co. v. Don Hammond, Inc., 157 Ga. App. 640, 278 S.E.2d 182 (1981) (decided under former Code 1933, § 38-116).

Equal knowledge or means of knowing truth. — There is no estoppel by conduct when both parties have equal knowledge or equal means of obtaining the truth. Gay v. Laurens County, 213 Ga. 518, 100 S.E.2d 271 (1957) (decided under former Code 1933, § 38-116); Yancey Bros. Co. v. Dehco, Inc., 108 Ga. App. 875, 134 S.E.2d 828 (1964) (decided under former Code 1933, § 38-116); Tybrisa Co. v. Tybeeland, Inc., 220 Ga. 442, 139 S.E.2d 302 (1964) (decided under former Code 1933, § 38-116).

Duty to speak. — In cases of estoppel through silence there must be not only the right but the duty to speak before failure to do so can operate as an estoppel. Tybrisa Co. v. Tybeeland, Inc., 220 Ga. 442, 139 S.E.2d 302 (1964) (decided under former Code 1933, § 38-116).

Testimony of party at second trial. — In a second trial of a case, a party is not estopped to give testimony at the second trial which is different from the party's testimony given at the first trial. Central of Ga. Ry. v. Brower, 106 Ga. App. 340, 127 S.E.2d 33, rev'd on other grounds, 218 Ga. 525, 128 S.E.2d 926 (1962) (decided under former Code 1933, § 38-116).

Burden of proof rests upon the party asserting an estoppel to establish all the elements necessary to constitute an estoppel. Hartsfield Loan & Sav. Co. v. Garner, 184 Ga. 283, 191 S.E. 119 (1937) (decided under former Code 1933, § 38-116); Bennett v. Davis, 201 Ga. 58, 39 S.E.2d 3 (1946) (decided under former Code 1933, § 38-116).

Burden of pleading. — In order for an estoppel to be proved, it must be properly pleaded; a defendant who relies upon equitable estoppel must set up the same by answer in the suit of one's adversary. Citizens & S. Bank v. Barron, 181 Ga. 351, 181 S.E. 859 (1935) (decided under former Code 1933, § 38-116); Hartsfield Loan & Sav. Co. v. Garner, 184 Ga. 283, 191 S.E. 119 (1937) (decided under former Code 1933, § 38-116).

Pleading concealment of facts. — It is not error for the trial court to strike the plaintiff in error's plea of estoppel when there is no allegation showing a concealment of facts which resulted in the party asserting the estoppel acting to one's detriment. Beeland v. Alston, 101 Ga. App. 584, 114 S.E.2d 545 (1960) (decided under former Code 1933, § 38-116).

Question for jury. — When the facts relied on to establish estoppel do not unequivocally show an estoppel in pais, the jury, and not the judge, should determine whether the facts constitute such an estoppel. Tune v. Beeland, 131 Ga. 528, 62 S.E. 976 (1908) (decided under former Civil Code 1895, § 5152).

As a factual determination, estoppel is a matter to be determined by a jury. Mathis v. Rock Springs Whsle. Co., 157 Ga. App. 726, 278 S.E.2d 484 (1981) (decided under former Code 1933, § 38-116).

Estoppel of state. — State can only be estopped from asserting the state's right to the state's own property by legislative enactment or resolution. State Hwy. Dep't v. Strickland, 214 Ga. 467, 105 S.E.2d 299 (1958) (decided under former Code 1933, § 38-116).

Illustrations

Admission in favor of third person. — Admissions against one's title to land, and in favor of the title of a third person, will be no estoppel in behalf of one to whom they were not made and who has merely heard of them, it not appearing that they were made for the purpose of being acted upon or with any design or intention that they should be acted upon. Randolph v. Merchants & Mechanics Banking & Loan Co., 181 Ga. 671, 183 S.E. 801 (1936) (decided under former Code 1933, § 38-116).

Silence after sale by tenant in common. — When plaintiff did not stand by at the time of the sale with knowledge that the sale was taking place, but only remained silent after learning of the sale previously made and of the valuable, permanent, and expensive improvements made thereon by the purchaser, the plaintiff is not estopped to assert the plaintiff's title or claim of interest in the property within seven years from the date of the sale. Owen v. Miller, 209 Ga. 875, 76 S.E.2d 772 (1953) (decided under former Code 1933, § 38-116).

Persons acquiescing in partitions. — Persons sui juris, who acquiesced in a partition and took possession of their shares, could not recover from a grantee of one partitioner. Watkins v. Gilmore, 130 Ga. 797, 62 S.E. 32 (1908) (decided under former Civil Code 1895, § 5152).

Recorded deed. — Fact that a deed from a husband to his wife, under which a wife claimed title, may have been based upon a valuable consideration and duly recorded would not necessarily prevent a subsequent purchaser, by security deed, from relying upon the principle of estoppel, if he was in fact ignorant of the true title. Roop Grocery Co. v. Gentry, 195 Ga. 736, 25 S.E.2d 705 (1943) (decided under former Code 1933, § 38-116).

Innocent representations coupled with delay in ascertaining truth. — If a person having legal title to land, which fact person does not know but has convenient means of knowing, and after a lapse of 27 years, during which time person was under no legal disability, person still has not learned the fact of the person's interest in the land, and in those circumstances the person induces one to buy the land from a third person by representations that the land is the property of such third person, the person's misrepresentations to the purchaser innocently made, coupled with the person's delay in ascertaining the truth, will amount to constructive fraud, and they may be pleaded as an estoppel by the purchaser on the faith of the title of the person's vendor. Lanier v. Bryant, 180 Ga. 409, 179 S.E. 346 (1935) (decided under former Code 1933, § 38-116).

Valuable improvements on land. — One who has title to land and sees another who is in bona fide possession thereof place valuable improvements thereon, without giving notice of one's title, is not thereby subsequently estopped from asserting ones' title. Owen v. Miller, 209 Ga. 875, 76 S.E.2d 772 (1953) (decided under former Code 1933, § 38-116).

Restrictive covenant. — Plaintiff was not estopped by acquiescence from seeking to enjoin violations of restrictive covenants by defendants merely because the same covenants were previously violated by other and different parties by more remote sales. Dooley v. Savannah Bank & Trust Co., 199 Ga. 353, 34 S.E.2d 522 (1945) (decided under former Code 1933, § 38-116).

Waiver of landlord's lien. — Even if the claimant by the claimant's signature to the waiver of the claimant's landlord's lien against the immediately preceding bill of sale to secure debt, and by the express reference in the claimant's waiver to such bill of sale, did not in effect so recognize the covenant and warranty of title made by the debtor in the bill of sale to the property in question as to be conclusively bound thereby the same as if the claimant had signed the bill of sale as a party thereto, the claimant will at least be prima facie presumed to have read the bill of sale, to which the claimant expressly referred, or to have had knowledge of its essential contents; the claimant will be assumed not to have acted without knowledge of the property on which the claimant expressly waived the claimant's lien. Federal Intermediate Credit Bank v. Sherrod, 50 Ga. App. 501, 178 S.E. 477 (1935) (decided under former Code 1933, § 38-116).

Illustrations (Cont'd)

Condemnation. — When there was no evidence of intentional deception on the part of the plaintiff, or any conduct which actually misled the defendant, the plaintiff would not be estopped from asserting any of the plaintiff's legal rights in injunction proceedings against the condemnation of property for a railroad right of way. Piedmont Cotton Mills v. Georgia Ry. & Elec. Co., 131 Ga. 129, 62 S.E. 52 (1908) (decided under former Civil Code 1895, § 5152).

Claiming equitable title to property. — When a wife, who claimed the equitable title to property, knowingly permitted her husband to retain the legal title and possession thereof, and credit was extended to him upon the faith of his apparent ownership or arose from the purchase of his outstanding promissory note, she was estopped from asserting her secret equity as against a creditor, whether or not he had reduced his claim to judgment, who had no notice of such equity. Rowe v. Cole, 171 Ga. 391, 155 S.E. 473 (1930), later appeal, 176 Ga. 592, 168 S.E. 882 (1933), and 183 Ga. 477, 188 S.E. 668 (1936) (decided under former Code 1933, § 38-116).

Actual knowledge. — When one knows that one owns the title to or an interest in real or personal property, and knowingly permits or acquiesces in the property's sale, encumbrance, or pledge by another, one will be estopped from setting up one's title or interest against the person who by such conduct has been misled to one's injury; however, when the estoppel relied upon is not one by deed or from an express contract, signed by the person against whom the rule is invoked, and is merely an equitable estoppel, it is the general rule that such person must, before the injury, have had actual knowledge of the transfer, sale, or encumbrance, and the material facts and circumstances attending the transaction. Federal Intermediate Credit Bank v. Sherrod, 50 Ga. App. 501, 178 S.E. 477 (1935) (decided under former Code 1933, § 38-116).

Husband and wife. — Wife was estopped from claiming title to personalty in her husband's possession and mortgaged by him. Whitchard v. Exchange Nat'l Bank, 15 Ga. App. 190, 82 S.E. 770 (1914) (decided under former Civil Code 1910, § 5738).

Consent of wife to include her property in husband's mortgage. — Fact that a wife may have consented for her husband to include personal property, belonging to her, in a mortgage executed by him to secure his individual debt would not estop her from thereafter setting up her title to the property, where the mortgagee had knowledge of the true ownership of the property at the time the mortgage was executed. Whitchard v. Exchange Nat'l Bank, 15 Ga. App. 190, 82 S.E. 770 (1914) (decided under former Civil Code 1910, § 5738).

Signing ancillary agreement. — When one who is not a party to the instrument of sale signs an ancillary agreement thereon, which agreement is material to the force and effect of the instrument on the signer, and which expressly refers to the preceding instrument, one is estopped from asserting any interest one may have. Federal Intermediate Credit Bank v. Sherrod, 50 Ga. App. 501, 178 S.E. 477 (1935) (decided under former Code 1933, § 38-116).

Failure to file will. — One's failure to move in the matter of compelling another to file the alleged will after one's refusal, and to apply to have the will probated for so long a time, is such gross negligence as would amount to constructive fraud against a purchaser from the other without notice of the will and acting on faith of one's apparent title as heir at law, and would estop one and one's assigns from setting up title under the subsequently probated will as against such purchaser from the husband claiming as heir at law. Hadden v. Stevens, 181 Ga. 165, 181 S.E. 767 (1935) (decided under former Code 1933, § 38-116).

Acceptance of insurance premiums and placing the money in the general funds of the defendant insurer amounted to such an unconditional acceptance as to estop the defendant to contend that the insured's policy was not in force at the date of the fire. Progressive Fire Ins. Co. v. Morrison, 72 Ga. App. 473, 34 S.E.2d 173 (1945) (decided under former Code 1933, § 38-116).

State utility company and railroad station owner were estopped from contending that debtor's lease had been terminated prior to the debtor's bankruptcy filing since a revised memorandum effecting only the minor change of extending a termination date did not serve to negate the debtor's reasonable reliance on the previously established general terms of the contested deal. Historic Macon Station Ltd. Partnership v. Piedmont-Forrest Corp., 152 Bankr. 358 (Bankr. M.D. Ga. 1993) (decided under former O.C.G.A. § 24-4-27).

Invalidity of franchise. — Regardless of the amount of expenditures holder of franchise and transferee might have made in connection therewith, no equitable estoppel would arise against city barring it from challenging validity of the franchise since there was evidence to show such expenses were incurred with knowledge of the invalidity of the franchise and therefore good faith was wholly lacking. Mid-Georgia Natural Gas Co. v. City of Covington, 211 Ga. 163, 84 S.E.2d 451 (1954) (decided under former Code 1933, § 38-116).

Bank's refusal to honor check. — Car auction contended that a bank should have been equitably estopped from denying that the bank had an obligation to honor checks drawn on a special account. However, the bank made no intentional misrepresentations and had no duty to disclose the bank's customer's financial status. The car auction, also, did not act with reasonable diligence by relying on the credit history of the customer's father instead of performing the auction's standard credit check. Georgia Cas. & Sur. Co. v. Tennille Banking Co. (In re Smith), 51 Bankr. 904 (Bankr. M.D. Ga. 1985) (decided under former O.C.G.A. § 24-4-27).

Use of other's name in making purchase to escape sales tax payment. — Use of out-of-state party's name and address to avoid payment of state sales tax does not give rise to estoppel to assert title to diamond ring since such party knew of the use of her name and address and has not adversely changed position in reliance thereon. Kornegay v. Thompson, 157 Ga. App. 558, 278 S.E.2d 140 (1981) (decided under former Code 1933, § 38-116).

Wife who benefited from a loan obtained by her husband from his mother because it protected the marital home from foreclosure was not estopped from pursuing a claim to the residence since it was not shown that the wife was in any way directly involved in the discussions and negotiations that procured the loan. Watkins v. Watkins, 256 Ga. 58, 344 S.E.2d 220 (1986) (decided under former O.C.G.A. § 24-4-27).

No evidence party misled to that party's detriment. Cowen v. Snellgrove, 169 Ga. App. 271, 312 S.E.2d 623 (1983) (decided under former O.C.G.A. § 24-4-27).

In a dispute between adjoining landowners over title to approximately six acres of land, because appellant adjoining neighbors failed to identify any evidence of deception on the part of the adjoining landowner or the landowner's predecessors, the trial court did not err by omitting a jury charge on equitable estoppel. Pirkle v. Turner, 281 Ga. 846, 642 S.E.2d 849 (2007) (decided under former O.C.G.A. § 24-4-27).

No fraud shown on part of developer. — In an action brought by the purchasers of a lot seeking to cancel the developer's security deed based upon alleged fraud, the trial court properly granted summary judgment to the developer as, even if the developer knew of the sale of the lot to the purchasers, such sale did not estop the developer from the developer's claim against the lot pursuant to the developer's security deed; however, the trial court did err by denying the equitable subrogation claim asserted by the purchasers' lender since exercising subrogation did not prejudice the developer in any manner. Byers v. McGuire Props., 285 Ga. 530, 679 S.E.2d 1 (2009) (decided under former O.C.G.A. § 24-4-27).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Equitable Adoption, 18 POF2d 531.

ALR. — Estoppel to assert title to real property by conduct subsequent to contract between third persons, 1 ALR 1482.

What names import corporation within rule that one contracting with body described by corporate name is estopped to deny its corporate existence, 5 ALR 1580.

Loss of right to contest assessment in proceeding for street or sewer improvement by waiver, estoppel, or the like, 9 ALR 634.

Loss of right to contest assessment in drainage proceeding by waiver, estoppel, or the like, 9 ALR 842.

Denial of, or expression of doubt as to paternity or other relationship as estoppel to assert right of inheritance by virtue of such relationship, 33 ALR 579.

Estoppel of mortgagor or seller to deny existence of property mortgaged or sold, 40 ALR 382.

Failure to record or delay in recording an instrument affecting real property as basis of estoppel in favor of creditors not directly within protection of recording acts, 52 ALR 183.

Execution of deed in representative or fiduciary capacity as estoppel of one in his individual capacity, 64 ALR 1556.

Effect of intrusting another with stock certificate endorsed or assigned in blank to estop owner as against a bona fide purchaser or pledgee for value, 73 ALR 1405.

Estoppel by conduct during testator's life to dissent from or attack validity of will, 74 ALR 659.

Estoppel of one riparian owner to complain of diversion of water by another riparian owner, 74 ALR 1129.

Estoppel by apparent acquiescence in or silence concerning improvements of real property to assert antagonistic title or interest, 76 ALR 304.

Estoppel of wife who permits record title to realty to remain in husband's name to assert her own title as against one extending credit to husband, 76 ALR 1501.

Waiver of, or estoppel to assert, debtor's exemption, by laches or delay, 82 ALR 648.

Right of a purchaser assuming a mortgage debt, with the authorization of the mortgagor, to set up usury in mortgage as a defense or rely upon it as a ground of relief in equity, 82 ALR 1153.

Estoppel of municipality to deny that it gave its consent to street franchise, 89 ALR 619.

Principle which denies relief to party who has conveyed or transferred property in fraud of his creditors, as affected by execution, as part of, or as contemplated at time of, the fraudulent transaction, of reconveyance or retransfer of the property to him, 89 ALR 1166.

Rule of estoppel of tenant to deny landlord's title as applicable where landlord affirmatively asserts a title or interest beyond that essential to his right to create the tenancy, 89 ALR 1295.

Intrusting possession of securities to bank officer or employee who uses them to make a fraudulent showing of bank assets as estoppel of owner to reclaim them as against bank receivers, 100 ALR 679.

Estoppel to question validity of proceedings extending boundaries of municipality, 101 ALR 581.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 ALR 1310.

Waiver of, or estoppel to assert, or election not to assert, forfeiture of executory land contract because of default in payment, 107 ALR 345.

Abandonment of appeal or right of appeal by commencement, or prosecution to judgment, of another action, 115 ALR 121.

Promissory estoppel, 115 ALR 152; 48 ALR2d 1069.

Tax exemption as affected by failure to claim or delay in claiming it for past years, 115 ALR 1484.

Estoppel as ground for holding defendant liable for negligence in conduct of business which appears to be his but which in fact belongs to another, 122 ALR 256.

Estoppel to assert invalidity of foreign decree of divorce for lack of domicil at divorce forum or failure to obtain jurisdiction of person of defendant, 122 ALR 1321; 140 ALR 914; 153 ALR 941; 175 ALR 538.

Creditor's statement or assurance to debtor, not supported by a consideration, that payment need not be made at time due, as binding upon creditor by way of estoppel, 124 ALR 1248.

Doctrine of estoppel as applicable against one's right to hold a public office or his status as a public officer, 125 ALR 294.

Mistake as to date of lapse of policy in insurer's statement of reason for denial of claim under policy as affecting its right to insist upon lapse as defense, 125 ALR 1270.

Estoppel to rely on statute of limitations, 130 ALR 8; 24 ALR2d 1413.

Estoppel by acquiescence or delay to question validity of plan for reorganization of bank, 139 ALR 659.

Estoppel of grantee or mortgagee as to amount of prior mortgage recited, 141 ALR 1184.

What agreement or conduct subsequent to assignment of lease amounts to assumption by assignee of covenants of lease, or estoppel to deny such assumption, 148 ALR 393.

Estoppel of owner of tangible personal property who knowingly or voluntarily permits another to have possession of certificates or other evidences of title, endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge, or otherwise deal with, the property, 151 ALR 690.

Estoppel to invoke rule or statute against perpetuities, 162 ALR 156.

Estoppel of intervener to assert claim against original complainant, 166 ALR 911.

Construction and application of statute respecting estoppel of insurer where insured was examined by medical examiner, 172 ALR 143.

Acceptance by building or construction contractor of payments under his contract as a waiver of right of action upon implied warranty as to conditions affecting cost, 173 ALR 308.

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 ALR2d 294.

Insurer's demand for additional or corrected proof of loss as waiver or estoppel as to right to assert contractual limitation provision, or as suspending running thereof, 15 ALR2d 955.

Estoppel of one selling or conveying property to dissolved or defunct corporation to deny its existence, 20 ALR2d 1084.

Renunciation of beneficial interest under inter vivos trust as condition of right to contest its validity, 21 ALR2d 1457.

Estoppel to contest will or attack its validity, 28 ALR2d 116.

Insurer's admission of liability, offers of settlement, negotiations, and the like, as waiver of, or estoppel to assert, contractual limitation provision, 29 ALR2d 636.

Insurer's admission of liability, offers of settlement, and negotiations for adjustment or settlement, as waiver of proof of property loss, 49 ALR2d 87.

Denial of liability as waiver of proofs of loss required by insurance policy, 49 ALR2d 161.

Estoppel to assert that article annexed to realty is or is not a fixture, 60 ALR2d 1209.

Right to attack validity of statute, ordinance, or regulation relating to occupational or professional license as affected by applying for, or securing license, 65 ALR2d 660.

Partial payment on private building or construction contract as waiver of defects, 66 ALR2d 570.

Waiver of, or estoppel to rely upon, contractual limitation of time for bringing action against municipality or other political subdivision, 81 ALR2d 1039.

Purchaser's right to set up invalidity of contract because of violation of state securities regulation as affected by doctrines of estoppel or pari delicto, 84 ALR2d 479.

Estoppel of lessee, because of occupancy of, or other activities in connection with, premises, to assert invalidity of lease because of irregularities in description or defects in execution, 84 ALR2d 920.

Physician giving medical examination to insurance applicant as agent of insured or of insurer, 94 ALR2d 1389.

Quantum or degree of evidence necessary to prove an equitable estoppel, 4 ALR3d 361.

Infant's misrepresentation as to his age as estopping him from disaffirming his voidable transaction, 29 ALR3d 1270.

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127.

Agreement of parties as estopping reliance on statute of limitations, 43 ALR3d 756.

Estoppel of municipality as to encroachments upon public streets, 44 ALR3d 257.

Promises to settle or perform as estopping reliance on statute of limitations, 44 ALR3d 482.

Plaintiff's diligence as affecting his right to have defendant estopped from pleading the statute of limitations, 44 ALR3d 760.

Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations, 45 ALR3d 630.

Delay caused by other litigation as estopping reliance on statute of limitations, 45 ALR3d 703.

Promissory estoppel as basis for avoidance of statute of frauds, 56 ALR3d 1037.

Automobile or motorcycle as necessary for infant, 56 ALR3d 1335.

Public contracts: duty of public authority to disclose to contractor information, allegedly in its possession, affecting cost or feasibility of project, 86 ALR3d 182.

Failure of creditor, or creditor's assignee, to secure credit insurance as affecting rights or liabilities of debtor, upon debtor's loss, 88 ALR3d 794.

Modern status of law as to equitable adoption or adoption by estoppel, 97 ALR3d 347.

Liability insurer's waiver of right, or estoppel, to set up breach of cooperation clause, 30 ALR4th 620.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder, 78 ALR4th 90.

Laches or delay in bringing suit as affecting right to enforce restrictive building covenant, 25 ALR5th 233.

ARTICLE 3

PARTICULAR MATTERS OF PROOF

Law reviews. — For article on the 2011 enactment of this article, see 28 Ga. St. U.L. Rev. 1 (2011).

24-14-40. Evidence of identity; burden in civil proceedings.

(a) Concordance of name alone is some evidence of identity. Residence, vocation, ownership of property, and other like facts may be proved. Reasonable certainty shall be all that is be required.

(b) In civil proceedings, parties shall generally be relieved from the onus of proving identity, as it is a fact generally more easily disproved than established. (Code 1981, § 24-14-40, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

History of Code section. — Former Code Section 24-4-40, which contained comparable provisions to this Code section, as effective January 1, 2013, was derived from the decision in Mullery v. Hamilton, 71 Ga. 720 (1884).

Cross references. — DNA sampling, collection, and analysis, § 35-3-160.

Law reviews. — For article, "DNA Fingerprinting: A Scientific Perspective," see 42 Mercer L. Rev. 1099 (1991).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5765, former Code 1933, § 38-304, and former O.C.G.A. § 24-4-40 are included in the annotations for this Code section.

Constitutionality of speech identification. — Requiring a suspect in a criminal case to verbalize specified words for identification purposes, whether or not the words used were the same as those allegedly used during the commission of the offense, did not violate an accused's privilege against self-incrimination accorded the accused by the United States Constitution and the state statutes and Constitution. Tate v. State, 153 Ga. App. 508, 265 S.E.2d 818 (1980) (decided under former Code 1933, § 38-304).

Identification testimony admissible when it was relevant and supported by facts. Clark v. State, 153 Ga. App. 829, 266 S.E.2d 577 (1980) (decided under former Code 1933, § 38-304).

Jury question. — Question of identity was one for the jury. Calhoun v. Herrin, 125 Ga. App. 518, 188 S.E.2d 273 (1972) (decided under former Code 1933, § 38-304).

Identity of names was generally prima facie evidence of identity of persons. Hardrick v. State, 96 Ga. App. 670, 101 S.E.2d 99 (1957) (decided under former Code 1933, § 38-304).

Concordance of name was sufficient to show that the defendant and the individual previously convicted were the same person, in the absence of any denial by the defendant and no proof to the contrary. Hammond v. State, 139 Ga. App. 820, 229 S.E.2d 685 (1976) (decided under former Code 1933, § 38-304).

In the absence of a denial by the defendant that the defendant was the perpetrator of a previous crime and any proof to the contrary, a concordance of name was sufficient to show that the defendant and the individual previously convicted were the same person. Lewis v. State, 234 Ga. App. 873, 508 S.E.2d 218 (1998) (decided under former O.C.G.A. § 24-4-40).

Under former O.C.G.A. § 24-4-40(a), if a defendant had the same name as is specified in a certified copy of a conviction, the concordance of name alone was some evidence of identity; without evidence to the contrary, the concordance of name established the previous conviction. Additionally, defendant stated the sentence set forth in the final disposition and acknowledged that defendant served the sentence. Patterson v. State, 259 Ga. App. 630, 577 S.E.2d 850 (2003) (decided under former O.C.G.A. § 24-4-40).

Trial court did not err in admitting similar transaction evidence because the prior armed robbery victim's identification of the defendant as one of the robbers was based on an investigating officer's personal knowledge; a second police officer's testimony that the officer had arrested a man with the same name as the defendant with a date of birth of February 23, 1984, was sufficient circumstantial evidence that the defendant committed a motor vehicle theft in 1998. Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010), overruled on other grounds, Reed v. State, 291 Ga. 10, 727 S.E.2d 112 (2012) (decided under former O.C.G.A. § 24-4-40).

Adoption of name. — Witness could testify as to the identity of another person by showing that the other person had assumed and adopted the name in question. Hardrick v. State, 96 Ga. App. 670, 101 S.E.2d 99 (1957) (decided under former Code 1933, § 38-304).

Reference to person in case. — If a witness mentioned the name of a person, it would be referred to the person in the case of that name, rather than to some outsider. Swift v. Oglesby & Smith, 8 Ga. App. 540, 70 S.E. 97 (1911) (decided under former Civil Code 1910, § 5765).

If pretrial showup may have been unnecessarily suggestive, the criteria to determine whether there was a substantial likelihood of irreparable misidentification are: (1) opportunity to view the defendant at the scene; (2) witness's degree of attention; (3) accuracy of prior description; (4) level of certainty demonstrated at confrontation; and (5) time lapse. Tate v. State, 153 Ga. App. 508, 265 S.E.2d 818 (1980) (decided under former Code 1933, § 38-304); Smith v. State, 160

Ga. App. 60, 286 S.E.2d 45 (1981) (decided under former Code 1933, § 38-304).

Two-prong test for admissibility of preindictment lineup. — In determining whether the eyewitness testimony following a preindictment investigative lineup should be admitted, each case must have been considered on its own facts and a two-prong test must have been applied: (1) whether the photographic display was impermissibly suggestive, and, if it was, the court must consider (2) whether there was a substantial likelihood of irreparable misidentification. Cheeves v. State, 157 Ga. App. 566, 278 S.E.2d 148 (1981) (decided under former O.C.G.A. § 24-4-40).

In considering whether lineup was impermissibly suggestive, evil to be avoided was likelihood of misidentification of an accused. James v. State, 157 Ga. App. 645, 278 S.E.2d 187 (1981) (decided under former O.C.G.A. § 24-4-40).

Reliability of any identification procedure requires determination of whether it was in any way tainted by illegal pretrial showup or lineup or by use of photographs; in such situations the court should consider the totality of the circumstances and determine first if the procedures were impermissibly suggestive, and, if so, did that procedure give rise to a substantial likelihood of irreparable misidentification. Miller v. State, 158 Ga. App. 21, 279 S.E.2d 289 (1981) (decided under former O.C.G.A. § 24-4-40).

Photo array was not impermissibly suggestive because the eyewitnesses testified that the eyewitnesses looked at the lineup outside the presence of each other, read an admonition form before looking at the lineup, and picked out defendant's photograph; furthermore, the officer showing the lineup to the eyewitnesses did not tell the eyewitnesses that the eyewitnesses had picked the "right" photograph. Pace v. State, 272 Ga. App. 16, 611 S.E.2d 694 (2005) (decided under former O.C.G.A. § 24-4-40).

Vocal verification was analogous to visual verification. Wallace v. State, 156 Ga. App. 525, 275 S.E.2d 110 (1980) (decided under former Code 1933, § 38-304).

Photographic array could be suggestive when used close in time to a lineup, but when the record was devoid of specifics which would substantiate a claim of misidentification and the witness was able to identify appellant from the array, the procedure was not impermissibly suggestive. Coleman v. State, 150 Ga. App. 380, 258 S.E.2d 12 (1979) (decided under former Code 1933, § 38-304).

Evidence of other offenses of a similar nature may have been admitted in criminal prosecutions for the purpose of identifying the accused and for the purpose of showing a common motive, plan, scheme, bent of mind, or course of conduct. Laws v. State, 153 Ga. App. 166, 264 S.E.2d 700 (1980) (decided under former Code 1933, § 38-304); Chambers v. State, 154 Ga. App. 620, 269 S.E.2d 42 (1980) (decided under former Code 1933, § 38-304).

Admissible evidence. — Personal appearance, conversations, account one gave of oneself, one's family connections and associations, were admissible. Mullery v. Hamilton, 71 Ga. 720 (1883) (decided under former law).

Evidence sufficient. — In the instant suit by the beneficiary on a policy insuring the life of one's brother, even if under this rule the burden of providing that the person, bearing the same name as the insured and as to whom proof of death by pleuro-pneumonia was made, was the insured named in the policy, the onus was sufficiently met by the plaintiff's testimony, admitted without objection, that plaintiff's brother, of the name stated in the policy, was a world war veteran, that the Veterans' Bureau in Washington, D.C., informed plaintiff of plaintiff's brother's death, and that upon further inquiry plaintiff found that plaintiff's brother had died in a town in New Jersey, no evidence having been presented by the defendant to dispute such identity, a finding on that question was demanded for the plaintiff. Progressive Life Ins. Co. v. Haygood, 53 Ga. App. 231, 185 S.E. 534 (1936) (decided under former Code 1933, § 38-304).

RESEARCH REFERENCES

Am. Jur. 2d. — 29 Am. Jur. 2d, Evidence, § 576 et seq. 29A Am Jur. 2d, Evidence, §§ 1399, 1400, 1403 et seq.

Am. Jur. Proof of Facts. — Lineups and Showups — Admissibility and Effect of Pretrial Identification, 19 POF2d 435.

Foundation for DNA Fingerprint Evidence, 8 POF3d 749.

C.J.S. — 31A C.J.S., Evidence, § 263. 32A C.J.S., Evidence, § 1304, 1305.

ALR. — Footprints as evidence, 31 ALR 204; 35 ALR2d 856.

Baptismal certificate or church record as evidence of age, 36 ALR 689.

Admissibility and weight of evidence of resemblance on question of paternity or other relationship, 40 ALR 97; 95 ALR 314.

Admissibility in action for death of statements against interest by decedent, 114 ALR 921.

Blood grouping tests, 163 ALR 939; 46 ALR2d 1000.

Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction, 11 ALR2d 870.

Admissibility of declaration of persons other than members of family as to pedigree, 15 ALR2d 1412.

Proof of identity of person or thing where object, specimen, or part is taken from a human body, as basis for admission of testimony or report of expert or officer based on such object, specimen, or part, 21 ALR2d 1216.

Fingerprints, palm prints, or bare footprints as evidence, 28 ALR2d 1115.

Identification of accused by his voice, 70 ALR2d 995.

Homicide: identification of victim as person named in indictment or information, 86 ALR2d 722.

What evidence is admissible to identify plaintiff as person defamed, 95 ALR2d 227.

Admissibility of evidence of showup identification as affected by allegedly suggestive showup procedures, 39 ALR3d 791.

Admissibility of evidence of photographic identification as affected by allegedly suggestive identification procedures, 39 ALR3d 1000.

Malicious prosecution: liability for instigation or continuation of prosecution of plaintiff mistakenly identified as person who committed an offense, 66 ALR3d 10.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 ALR4th 229.

Admissibility of bare footprint evidence, 45 ALR4th 1178.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 ALR5th 672.

Admissibility of evidence of voice identification of defendant as affected by allegedly suggestive voice lineup procedures, 55 ALR5th 423.

24-14-41. Proof of de facto officer.

An officer de facto may be proved to be such by his or her acts, without the production of his or her commission or appointment. (Code 1981, § 24-14-41, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5754; former Code 1933, § 38-207; and former O.C.G.A. § 24-4-41 are included in the annotations for this Code section.

De facto notary doctrine. — Pursuant to the de facto notary doctrine, an expert's affidavit satisfied the requirements of O.C.G.A. § 9-11-9.1, despite the fact that the commission of the notary who attested the affidavit had expired. Thomas v. Gastroenterology Assocs. of Gainesville, P.C., 280 Ga. 698, 632 S.E.2d 118 (2006) (decided under former O.C.G.A. § 24-4-41).

24-14-42. Judgment admissible; effect.

A judgment shall be admissible between any parties to show the fact of the rendition thereof; between parties and privies it is conclusive as to the matter directly in issue, until reversed or set aside. (Code 1981, § 24-14-42, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Law reviews. — For article on the effect of a conviction that is based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5820, former Code 1933, § 38-623, and former O.C.G.A. § 24-4-42 are included in the annotations for this Code section.

Direct or indirect relitigation prohibited. — Questions settled by a former final judgment must have been considered an end of the litigation; those questions could not be litigated in other actions, directly or indirectly. Smith v. Robinson, 214 Ga. 835, 108 S.E.2d 317 (1959) (decided under former Code 1933, § 38-623).

Issues in second suit are concluded as between parties and their privies if they were made in the first suit or if, under the rules of pleading and evidence, they could have been put in issue. Roadway Express, Inc. v. McBroom, 61 Ga. App. 223, 6 S.E.2d 460 (1939) (decided under former Code 1933, § 38-623).

Mere witness not estopped. — While an adjudication of the same subject matter in issue in a former suit between the same parties by a court of competent jurisdiction is an end of litigation, the plaintiff was not estopped by the judgment rendered in the court of ordinary (now probate court) in a proceeding to which the plaintiff was not a party, although the plaintiff appeared as a witness therein. McAfee v. Martin, 211 Ga. 14, 83 S.E.2d 605 (1954) (decided under former Code 1933, § 38-623).

Entire record must be offered. — When a judgment was relied on as establishing any particular state of facts it could be proved only by offering in evidence the entire proceedings in which the judgment was rendered. Cambron v. Canal Ins. Co., 246 Ga. 147, 269 S.E.2d 426 (1980) (decided under former Code 1933, § 38-623).

New rule of law irrelevant. — Judgment of the Court of Appeals, reversing a judgment of the trial court could not be set aside on motion in the trial court, upon the ground that since the rendition of the decision by the Court of Appeals, the Supreme Court, in another case, announced a rule of law contrary to the decision of the Court of Appeals. Atkinson v. Battle, 11 Ga. App. 837, 76 S.E. 597 (1912) (decided under former Civil Code 1910, § 5820).

Decree in chancery was evidence, not merely of the fact of its rendition, but also of all the consequences resulting therefrom. It may have been given in proof against persons who were not parties to the bill, in support of the plaintiff's right or title to sue. Hardwock v. Hook, 8 Ga. 354 (1850) (decided under former law).

Judgment could not be collaterally questioned by third persons, except on the ground of fraud and collusion, in the procurement of the judgment. Creditors or bona fide purchasers could attack a judgment fraudulently obtained, whenever the judgment interfered with their rights, either at law or in equity. Hammock v. McBride, 6 Ga. 178 (1849) (decided under former law).

Same parties and privies. — Debtor's transfer of real property to the debtor's wife, a default judgment in a lawsuit, which the trustee claimed rendered the debtor insolvent, in which the wife did not participate and which was filed after the transfer did not prove the debtor's insolvency at the time of the transfer for purposes of former O.C.G.A. § 18-2-22(3); the wife's status as the debtor's wife, standing alone, did not establish privity with the

debtor, and the judgment against the debtor did not bind the wife. Thurmond v. Turner (In re Turner), No. 00-72597-PWB, 2006 Bankr. LEXIS 2745 (Bankr. N.D. Ga. Sept. 19, 2006) (decided under former O.C.G.A. § 24-4-42).

Irregular judgment. — Although the judgment of a court may have been irregular, still the judgment may have been given in evidence for many purposes. Bryan v. Watson, 20 Ga. 480 (1856) (decided under former law).

Consent order in previous litigation involving an insurer and insured in subsequent litigation, unreversed and not set aside, which recited that a compromise settlement release was valid according to all its terms and provisions was conclusive on the parties as to any claim under the policy. Mutual of Omaha Ins. Co. v. Morris, 120 Ga. App. 525, 171 S.E.2d 378 (1969) (decided under former Code 1933, § 38-623).

Litigation of jurisdiction. — When in an action for divorce brought by wife, the husband appeared and filed an answer denying the allegations as to residence and also filed a plea to the jurisdiction, the question as to jurisdiction was necessarily litigated despite the fact that he had not appeared to defend the action in person, and the result was binding on the husband, in the absence of fraud, accident, or mistake, unmixed with negligence on his part. Johnson v. Johnson, 188 Ga. 800, 4 S.E.2d 807 (1939) (decided under former Code 1933, § 38-623).

Issue directly litigated. — When the defendant in a trover suit sued the plaintiff therein for divorce, and the question of title to the automobile was adjudicated by a court of competent jurisdiction, without objection by either party, in the action for divorce, the judgment rendered in that case, when the issue as to the title of the automobile was directly made, was conclusive on that question in the trover case. Maddox v. Carithers, 77 Ga. App. 280, 47 S.E.2d 888 (1948) (decided under former Code 1933, § 38-623).

When custody of minor child was vested in the mother by prior judgment, until and unless it was set aside in accordance with law, it was conclusive against the father, and was res judicata in a habeas corpus proceeding by the father. Levens v. Edge, 217 Ga. 418, 122 S.E.2d 728 (1961) (decided under former Code 1933, § 38-623).

Res judicata in criminal case. — Court properly sustained the state's plea of res judicata and dismissed on oral motion the defendant's special plea, when the judgment pleaded in bar thereof adjudicated the issue, as the judgment so pleaded by the state had been neither reversed nor modified by any exception which the accused had taken to it, such unreversed and unmodified judgment had consequently become and was the law of the case. Seymour v. State, 210 Ga. 571, 81 S.E.2d 808 (1954) (decided under former Code 1933, § 38-623).

Evidence of original divorce decree. — Trial court presiding over an action for modification of alimony erred in refusing to allow the introduction into evidence of the original divorce decree. Cotton v. Cotton, 272 Ga. 276, 528 S.E.2d 255 (2000) (decided under former O.C.G.A. § 24-4-42).

Admissibility of civil judgment in criminal case. — Judgment in a civil action was not admissible in a criminal action to prove any fact determined in the civil action. Flynt v. State, 153 Ga. App. 232, 264 S.E.2d 669, application for stay of execution, 449 U.S. 888, 100 S. Ct. 2960, 64 L. Ed. 2d 837 (1980) (decided under former Code 1933, § 38-623).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1277 et seq.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Evidence, § 11.

C.J.S. — 32A C.J.S., Evidence § 1027.

ALR. — Judgment in favor of less than all parties to contract as bar to action against other parties, 2 ALR 124.

Conviction or acquittal as evidence of facts on which it was based, in a civil action, 31 ALR 261; 18 ALR2d 1287.

Judgment in action on commercial paper as affecting party to the paper who was not a party to the suit, 34 ALR 152.

Conclusiveness of decree assessing stockholders of insolvent corporation as against nonresident stockholders not personally served within the state in which it was rendered, 48 ALR 669; 175 ALR 1419.

Judgment in action for services of physician or surgeon as bar to action against him for malpractice, 49 ALR 551.

Suit in one state or country to enforce a contract as regards real property therein as a bar to suit in another state or country to enforce the contract as regards the property therein, 52 ALR 180.

Judgment in action for death as a bar to an action for the same death in another jurisdiction or under another statute, 53 ALR 1275.

Necessity of verdict against servant or agent as condition of verdict against master or principal for tort of servant or agent, 78 ALR 365.

Admissibility and effect of finding or order on claim under Workmen's Compensation Act for personal injury, in proceedings on claim for compensation for death, 88 ALR 1179.

Necessity of offering in evidence the record in the prior case in support of plea or claim that former judgment is bar or res judicata, 96 ALR 944.

Judgment in favor of defendant in action for personal injuries as bar to suit for death caused by such injuries, and vice versa, 99 ALR 1091.

Homestead exemption as exception to rule that judgment is conclusive as to defenses which might have been but were not raised, 103 ALR 934.

Extraterritorial recognition and effect, as regards marital status, of a decree of divorce or separation rendered in a state or country in which neither of the parties was domiciled, 105 ALR 817; 1 ALR2d 1385; 28 ALR2d 1303.

Findings or order upon application for alimony pendente lite in action for divorce or separation as res judicata, 105 ALR 1406.

Advantage which the original trier of facts enjoyed over reviewing court from opportunity of seeing and hearing witnesses, 111 ALR 742.

Adjudication in fixing inheritance, succession, or estate tax, as conclusive for other purposes, 117 ALR 1227.

Judgment against tort-feasor's insurer in action by injured person as res judicata in similar action by another person injured in same accident, 121 ALR 890.

Rule of res judicata as applied to judicial construction of will, 136 ALR 1180.

Judgment as conclusive as against, or in favor of one not a party of record or privy to a party, who prosecuted or defended suit on behalf and in the name of party, or assisted him or participated with him in its prosecution or defense, 139 ALR 9.

Judgment for plaintiff in action in tort or contract against codefendants, as conclusive in subsequent action between codefendants as to the liability of both or the liability of one and the nonliability of the other, 142 ALR 727.

Conclusiveness as to merits of judgment of court of foreign country, 148 ALR 991.

Judgment in wrongful death action as res judicata in a subsequent action in same jurisdiction for the same death under same statute brought by or for benefit of statutory beneficiary whose status as such was ignored in the former action, 148 ALR 1346.

Judgment for or against ward, cestui que trust, trustor, or distributee, as res judicata as to guardian, trustee, assignee for creditors, receiver, or personal representative, not a party to action or proceeding in which judgment was rendered, 162 ALR 1024.

Judgment in tax case as to one period as res judicata as to another period, 162 ALR 1204.

Judgment for defendant based on the statute of limitations as bar to maintenance of action in another state, 164 ALR 693.

Judgment based on construction of instrument as res judicata of its validity, 164 ALR 873.

Privity between cotenants for purposes of doctrine of res judicata, 169 ALR 179.

Recognition as to marital status of foreign divorce decree attacked on ground of lack of domicil, since Williams decision, 1 ALR2d 1385; 28 ALR2d 1303.

Denial of divorce in sister state or foreign country as res judicata in another

suit for divorce between the same parties, 4 ALR2d 107.

Privity as between lessor or bailor and lessee or bailee of personal property as regards effect of judgment in third person's action for damages against lessee or bailee as res judicata in lessor's or bailor's subsequent action against third person for damage to the property, or vice versa, 4 ALR2d 1378.

Judgment denying validity of will because of undue influence, lack of mental capacity, or the like, as res judicata as to validity of another will, deed, or other instrument, 25 ALR2d 657.

Decree granting or refusing injunction as res judicata in action for damages in relation to matter concerning which injunction was asked in first suit, 26 ALR2d 446.

Judgment involving real property against one spouse as binding against other spouse not a party to the proceeding, 58 ALR2d 701.

Decree in suit for "separation" as res judicata in subsequent suit for divorce or annulment, 90 ALR2d 745.

Judgment in spouse's action for personal injuries as binding, as regards loss of consortium and similar resulting damage, upon other spouse not a party to the action, 12 ALR3d 933.

Judgment in action against codefendants for injury or death of person, or for damage to property, as res judicata in subsequent action between codefendants as to their liability inter se, 24 ALR3d 318.

Liability insurer's right to open or set aside, or contest matters relating to merits of, judgment against insured, entered in action in which insurer did not appear or defend, 27 ALR3d 350.

Judgment in action against seller or supplier of product as res judicata in action against manufacturer for injury from defective product, or vice versa, 34 ALR3d 518.

Validity of verdict or verdicts by same jury in personal injury action awarding damages to injured spouse but denying recovery to other spouse seeking collateral damages, or vice versa, 66 ALR3d 472.

Modern views of state courts as to whether consent judgment is entitled to res judicata or collateral estoppel effect, 91 ALR3d 1170.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action or vice versa, 94 ALR3d 676.

24-14-43. Calendars as proof of dates.

Stern's United States calendar and Stafford's office calendar shall be admissible in proof of dates for the space of time covered by them respectively without further proof. (Code 1981, § 24-14-43, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-14-44. American Experience Mortality Tables.

In all civil proceedings where the life expectancy of a person shall be an issue, the American Experience Mortality Tables shall be admissible as evidence of the life expectancy of such person. (Code 1981, § 24-14-44, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — The American Experience Mortality Table, appendix to this volume.

Law reviews. — For article discussing the use of mortality tables in determining the value of life earnings of the deceased in wrongful death actions, with emphasis on the Carlisle table, see 9 Ga. St. B.J. 293 (1973). For article, economic evaluation of damages in personal injury and wrongful death litigation, see 19 Ga. St. B.J. 60 (1982). For article, "Damage Calibrations Under the Federal Tort Claims Act," see 25 Ga. St. B.J. 100 (1988).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1956, p. 68, § 1 and former O.C.G.A. § 24-4-44 are included in the annotations for this Code section.

Permanent injuries. — Court erred in failing to charge that mortality tables were to be used only if the injuries sued for were permanent, and that the value of the victim-wife's services and consortium in the future, for the loss of which the plaintiff husband sought recovery, should be reduced to present cash value when there was an issue as to whether or not the injuries sustained by the plaintiff wife were permanent. Davison-Paxon Co. v. Archer, 91 Ga. App. 131, 85 S.E.2d 182 (1954) (decided under former Ga. L. 1956, p. 68, § 1).

Jury not bound by tables. — While standard mortality tables were admissible in evidence as an aid to the jury in determining the life expectancy of a deceased person, the jurors were not bound by such tables, but may have used any method known to jurors as upright and intelligent individuals in applying jurors' knowledge of the common phenomena and facts of human experience to the evidence, when sufficient facts appeared as to the age, health, physical condition, and habits of the deceased to afford a basis for a proper conclusion. Pollard v. Gorman, 52 Ga. App. 127, 182 S.E. 678 (1935) (decided under former law).

RESEARCH REFERENCES

C.J.S. — 32A C.J.S., Evidence, § 1033.

ALR. — Instructions regarding determination of life expectancy in action for personal injuries or death, 87 ALR 910.

Admissibility and weight of mortality tables as evidence as affected by lack of normal health, 116 ALR 416.

Shortening of life expectancy as element of damages recoverable in action by person injured or in action under survival statute or death statute, 131 ALR 1351.

Use of mortality tables as aid in determining life expectancy of young child whose age is not tabulated therein, 162 ALR 1003.

Admissibility of mortality tables in personal injury action as dependent upon showing of permanency of injury, 50 ALR2d 419.

Cost of annuity as a factor for consideration in fixing damages in personal injury or death action, 53 ALR2d 1454.

Counsel's use, in trial of personal injury or wrongful death case, of blackboard, chart, diagram, or placard not introduced in evidence, relating to damages, 86 ALR2d 239.

24-14-45. Other mortality tables.

(a) In addition to any other lawful methods of computing the value of the life of a decedent in wrongful death cases or of determining the present value of future due earnings or amounts in proceedings involving permanent personal injuries, there shall be admissible in evidence, as competent evidence in such proceedings, either or both of the following mortality tables:

(1) The Commissioners 1958 Standard Ordinary Mortality Table; or

(2) Annuity Mortality Table for 1949, Ultimate.

(b) In addition to the provisions set out in subsection (a) of this Code section, the jury or court shall be authorized in cases of wrongful death or permanent personal injuries to use any table determined by the jury or court, whichever is the trier of fact, to be accurate in showing the value of annuities on single lives according to the mortality tables listed in subsection (a) of this Code section.

(c) The admissible evidence provided for in subsections (a) and (b) of this Code section shall not be the exclusive method which the jury or court is required to use in such proceedings but shall be supplementary to other lawful and allowable evidence and methods for such purpose. (Code 1981, § 24-14-45, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

Cross references. — The Commissioners 1958 Standard Ordinary Mortality Table and the Annuity Mortality Table for 1949, Ultimate, appendix to this volume.

Law reviews. — For article discussing the use of mortality tables in determining the value of life earnings of the deceased in wrongful death actions, with emphasis on the Carlisle table, see 9 Ga. St. B.J. 293 (1973). For article, economic evaluation of damages in personal injury and wrongful death litigation, see 19 Ga. St. B.J. 60 (1982). For article, "Damage Calibrations Under the Federal Tort Claims Act," see 25 Ga. St. B.J. 100 (1988).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1970, p. 168, §§ 1, 3, 4, and former O.C.G.A. § 24-4-45 are included in the annotations for this Code section.

Jury's findings must be fair. — While a jury had latitude in determining the value of a person's life in considering income, health, life expectancy, etc., and were not bound by mortality tables which may have been introduced in evidence and may have reduced the value of a person's life to its present cash value by any method satisfactory to them which produces a definite result that was fair and reasonable and was authorized by the evidence, their final finding as to the present cash value of the decedent's life must have been fair and within reason and adjusted to the evidence within the latitudes above mentioned. Swift & Co. v. Lawson, 95 Ga. App. 35, 97 S.E.2d 168 (1957) (decided under former law).

Expert testimony. — Evidence offered by an expert on the value of the life of the deceased may have taken into account statistical studies and inflationary trends. Georgia S. & Fla. Ry. v. Odom, 152 Ga. App. 664, 263 S.E.2d 469 (1979) (decided under former Ga. L. 1970, p. 168, §§ 1, 3, 4).

Table properly admitted. — Trial court did not err in admitting into evidence, over objection, a mortality table and in charging the jury on permanent injury since plaintiff was injured on February 28, 1983, and at the time of trial on March 19, 1986, was still disabled from performing some normal, everyday functions, and the court limited any damages awarded to future pain and suffering. Cox v. Cantrell, 181 Ga. App. 722, 353 S.E.2d 582 (1987) (decided under former O.C.G.A. 24-4-45).

RESEARCH REFERENCES

Am. Jur. 2d. — 29A Am. Jur. 2d, Evidence, § 1348 et seq.

C.J.S. — 32A C.J.S., Evidence, § 1033.

ALR. — Medical books or treatises as independent evidence, 65 ALR 1102; 84 ALR2d 1338.

Remarriage tables, 25 ALR2d 1464.

Admissibility of mortality tables in personal injury action as dependent upon showing of permanency of injury, 50 ALR2d 419.

Cost of annuity as a factor for consideration in fixing damages in personal injury or death action, 53 ALR2d 1454.

Admissibility of evidence as to experiments or tests in civil action for death, injury, or property damage against electric power company or the like, 54 ALR2d 922.

Counsel's use, in trial of personal injury or wrongful death case, of blackboard, chart, diagram, or placard not introduced in evidence, relating to damages, 86 ALR2d 239.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 ALR3d 88.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of homemaker, 47 ALR4th 100.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in trades and manual occupations, 47 ALR4th 134.

Admissibility of evidence, in action for personal injury or death, of injured party's use of intoxicants or illegal drugs on issue of life expectancy, 86 ALR4th 1135.

24-14-46. United States Department of Agriculture inspection certificates prima-facie evidence.

All inspection certificates issued by the United States Department of Agriculture over the signature of any inspector thereof which are admissible in courts of the United States as prima-facie evidence of the truth of the statements therein contained shall be admissible in all courts of the State of Georgia as prima-facie evidence of the truth of the statements therein contained. (Code 1981, § 24-14-46, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

24-14-47. Proof that person is dead or missing as evidence.

(a) A written finding of presumed death made by officers or employees of the United States authorized to make such findings pursuant to any law of the United States or a duly certified copy of such finding shall be received in any court, office, or other place in this state as evidence of the death of the person therein found to be dead and the date, circumstances, and place of his or her disappearance.

(b) An official written report, record, or duly certified copy thereof that a person is missing, missing in action, interned in a neutral country, beleaguered, besieged, or captured by an enemy, dead or alive, made by an officer or employee of the United States authorized by any law of the United States to make the same shall be received in any court, office, or other place in this state as evidence that such person is missing, missing in action, interned in a neutral country, beleaguered, besieged, or captured by an enemy, dead or alive, as the case may be.

(c) For the purposes of subsections (a) and (b) of this Code section, any finding, report, record, or duly certified copy thereof purporting to

have been signed by an officer or employee of the United States as is described in this Code section shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his or her authority. (Code 1981, § 24-14-47, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

U.S. Code. — Payments to missing federal employees, 5 U.S.C., § 5561 et seq. Payments to missing service personnel, 37 U.S.C., § 551 et seq.

RESEARCH REFERENCES

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ALR. — Circumstances justifying inference of death of insured before the lapse of seven years from his disappearance, 34 ALR 1389; 61 ALR 1327.

Presumption of death from absence as affected by fact that person was fugitive from justice, 44 ALR 1488.

Death certificate as evidence, 96 ALR 324.

Presumption of death as evidence, 115 ALR 404.

Presumption against suicide as overcome by death certificate, coroner's verdict, or similar documentary evidence, 159 ALR 181.

APPENDIX

AMERICAN EXPERIENCE MORTALITY TABLE

Age	Expectation of Life (Years)	Age	Expectation of Life (Years)
10	48.72	47	23.08
11	48.08	48	22.36
12	47.45	49	21.63
13	46.80	50	20.91
14	46.16	51	20.20
15	45.50	52	19.49
16	44.85	53	18.79
17	44.19	54	18.09
18	43.53	55	17.40
19	42.87	56	16.72
20	42.20	57	16.05
21	41.53	58	15.39
22	40.85	59	14.74
23	40.17	60	14.10
24	39.49	61	13.47
25	38.81	62	12.86
26	38.12	63	12.26
27	37.43	64	11.67
28	36.73	65	11.10
29	36.03	66	10.54
30	35.33	67	10.00
31	34.63	68	9.47
32	33.92	69	8.97
33	33.21	70	8.48
34	32.50	71	8.00
35	31.78	72	7.55
36	31.07	73	7.11
37	30.35	74	6.68
38	29.62	75	6.27
39	28.90	76	5.88
40	28.18	77	5.49
41	27.45	78	5.11
42	26.72	79	4.74
43	26.00	80	4.39
44	25.27	81	4.05
45	24.54	82	3.71
46	23.81	83	3.39

Age	Expectation of Life (Years)	Age	Expectation of Life (Years)
84	3.08	90	1.42
85	2.77	91	1.19
86	2.47	92	.98
87	2.18	93	.80
88	1.91	94	.64
89	1.66	95	.50

Cross references. — Admissibility of this table in civil cases where life expectancy of a person is an issue, § 24-14-44.

THE COMMISSIONERS 1958 STANDARD ORDINARY MORTALITY TABLE

Age	Expectation of Life (Years)	Age	Expectation of Life (Years)
0	68.30	38	33.97
1	67.78	39	33.07
2	66.90	40	32.18
3	66.00	41	31.29
4	65.10	42	30.41
5	64.19	43	29.54
6	63.27	44	28.67
7	62.35	45	27.81
8	61.43	46	26.95
9	60.51	47	26.11
10	59.58	48	25.27
11	58.65	49	24.45
12	57.72	50	23.63
13	56.80	51	22.82
14	55.87	52	22.03
15	54.95	53	21.25
16	54.03	54	20.47
17	53.11	55	19.71
18	52.19	56	18.97
19	51.28	57	18.23
20	50.37	58	17.51
21	49.46	59	16.81
22	48.55	60	16.12
23	47.64	61	15.44
24	46.73	62	14.78
25	45.82	63	14.14
26	44.90	64	13.51
27	43.99	65	12.90
28	43.08	66	12.31
29	42.16	67	11.73
30	41.25	68	11.17
31	40.34	69	10.64
32	39.43	70	10.12
33	38.51	71	9.63
34	37.60	72	9.15
35	36.69	73	8.69
36	35.78	74	8.24
37	34.88	75	7.81

Age	Expectation of Life (Years)	Age	Expectation of Life (Years)
76	7.39	88	3.55
77	6.98	89	3.31
78	6.59	90	3.06
79	6.21	91	2.82
80	5.85	92	2.58
81	5.51	93	2.33
82	5.19	94	2.07
83	4.89	95	1.80
84	4.60	96	1.51
85	4.32	97	1.18
86	4.06	98	.83
87	3.80	99	.50

Cross references. — Admissibility of this table in cases of wrongful death or permanent personal injury, § 24-14-45.

ANNUITY MORTALITY TABLE FOR 1949, ULTIMATE

Age	Expectation of Life (Years) Male	Female	Age	Expectation of Life (Years) Male	Female
0	73.18	78.69	38	37.02	42.01
1	72.47	77.94	39	36.08	41.06
2	71.59	77.04	40	35.15	40.11
3	70.65	76.10	41	34.22	39.17
4	69.70	75.14	42	33.29	38.22
5	68.75	74.17	43	32.38	37.28
6	67.78	73.19	44	31.47	36.35
7	66.82	72.21	45	30.57	35.41
8	65.85	71.23	46	29.67	34.48
9	64.89	70.24	47	28.80	33.56
10	63.92	69.26	48	27.93	32.64
11	62.95	68.27	49	27.07	31.72
12	61.98	67.29	50	26.23	30.81
13	61.01	66.30	51	25.40	29.91
14	60.04	65.32	52	24.58	29.01
15	59.07	64.33	53	23.78	28.11
16	58.10	63.35	54	22.98	27.22
17	57.13	62.37	55	22.20	26.33
18	56.17	61.39	56	21.44	25.46
19	55.20	60.41	57	20.68	24.59
20	54.23	59.43	58	19.93	23.72
21	53.26	58.45	59	19.20	22.87
22	52.30	57.48	60	18.48	22.02
23	51.33	56.50	61	17.76	21.18
24	50.37	55.53	62	17.06	20.36
25	49.41	54.55	63	16.37	19.54
26	48.44	53.58	64	15.68	18.73
27	47.48	52.61	65	15.01	17.94
28	46.52	51.64	66	14.36	17.16
29	45.56	50.67	67	13.71	16.39
30	44.61	49.70	68	13.08	15.64
31	43.65	48.73	69	12.46	14.90
32	42.70	47.77	70	11.86	14.18
33	41.74	46.80	71	11.28	13.47
34	40.79	45.84	72	10.71	12.78
35	39.85	44.88	73	10.15	12.11
36	38.90	43.92	74	9.61	11.45
37	37.96	42.97	75	9.09	10.82

Age	Expectation of Life (Years) Male	Female	Age	Expectation of Life (Years) Male	Female
76	8.58	10.20	93	2.67	2.92
77	8.10	9.60	94	2.47	2.68
78	7.63	9.02	95	2.28	2.45
79	7.17	8.47	96	2.10	2.24
80	6.74	7.93	97	1.94	2.05
81	6.32	7.42	98	1.79	1.87
82	5.92	6.93	99	1.65	1.71
83	5.54	6.46	100	1.52	1.56
84	5.18	6.01	101	1.40	1.42
85	4.84	5.58	102	1.29	1.30
86	4.51	5.18	103	1.20	1.19
87	4.20	4.79	104	1.10	1.09
88	3.90	4.43	105	1.02	0.99
89	3.62	4.09	106	0.94	0.91
90	3.36	3.77	107	0.86	0.83
91	3.12	3.47	108	0.75	0.73
92	2.88	3.19	109	0.50	0.50

Cross references. — Admissibility of this table in cases of wrongful death or permanent personal injury, § 24-14-45.

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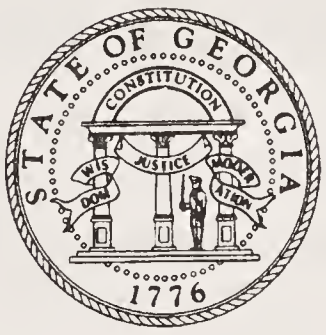
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Emory Bankruptcy Developments Journal.
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Georgia Journal of International and Comparative Law.
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Georgia State University Law Review.
John Marshall Law Review.
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American Jurisprudence, Proof of Facts.
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Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2018 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2018 supplement pamphlets and in the bound volumes of the Code.

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TITLE 24

EVIDENCE

Chap.

4. Relevant Evidence and its Limits, 24-4-401 through 24-4-418.

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Law reviews. — For article, "The Best Evidence Rule Made Better: A Glimpse into Georgia's New Evidence Code," see 19 Ga. St. B.J. 12 (Aug. 2013). For annual survey on evidence law, see 64 Mercer L. Rev. 929 (2013). For article, "Eleventh Circuit Survey: January 1, 2013 — December 31, 2013: Article: Evidence," see 65 Emory L.J. 945 (2014). For article, "Eleventh Circuit Survey: January 1, 2014 — December 31, 2014: Evidence," see 66 Mercer L. Rev. 965 (2015). For annual survey of evidence law, see 67 Mercer L. Rev. 907 (2016). For annual survey on evidence law, see 68 Mercer L. Rev. 121 (2016). For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

CHAPTER 1

GENERAL PROVISIONS

ARTICLE 1

PURPOSE AND APPLICABILITY OF RULES OF EVIDENCE

24-1-1. Purpose and construction of the rules of evidence.

Law reviews. — For article, "Symposium on Evidence Reform," see 47 Ga. L. Rev. 657 (2013). For article, "Symposium on Evidence Reform: Searching for Truth in the American Law of Evidence and Proof," see 47 Ga. L. Rev. 801 (2013).

JUDICIAL DECISIONS

Cited in State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27 (2015).

24-1-2. Applicability of the rules of evidence.

Law reviews. — For annual survey of evidence law, see 67 Mercer L. Rev. 63 (2015).

JUDICIAL DECISIONS

Long standing requirement for admission of victim's character evidence not changed. — There is no reason to construe the rules regarding the admission of character evidence as a modification of Georgia's long-standing requirement that a defendant must first make a prima facie showing of self-defense before requiring a trial court to determine whether evidence pertaining to the victim's character is admissible. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Cited in Taylor v. State, 337 Ga. App. 486, 788 S.E.2d 97 (2016); W. Sky Fin., LLC v. State of Ga. ex rel. Olens, 300 Ga. 340, 793 S.E.2d 357 (2016).

ARTICLE 2

GENERAL EVIDENTIARY MATTERS

24-1-103. Rulings on evidence.

JUDICIAL DECISIONS

Plain error standard applies to evidence but not closing arguments. — Georgia has adopted the plain error standard with respect to rulings on evidence; however, this rule does not apply to a prosecutor's closing statements, which are not evidence, and are reviewed under prior case law providing for waiver of issues that were not objected to at trial. Gates v. State, 298 Ga. 324, 781 S.E.2d 772 (2016).

Under a plain error review, since the defendant failed to object at trial, the trial court did not abuse the court's discretion by allowing various autopsy photographs to be admitted into evidence at trial because the photos were not particularly gory or gruesome and were relevant to show the nature and location of the victim's injuries, which corroborated the account of the shooting given by the eyewitnesses who saw the defendant. Benton v. State, 301 Ga. 100, 799 S.E.2d 743 (2017).

In a malice murder case, pretermitting whether the trial court erred in admitting a statement that the victim had made to the victim's wife before the shooting, any error in the admission of the statement was harmless as the evidence of the defendant's guilt was overwhelming, and it was highly probable that the admission of the victim's hearsay statement did not contribute to the verdict because, prior to the shooting, the defendant had the victim's name stored as "the dead man" in the defendant's cell phone; the defendant told an employee at the tire shop where the victim worked to tell the victim that the defendant was going to kill the victim; and, after the shooting, the defendant told officers that the defendant shot the victim. Perez v. State, No. S17A1370, 2018 Ga. LEXIS 146 (Mar. 5, 2018).

Admission of evidence of fighting at school. — Pretermitting whether the second defendant showed that the admission of the evidence of the second defendant's no contest plea to disrupting a public school and affray was obviously erroneous, the second defendant did not even allege that the outcome of the trial was likely affected by its admission, especially considering that other, independent evidence was presented that the second defendant was involved in fighting at the second defendant's public school. Anthony

v. State, No. S17A1724, 2018 Ga. LEXIS 184 (Mar. 5, 2018).

Admission of no contest plea not plain error. — After the defendant was found guilty of driving under the influence of alcohol to the extent that the defendant was less safe to drive (DUI), the defendant could not show error, much less plain error, in the admission of evidence pertaining to the administrative license suspension (ALS) stipulation because the stipulation entered in the ALS hearing that the defendant would plead guilty to DUI in exchange for the return of the defendant's driver's license was relevant to, though certainly not dispositive of, the charge that the defendant was driving under the influence of alcohol, and its probative value was not substantially outweighed by its prejudicial effect. Adams v. State, 344 Ga. App. 159, 809 S.E.2d 87 (2017).

Decision to use prior convictions improper. — In a child molestation case, the trial court erred in denying the defendant's motion for new trial because it was an abuse of discretion to allow the prosecution to question the victim's mother listing the defendant's prior arrests for four offenses after the mother had already testified that the mother was aware of the defendant's prior arrests and that the arrets did not change the mother's opinion of the defendant's character; further, the admission of specific instances of conduct was not harmless as the victim's description of the defendant's improper conduct varied over time, and the appellate court could not say that the defendant's prior arrests did not enter into the jury's evaluation of the defendant's testimony and credibility. Gaskin v. State, 334 Ga. App. 758, 780 S.E.2d 426 (2015).

When the defendant was convicted of three counts of computer or electronic pornography and child exploitation, the trial court did not plainly err in admitting a retired police officer's testimony during the trial about the retired officer's investigation of an alleged similar transaction in 2008 because it was undisputed that the relevant videos and photographs from the 2008 investigation were destroyed when the hard drive used in that investigation crashed; there was no evidence that the state intentionally destroyed the videos and photographs in bad faith; and the admission of the retired officer's identification testimony did not affect the outcome of the trial as the evidence of the defendant's guilt was overwhelming. Patch v. State, 337 Ga. App. 233, 786 S.E.2d 882 (2016).

Informing jury that witnesses were held in contempt for failing to testify not plain error. — Trial court did not plainly err by informing the jury that two witnesses were held in contempt for refusing to testify on behalf of the state because, even if the trial court's remarks did give rise to some suggestion that the witnesses would point to the defendant as the perpetrator in the shooting of the victim, that suggestion was not at odds with the defense at trial as the defendant did not point to another perpetrator but claimed that the victim was accidentally shot while tussling with the defendant. Wallace v. State, 303 Ga. 34, 810 S.E.2d 93 (2018).

Substance of the evidence apparent from the context. — Although a drug distribution defendant failed to make an offer of proof as to the evidence regarding a detective's credibility that was excluded, the court found that the substance of the evidence was sufficiently apparent from the attorneys' discussion to preserve the defendant's argument for appellate review as permitted under O.C.G.A. § 24-1-103(a)(2). Williams v. State, 332 Ga. App. 546, 774 S.E.2d 126 (2015).

Admission of prior criminal activity to show involvement in criminal street gang. — Trial court did not commit plain error by permitting the state to introduce evidence that the third defendant had been involved in prior criminal activity, including battery, theft of a vehicle, and disorderly conduct, for the limited purpose of showing the third defendant's involvement in a criminal street gang. Anthony v. State, No. S17A1724, 2018 Ga. LEXIS 184 (Mar. 5, 2018).

Admitting evidence of witness's compensation not plain error. — In a products liability case, the prejudicial effect of admitting evidence of a car manufacturer's CEO's compensation did not so dramatically outweigh its probative value

that it required reversal of the jury verdict; the actions of the CEO in allegedly interfering with a government recall of the vehicle made the CEO's credibility and bias relevant. Chrysler Group LLC v. Walden, No. S17G0832, 2018 Ga. LEXIS 154 (Mar. 15, 2018).

Exclusion of evidence of victim's gang membership not plain error. — Trial court did not commit plain error by excluding evidence that the first victim was a member of a street gang because any such affiliation was irrelevant and had no connection to the shooting; and the defendant provided nothing to indicate that the motivation for the shooting, or anything related to the shooting for that matter, was related to street gang activity. Walton v. State, 303 Ga. 11, 810 S.E.2d 134 (2018).

Exclusion of alleged false accusation of child molestation. — In the defendant's trial for child molestation arising out of viewing a pornographic video with the defendant's four-year-old daughter, the trial court did not err in refusing to allow the defendant to cross-examine the child's mother pursuant to O.C.G.A. § 24-6-608 regarding her own accusations of molestation against her stepfather, who had been acquitted, because the charges were not shown to be false. Further, any error was harmless. Douglas v. State, 340 Ga. App. 168, 796 S.E.2d 893 (2017).

Harmless error when cumulative evidence admitted. — Trial court did not abuse the court's discretion by admitting evidence from a witness that the defendant had put a hit out on the witness because the evidence was cumulative of other evidence and, thus, any error in the admission of the evidence was harmless. Anglin v. State, 302 Ga. 333, 806 S.E.2d 573 (2017).

Exclusion of forensic toxicologist evidence. — In a malice murder case, the trial court did not commit plain error in excluding evidence from the forensic toxicologist regarding the drugs found in the victim's system because, given that the defendant offered no evidence to support the defendant's theory that the victim, the defendant's wife, died because drugs in the victim's system made the victim more susceptible to asphyxiation, the defendant could not show that there was a reasonable probability that, if the proffered testimony about drugs in the victim's system had been admitted, the outcome of the trial would have been more favorable to the defendant. Williams v. State, 302 Ga. 147, 805 S.E.2d 873 (2017).

Testimony regarding defendant's failure to contact police. — In the defendant's murder and rape trial, admission of testimony about the defendant's failure to contact police after the victim's death despite the defendant admittedly having sex with the victim, arguing with the victim, and pushing the victim the night of the victim's death was not plain error because the defendant failed to point to clear controlling authority that admission of the testimony was a clear and obvious legal error. Simmons v. State, 299 Ga. 370, 788 S.E.2d 494 (2016).

Admission of detective's comment that "defendant was going to prison" was harmless error. — Even assuming that the detective's comment that the detective thought the defendant was going to prison should have been redacted from the video recording of the defendant's interview by the police, its admission was harmless because, considering the strength of the properly admitted evidence of the defendant's guilt and the context of a police interview in which the defendant claimed that the defendant had nothing to do with the victim's death, the jury was highly unlikely to have been swayed by the detective's passing comment; and the jury could not have believed that the defendant had already been tried and convicted based on a statement made during a police interview played for the jury during the defendant's trial. Tanner v. State, 303 Ga. 203, No. S17A1417, 2018 Ga. LEXIS 141 (Mar. 5, 2018).

Admission of other crimes, wrongs, or acts did not constitue plain error. — In an armed robbery case, pretermitting whether admission of evidence of the defendant's prior armed robbery conviction amounted to clear or obvious error, the admission of that evidence did not constitute plain error that affected the defendant's substantial rights because the defendant testified and admitted that

the defendant pled guilty to the prior charge; although the defendant claimed the defendant acted in self-defense, eyewitnesses testified that they saw no weapons on the victims, saw the defendant rifling the victims' pockets, and heard one of the victims pleading with the defendant not to kill the victim; and the evidence indicated that both victims were shot from behind, undermining the defendant's claim of self-defense. Nations v. State, No. S17A1597, 2018 Ga. LEXIS 137 (Mar. 5, 2018).

Harmless error in allowing state's demonstration. — Even if the trial court abused the court's discretion in allowing the state's demonstration in which one of the prosecutors beat a punching bag at the direction of the detective 100 times (the number of blows the detective estimated the victim had received), any error was harmless as any effect the demonstration might have had on the jury would have been minimal compared to the effect of the properly-admitted evidence before the jury because the evidence of the defendant's guilt was overwhelming; the placement and extent of the victim's bruises were well-documented by the medical examiner's diagrams and multiple photographs; and the jury heard extensive medical and law enforcement testimony about the bruises. Williams v. State, 302 Ga. 147, 805 S.E.2d 873 (2017).

Admission of bribery evidence constituted harmless error. — Improper admission of the testimony that the co-defendant's father attempted to influence the victim by bribing the victim into changing the victim's account of what took place was harmless because it was highly probable that the error did not contribute to the jury's verdict as, in addition to the victim's testimony, the state presented evidence that a witness overheard the defendant say that the defendant wanted to rob someone; party guests looked at a co-defendant's phone and saw text messages that referenced a plan to commit a robbery; the defendant was seen with the co-defendant at the party by multiple witnesses; the ATM machine photographed the co-defendant making withdrawals; and the defendant lied about the defendant's alibi. Belcher v. State, 344 Ga. App. 729, No. A17A1982, 2018 Ga. App. LEXIS 126 (2018).

Admission of photographs. — Admission of one photograph of a murder victim in life with the victim's spouse and grandchildren, as well as 15 photographs of the victim after the victim's death from being hit and dragged by the defendant's truck, was not plain error. Bozzie v. State, 302 Ga. 704, 808 S.E.2d 671 (2017).

Waiver based on failure to object. — Because the defendant's only objection to the messages on a social media website was that they were prejudicial and not probative, the defendant waived any objection that the messages were not properly authenticated; however, even if the defendant did not waive the authentication objection, the victim's mother properly authenticated the messages as the mother knew the defendant went by the name "Bucky Raw" because the mother had seen videos that the defendant had posted — and in which the defendant appeared — on another website using that alias; and the mother was able to discern the defendant's identity through the conversations the mother had with the defendant on the accounts that the mother and the mother's friend had set up. Cotton v. State, 297 Ga. 257, 773 S.E.2d 242 (2015).

Cited in Pyatt v. State, 298 Ga. 742, 784 S.E.2d 759 (2016); Anthony v. State, 298 Ga. 827, 785 S.E.2d 277 (2016); Jones v. State, 299 Ga. 40, 785 S.E.2d 886 (2016); Durden v. State, 299 Ga. 273, 787 S.E.2d 697 (2016); Amey v. State, 337 Ga. App. 480, 788 S.E.2d 80 (2016); Lupoe v. State, 300 Ga. 233, 794 S.E.2d 67 (2016); Latta v. State, 341 Ga. App. 696, 802 S.E.2d 264 (2017).

24-1-104. Preliminary questions.

Law reviews. — For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013). For annual survey of evidence law, see 67 Mercer L. Rev. 63 (2015).

JUDICIAL DECISIONS

Cited in Roberts v. Cmty. & S. Bank, 331 Ga. App. 364, 771 S.E.2d 68 (2015); Kemp v. State, 810 S.E.2d 515, No. S17A1648, 2018 Ga. LEXIS 107 (2018).

24-1-105. Limited admissibility.

JUDICIAL DECISIONS

Failure to request limiting instruction. — With regard to the defendant's trial for armed robbery and possession of a firearm, the trial court did not commit plain error in failing to give the jury limiting instructions for evidence presented against the co-defendant concerning charges that were unique to the co-defendant because the defendant failed to make such a request. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290 (2014).

24-1-106. Introduction of remaining portions of writings or recorded statements.

JUDICIAL DECISIONS

Violation of rule of completeness. — Because the earlier exculpatory portions of the defendant's transcribed statement were relevant as to both whether the defendant committed the rape and whether the defendant's statement was voluntary, the trial court violated the rule of completeness and abused the court's discretion when the court excluded those earlier portions of that statement; however, the error was harmless because the admitted and improperly excluded evidence showed overwhelmingly that the defendant was guilty of rape, whether principally or as a party to the crime, rendering it highly probable that any error in failing to admit the earlier portions of the defendant's statement did not contribute to the jury's verdict. Morales v. State, 337 Ga. App. 614, 788 S.E.2d 535 (2016).

No violation of rule of completeness. — State's introduction of a partial recording of a phone call that the defendant made to the defendant's mother did not violate the rule of completeness because the portion of the call in which the defendant told the mother about a potential plea offer was unrelated to the later conversation about the defendant's uncle, who was an eyewitness to the shooting. Jackson v. State, 301 Ga. 866, 804 S.E.2d 367 (2017).

Returned 911 call after emergency abated. — At the defendant's trial for DUI and battery, the trial court did not err in excluding admission of the sheriff's return call to the homeowner, who then admitted that punching the defendant's spouse was accidental, as hearsay, because the emergency leading to the homeowner's two 911 calls had then abated, making the statement testimonial, and the homeowner had later died. Further, the defendant was acquitted of the battery charge. Danley v. State, 342 Ga. App. 61, 802 S.E.2d 851 (2017).

Log sheet with handwritten intoxilyzer results admissible. — Log sheet with handwritten intoxilyzer results was not excluded because the state had provided everything it had with regard to the intoxilyzer results and there was nothing left in the state's possession to complete that evidence; to the extent that the state failed to provide information in the detail provided on an intoxilyzer printout, those omissions went to the weight and not the admissibility of the intoxilyzer results. Cross-examination of the officer who administered the test would allow the defendant's counsel the opportunity to test the nature of the state's evidence, and the trial court indicated that the court would revisit the motion in limine admitting the log sheet

should the state not offer the testimony of that officer. Jones v. State, 345 Ga. App. 14, No. A17A1532, 2018 Ga. App. LEXIS 169 (2018).

CHAPTER 2

JUDICIAL NOTICE

ARTICLE 1

ADJUDICATIVE FACTS

24-2-201. Judicial notice of adjudicative facts.

JUDICIAL DECISIONS

Analysis

General Consideration
Judicial Notice Proper

General Consideration

Cited in Sherman v. City of Atlanta, 317 Ga. 345, 730 S.E.2d 113 (2013); Atl. Geoscience, Inc. v. Phoenix Dev. & Land Inv., LLC, 341 Ga. App. 81, 799 S.E.2d 242 (2017).

Judicial Notice Proper

Judicial notice was held proper in the following cases.

Limited liability company and its individual members were properly held liable to a bank following their failure because there was ample undisputed evidence that the bank was the company's successor-in-interest under the credit line agreements as various documents allowed judicial notice (O.C.G.A. § 24-2-201(b)(2)) that the bank had acquired the company's assets. Jaycee Atlanta Dev., LLC v. Providence Bank, 330 Ga. App. 322, 765 S.E.2d 536 (2014).

ARTICLE 2

LEGISLATIVE FACTS; ORDINANCES OR RESOLUTIONS

24-2-220. Judicial notice of legislative facts.

JUDICIAL DECISIONS

Analysis

Judicial Notice Improper

Judicial Notice Improper

Judicial notice was held improper in the following cases.

Trial court was not authorized to take judicial notice of the judgment in a federal suit since it was material not included in the actual court record and the error was not harmless because, without admitting into evidence the duly certified copies of

Judicial Notice Improper (Cont'd)

the prior judgment, the defendants could not establish that collateral estoppel barred the plaintiff's wrongful foreclosure suit. Garner v. US Bank Nat'l Ass'n, 329 Ga. App. 86, 763 S.E.2d 748 (2014).

24-2-221. Judicial notice of ordinance or resolution.

JUDICIAL DECISIONS

Cited in Edwards v. City of Warner Robins, 302 Ga. 381, 807 S.E.2d 438 (2017).

CHAPTER 3

PAROL EVIDENCE

24-3-1. Parol evidence contradicting writing inadmissible generally.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
EVIDENCE ADMISSIBLE
4. OTHER AGREEMENTS

General Consideration

Cited in Thomas v. Emory Clinic, Inc., 321 Ga. App. 457, 739 S.E.2d 138 (2013); Bates v. State, 322 Ga. App. 319, 744 S.E.2d 841 (2013); Wilson v. State, 295 Ga. 84, 757 S.E.2d 825 (2014); Crop Production Services, Inc. v. Moye, No. A17A1775, 2018 Ga. App. LEXIS 195 (Mar. 15, 2018).

Evidence Admissible

4. Other Agreements

Life insurance beneficiary designation form.

With regard to the defendant's murder conviction, the trial court properly denied the defendant's motion for a new trial because the victim's out-of-court statements to the victim's brother were admissible under the necessity exception set forth in O.C.G.A. § 24-3-1(b); therefore, the defendant's counsel was not deficient because there is no deficient performance when an attorney fails to object to admissible evidence. Bulloch v. State, 293 Ga. 179, 744 S.E.2d 763 (2013).

Written consent required for timber cutting. — In an action for timber conversion, the trial court erred when the court denied the plaintiff's motion in limine to exclude parol evidence concerning the plaintiff's alleged consent to the timber company's cutting and other topics because O.C.G.A. § 51-12-51(a) clearly and unambiguously required written consent and any verbal consent to cut timber on the property was inadequate; parol evidence regarding an understanding to cut timber at or even after the closing was inadmissible as it could be taken to contradict the plain terms of the loan documents, which barred cutting without written consent; and the jury apparently considered the parol evidence in the course of reaching the jury's verdict for

the timber company. AgSouth Farm Credit, ACA v. Gowen Timber Co., 336 Ga. App. 581, 784 S.E.2d 913 (2016).

RESEARCH REFERENCES

ALR. — Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through interpreter — state cases, 97 A.L.R.6th 567.

Validity, construction, and enforcement of oral antenuptial agreements, 15 A.L.R.7th 2.

24-3-2. Proof of unwritten portions of contract admissible where not inconsistent.

JUDICIAL DECISIONS

Cited in Bulloch v. State, 293 Ga. 179, 744 S.E.2d 763 (2013); Carter v. State, 324 Ga. App. 118, 749 S.E.2d 404 (2013); Miller v. State, 296 Ga. 9, 764 S.E.2d 823 (2014).

24-3-3. Contemporaneous writings explaining each other; parol evidence explaining ambiguities.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Cited in Dulcio v. State, 292 Ga. 645, 740 S.E.2d 574 (2013); Johnson v. State, 323 Ga. App. 65, 744 S.E.2d 921 (2013); Wilson v. State, 295 Ga. 84, 757 S.E.2d 825 (2014).

24-3-5. Known usage.

JUDICIAL DECISIONS

Cited in Dulcio v. State, 292 Ga. 645, 740 S.E.2d 574 (2013); Garcia-Carrillo v. State, 322 Ga. App. 439, 746 S.E.2d 137 (2013); Hernandez-Garcia v. State, 322 Ga. App. 455, 745 S.E.2d 706 (2013); Folston v. State, 294 Ga. 778, 755 S.E.2d 803 (2014); Lawrence v. State, 342 Ga. App. 396, 802 S.E.2d 859 (2017).

24-3-10. Explanation of blank endorsements.

JUDICIAL DECISIONS

Cited in Rai v. Reid, 294 Ga. 270, 751 S.E.2d 821 (2013).

CHAPTER 4

RELEVANT EVIDENCE AND ITS LIMITS

Sec.
24-4-418. Admissibility of criminal gang activity, disclosure.

24-4-401. "Relevant evidence" defined.

JUDICIAL DECISIONS

Analysis

Relevancy Defined
Criteria of Admissibility
Relevant Evidence in Civil Cases
Relevant Evidence in Criminal Cases

Relevancy Defined

Evidence of victim's gang membership irrelevant. — Trial court did not commit plain error by excluding evidence that the first victim was a member of a street gang because any such affiliation was irrelevant and had no connection to the shooting; and the defendant provided nothing to indicate that the motivation for the shooting, or anything related to the shooting for that matter, was related to street gang activity. Walton v. State, 303 Ga. 11, 810 S.E.2d 134 (2018).

Crime participant's testimony relevant. — During the appellant's trial for felony murder, aggravated assault, and possession of a firearm during the commission of a felony, it was not error to admit the testimony of a witness related to their personal observations as a participant and witness to the crimes as the testimony clearly was damaging to the appellant's defense, it was relevant to establish the appellant's guilt and the circumstances surrounding the charged crimes, and did not improperly place the appellant's character in issue. Williams v. State, 298 Ga. 538, 783 S.E.2d 594 (2016).

Testimony on use of Facebook. — Trial court did not err by excluding as irrelevant the testimony of a witness the defendant sought to have testify regarding the witness's general experience using Facebook because the testimony was not relevant to a replaced juror's personal style. Smith v. State, 335 Ga. App. 497, 782 S.E.2d 305 (2016).

Criteria of Admissibility

Insufficient funds evidence relevant and admissible. — Trial court did not err when the court allowed the state to introduce evidence that, on the date of the death of the defendant's wife, the defendant received an email notifying the defendant that the defendant had insufficient funds in the defendant's bank account because it was within the discretion of the trial court to conclude that the evidence was relevant to show that the defendant was under some degree of financial stress and had some reason to be upset on the day of the killing; and the prejudicial effect of the evidence, if any, was minimal and not unfair. McClain v. State, 303 Ga. 6, 810 S.E.2d 77 (2018).

Relevant Evidence in Civil Cases

Evidence of diminished value after unauthorized cutting of timber. — Holder of a security deed on property from which timber was cut without authorization was not entitled to damages for the diminished value of the property, but only for the value of the trees; however, evidence of diminished value was relevant for purposes of attorney's fees and punitive damages. Redcedar, LLC v. CML-GA Social Circle, LLC, 341 Ga. App. 110, 798 S.E.2d 334 (2017).

Evidence of witness's compensation relevant. — In a products liability case, the prejudicial effect of admitting evidence of a car manufacturer's CEO's compensation did not so dramatically outweigh its probative value that it required reversal of the jury verdict; the actions of the CEO in allegedly interfering with a government recall of the vehicle made the CEO's credibility and bias relevant. Chrysler Group LLC v. Walden, No. S17G0832, 2018 Ga. LEXIS 154 (Mar. 15, 2018).

Autopsy photographs.

Trial court did not err in allowing certain autopsy photographs of the victim to be admitted because the challenged photographs did not depict the victim's autopsy incisions, and the photographs were not especially gory or gruesome in the context of autopsy photographs in a murder case; the photographs were relevant to show the nature and location of the victim's injuries, which corroborated the state's evidence of the circumstances of the killing; contrary to the defendant's assertion, the victim did not die solely from manual strangulation, but also from blunt force head trauma, and the photographs illustrated the nature and extent of the physical beating and resulting trauma sustained by the victim; and exclusion based on unfair prejudice was not warranted. Pike v. State, 302 Ga. 795, 809 S.E.2d 756 (2018).

Evidence in malicious prosecution case. — Malicious prosecution case was remanded to the trial court because the trial court, after concluding that the plaintiff's past criminal history was relevant, should have thereafter considered whether the plaintiff's prior arrests nevertheless should be excluded because of their inherently prejudicial nature or because those arrests potentially would confuse or mislead the jury. Rivers v. K-Mart Corp., 321 Ga. App. 788, 743 S.E.2d 464 (2013).

Relevant Evidence in Criminal Cases

Evidence not relevant to intent. — Trial court erred in excluding proffered evidence regarding how the detention center handled the defendant and the other detainee after the fight, because the proffered evidence dealt with administrative actions or decisions that occurred after the defendant struck the officer and those actions or decisions were not part of the circumstances connected with the act for which the defendant was accused and, thus, was not relevant under former O.C.G.A. § 24-2-1 to the issue of intent. Hickey v. State, 325 Ga. App. 496, 753 S.E.2d 143 (2013) (decided under former O.C.G.A. § 24-2-4).

When evidence of other crime admissible.

Trial court's ruling that the other-acts evidence would not be admitted was vacated because the appellate court could not discern whether the trial court considered whether the defendants had taken affirmative steps to withdraw intent as an element to be proved by the state or whether it compared the state of mind involved in the extrinsic offenses with that involved in the charged offenses before finding that the other-acts evidence constituted nothing more than inadmissible propensity evidence. State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27 (2015).

Trial court did not abuse the court's discretion by allowing the state to introduce evidence of the defendant's prior driving under the influence (DUI) conviction because the evidence was not unduly prejudicial as the relevance of the prior DUI was heightened since the defendant's defense was that the defendant did not drive the vehicle while intoxicated but drank after stopping; thus, the prior DUI was relevant to the intent to drive while intoxicated since the defendant did so before. King v. State, 338 Ga. App. 783, 792 S.E.2d 414 (2016).

Other acts evidence regarding two earlier instances of obstructing a law enforcement officer was relevant and admissible because, by expressly challenging whether the officer was lawfully discharging the officer's official duties, the defendant implicitly challenged the defendant's own knowledge that the officer's commands to the defendant were lawful; and it established that, on past occasions, the defendant had encountered officers under similar circumstances and been apprehended or accused of obstructing the offi-

Relevant Evidence in Criminal Cases (Cont'd)

cers when the defendant fled, such that the defendant knew that the officer's command that the defendant talk with the officer was made in the lawful discharge of the officer's official duties and that the defendant was not free to flee. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156 (2016).

Testimony regarding similar transactions that occurred years earlier was properly admitted as it was relevant to show the defendant's lustful disposition with respect to preteen or teenaged girls and the defendant's pattern of molesting young girls with whom the defendant was living. Harris v. State, 340 Ga. App. 865, 798 S.E.2d 498 (2017).

O.C.G.A. § 24-4-404(b) only relates to "other" crimes, wrongs, or acts that are independent of or extrinsic to the charged offense. If the other crime, wrong, or act is intrinsic to the charged offense or inextricably intertwined with it, it is admissible under O.C.G.A. § 24-4-401. Such evidence was called part of the res gestae of the offense under the rules in effect prior to the new Evidence Code, adopted in 2013. State v. Battle, 344 Ga. App. 565, No. A17A1753, 2018 Ga. App. LEXIS 68 (2018).

Prior convictions inadmissible. — In a malice murder and aggravated assault case, because the defendant never claimed, nor was there any evidence to suggest, that the shooting was the result of an accident or mistake, whether the defendant's actions were the result of an accident or mistake was irrelevant, and it was error for the trial court to admit the 2006 guilty pleas to aggravated assault. Brown v. State, 810 S.E.2d 145, No. S17A1582, 2018 Ga. LEXIS 136 (2018).

Prior difficulties evidence.

Testimony by the victims' mother regarding the defendant's prior history of violence toward the children or in the children's presence was relevant as probative of the defendant's ability to execute the threats to which the victims had testified. Allen v. State, No. A18A0480, 2018 Ga. App. LEXIS 245 (May 3, 2018).

Evidence rehabilitating victim's credibility not relevant or admissible. — Trial court erred in permitting the state to elicit testimony that the co-defendant's father attempted to influence the victim by bribing the victim into changing the victim's account of what took place as a means of rehabilitating the victim's credibility because the state did not contend that cross-examination of the victim included any manner of impeachment that would permit introduction of the complained-of evidence as being generally relevant; and there was no rule that generally opened the door to otherwise inadmissible evidence. Belcher v. State, 344 Ga. App. 729, No. A17A1982, 2018 Ga. App. LEXIS 126 (2018).

Evidence victim's father was sexual abuse victim irrelevant. — Since there was no logical link between the fact that the victim had a father who also claimed to be a victim of sexual abuse and a conclusion that the victim might therefore be an unreliable witness whose testimony regarding the defendant's actions was not worthy of belief, the trial court did not abuse the court's discretion in finding that any evidence that the victim's father suffered sexual abuse was irrelevant. Morris v. State, 341 Ga. App. 568, 802 S.E.2d 13 (2017).

Victim's condition relevant in cruelty to children case. — Trial court did not commit reversible error when the court permitted the state to bring the first victim into the courtroom because evidence of the first victim's condition was clearly relevant to the state's cruelty to children in the first and second charges, including that the defendant caused the first victim bodily harm by rendering the first victim's brain, a member of the first victim's body, useless by violently shaking the victim, causing permanent brain damage; the probative value of viewing the victim was not substantially outweighed by the danger of unfair prejudice; and under the Crime Victims' Bill of Rights statute, O.C.G.A. § 17-7-1 et seq., the first victim had the right to be present at the trial. Freeman v. State, 333 Ga. App. 6, 775 S.E.2d 258 (2015).

Evidence of license suspension agreement relevant in DUI case. — In a DUI case under O.C.G.A. § 40-6-391(a)(1), evidence of an agree-

ment the defendant entered in an administrative license suspension (ALS) proceeding, in which the defendant agreed to plead guilty to DUI in exchange for the return of the defendant's license, was relevant and admissible in the defendant's DUI case although the defendant later decided not to plead guilty and go to trial, and although the agreement did not recite that it could be used against the defendant at trial. Smith v. State, 345 Ga. App. 43, No. A18A0800, 2018 Ga. App. LEXIS 163 (2018).

Admission of horizontal gaze nystagmus test. — In the defendant's DUI trial, O.C.G.A. § 40-6-391(a)(1), horizontal gaze nystagmus (HGN) test was properly admitted, although the defendant stated the defendant had taken Prozac, which would influence the results, because the evidence was relevant as to whether the defendant showed signs of impairment, O.C.G.A. § 24-4-401, and the defendant remained free to attempt to persuade the factfinder that the testimony be afforded little weight under the circumstances. Cherry v. State, No. A17A2085, 2018 Ga. App. LEXIS 116 (Feb. 21, 2018).

Video admissible in DUI case. — Trial court did not err by allowing the state to admit demonstrative evidence of video clips showing three types of horizontal gaze nystagmus because the officer's testimony made clear that the video clips were not of the defendant, but that in the substantial particulars, the conditions of the video clips and the officer's observations of the defendant were similar as both showed the same kind of nystagmus. Monroe v. State, 340 Ga. App. 373, 797 S.E.2d 245 (2017).

For cases concerning photographic and diagrammatic evidence.

Defendant's conviction for aggravated child molestation under O.C.G.A. § 16-6-4 was affirmed because the trial court did not commit plain error by admitting photographs of the victim's injuries as the photographs were material and relevant to issues raised at trial, and the photographs were admissible even if the photographs, to some extent, duplicated other photographs. Robinson v. State, 342 Ga. App. 624, 805 S.E.2d 103 (2017).

Photos were arguably objectionable. — Three photos from the hospital series that did not depict the victim at all were arguably objectionable by counsel and an objection may have been sustained under O.C.G.A. § 24-4-403 as to relevancy but no ineffective assistance of counsel was shown based on the other evidence against the appellant being strong and the appellant failing to show a reasonable probability that the result of the trial would have been different. Davis v. State, 299 Ga. 180, 787 S.E.2d 221 (2016).

Photographs of the victim of a crime are admissible, etc.

Trial court did not abuse the court's discretion in admitting the autopsy photographs of the victim because the photographs were relevant as the medical examiner testified that the photographs showed the internal injuries that caused the victim's death that were not evident from the pre-incision photographs; the fact that the defendant might not have disputed the cause of death did not diminish the relevance of the photographs; and the trial court considered whether the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. Dailey v. State, 297 Ga. 442, 774 S.E.2d 672 (2015).

Photographs posted on social media. — Trial court did not abuse the court's discretion when the court found that a photograph that a friend took of the three defendants during the trial and posted on social media was relevant to show that the three defendants were members of a gang as the state also introduced other photographs of the three defendants that the same friend posted on social media and that depicted the defendants allegedly throwing gang signs. Anthony v. State, No. S17A1724, 2018 Ga. LEXIS 184 (Mar. 5, 2018).

Recorded telephone conversations made from jail. — Defendant's recorded telephone conversations made from jail were relevant and admissible: (1) to show the defendant's consciousness of guilt for the armed robbery as the defendant admonished a witness for divulging the defendant's name to the police; the defendant asked the witness if the witness told the police that the defendant had a gun; and the defendant told the witness that

Relevant Evidence in Criminal Cases (Cont'd)

the police pressure should not get to the witness as the witness had not done anything; and (2) to corroborate the witness's testimony that the defendant had told the witness not to give the defendant's name to the police; further, the probative value of the recorded telephone calls was not substantially outweighed by the danger of unfair prejudice. Anderson v. State, 337 Ga. App. 739, 788 S.E.2d 831 (2016).

Admission of defendant's tattoo irrelevant, but harmless. — Trial court abused the court's discretion in overruling the defendant's relevancy objection to questions about the defendant's tattoos, but the error was harmless as the properly admitted evidence proving the defendant's guilt was overwhelming given that several witnesses and the defendant testified the defendant was alone with the victim when the symptoms started, the defendant admitted to squeezing the baby, and expert testimony established that the symptoms would have been immediately apparent. Smith v. State, 299 Ga. 424, 788 S.E.2d 433 (2016).

Police dogs.

Trial court improperly granted the state's motion to quash the defendant's subpoena for all records and documents pertaining to the drug detection dog and the dog's handler involved in the detection of drugs in the defendant's luggage because the appellate court could not determine from the existing record whether the training materials were relevant to the issue of reliability of the drug dog as certification of the drug dog on the day of the alert did not preclude a challenge to its reliability; other than the blanket assertion that training materials were irrelevant to show reliability, the state offered no other basis for the state's objection to the subpoena; and the trial court had the discretion to modify the subpoena if the subpoena was overly broad. Harris v. State, 341 Ga. App. 831, 802 S.E.2d 708 (2017).

Stipulation at administrative license suspension hearing relevant. — Defendant's stipulation at the administrative license suspension hearing that the defendant would plead guilty to driving under the influence of alcohol in exchange for the return of the defendant's driver's license was relevant to, though certainly not dispositive of, the charge that the defendant was driving under the influence of alcohol. Flading v. State, 327 Ga. App. 346, 759 S.E.2d 67 (2014).

Relevance of evidence found.

Probative value of the probation officer's testimony about a phone number that the defendant had given to the officer that linked the defendant to the phone from which numerous calls were placed to one of the murder victims on the day of the murders was not substantially outweighed by its prejudicial effect because the testimony of the probation officer was clearly relevant; it had substantial probative value; although other evidence in the record tended to establish the connection between the defendant and one of the murder victims, none of it established a connection as directly or strongly as the testimony of the probation officer; and other evidence informed the jury that the defendant was on probation. Huff v. State, 299 Ga. 801, 792 S.E.2d 368 (2016).

Trial court did not abuse the court's discretion in allowing the admission of evidence of the defendant's friend's gang affiliation given the state's purpose, to show a connection between the robbery and murder and the foreseeable consequence of the defendant's participation in the robbery of the victim. Davis v. State, 301 Ga. 397, 801 S.E.2d 897 (2017).

Signs and fliers relevant to show defendant's bent of mind. — Images and language incorporated into the sign and fliers that the defendant displayed or distributed concerning the defendant's child's mother, the victim, at or near the victim's workplace demonstrated the state of the relationship between the defendant and the victim, and were "highly relevant" to show the defendant's abusive bent of mind toward the victim. Hudson v. State, 321 Ga. App. 702, 742 S.E.2d 516 (2013).

Officer's testimony relevant.

Trial court did not err by permitting a law-enforcement officer to testify about the pernicious effects of heroin and addiction because the testimony put in context what heroin was and the testimony was

relevant to explain why someone might engage in an enterprise to distribute heroin and possess a trafficking amount, and to explain why heroin was a Schedule I controlled substance. Jones v. State, 339 Ga. App. 95, 791 S.E.2d 625 (2016).

Excluded testimony relevant to explain impetus for defendant's actions. — Trial court erred in excluding testimony from a witness that, during a lengthy conversation with the defendant after the defendant killed the defendant's wife, the defendant told the witness that the wife had been unfaithful, that the defendant did not mean for the wife's death to happen, and the defendant loved the wife, because such testimony was relevant to explain the impetus for the defendant's actions. Allaben v. State, 299 Ga. 253, 787 S.E.2d 711 (2016).

Possession of a handgun was relevant.

Trial court did not abuse the court's discretion in admitting the revolver found in the defendant's vehicle into evidence as it was relevant to whether the defendant had threatened the judge who presided over the defendant's divorce and the judge's family, and to whether the defendant was in the process of executing the steps outlined in a letter to the judge, which included a plan to kill the judge's family, motivated by revenge. Satterfield v. State, 339 Ga. App. 15, 792 S.E.2d 451 (2016).

Discovery of relevant evidence properly allowed.

In a theft by taking case, the trial court erred in denying the defendant's motion to compel a response to the defendant's subpoena duces tecum as the defendant met the burden of showing the relevance of the evidence sought in the subpoena because the defendant demonstrated that the defendant sought the documents not just for use in cross-examining the pharmacy owner, but also to prove the volume of cash that the pharmacy used to pay its cash-based employees and that the defendant took cash out of the register at the employer's direction to pay those employees and other expenses. Gregg v. State, 331 Ga. App. 833, 771 S.E.2d 486 (2015).

Evidence of death of defendant's friend not relevant. — In a rape case, the trial court properly excluded evidence regarding the death of the defendant's friend to explain the defendant's alcoholism because it shed no light on the July 14, 2008 assault or the fact that the defendant had an alcohol problem and was drinking that night. Bill v. State, 341 Ga. App. 340, 799 S.E.2d 28 (2017).

Evidence of bar's reputation for violent incidents inadmissible. — When the defendant was convicted of, inter alia, malice murder and attempted murder, the trial court did not err in excluding the proffered evidence of 10 incidents at a bar because the evidence was not relevant to show that the dangerous, violent environment at the bar influenced the defendant's state of mind and made the defendant's extreme reaction to perceived threats from the victims reasonable as the defendant did not contend that the defendant knew about any of the proffered occurrences at the time of the shooting; none of the incidents showed a propensity for violence in either of the victims; and the evidence did not tend to make it more likely that the defendant reasonably believed that deadly force was necessary. Ramirez v. State, No. S17A1662, 2018 Ga. LEXIS 129 (Mar. 5, 2018).

RESEARCH REFERENCES

ALR. — Admissibility of evidence of medical defendant's apologetic statements or the like as evidence of negligence, 97 A.L.R.6th 519.

Construction and application of standard for reviewing challenges to sufficiency of evidence supporting conviction — Supreme Court cases, 76 A.L.R. Fed. 2d 295.

24-4-402. Relevant evidence generally admissible; irrelevant evidence not admissible.

JUDICIAL DECISIONS

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General Consideration

Evidence of gang activity relevant. — Evidence that the defendant was with two other gang members at the scene of a shooting was relevant to the material issue of the defendant's association with a criminal street gang; thus, the trial court did not abuse the court's discretion in admitting that evidence. Lang v. State, 344 Ga. App. 623, No. A17A1483, 2018 Ga. App. LEXIS 99 (2018).

When the defendant was convicted of possession of a firearm by a convicted felon and participation in criminal gang activity, the trial court did not err in admitting evidence that a police investigator, who was qualified as a gang expert, had seized a "book of knowledge" from the house of another gang member as the evidence was relevant to a material issue in the case because a conviction required that there be some nexus between the enumerated act and an intent to further street gang activity; and, based on the book and other information, gang members were required to possess firearms. Lang v. State, 344 Ga. App. 623, No. A17A1483, 2018 Ga. App. LEXIS 99 (2018).

Jail phone call relevant. — Trial court did not err in admitting an audio recording of a five-minute phone call that the defendant made from jail to a friend because the recording was relevant to show that the defendant made statements that were not consistent with either the defendant's statements at the defendant's second police interview or the defense theory of justification presented at trial; and the derogatory terms used by the defendant during the phone call did not create a risk of unfair prejudice that substantially outweighed the recording's probative value as the words that the defendant used had lost much of their shock value in contemporary culture and were unlikely to induce the jury to return a conviction based on a generalized assessment of character. Smith v. State, 302 Ga. 717, 808 S.E.2d 661 (2017).

Irrelevant Evidence in Civil Cases

Evidence in malicious prosecution case. — Malicious prosecution case was remanded to the trial court because the trial court, after concluding that plaintiff's past criminal history was relevant, should have thereafter considered whether the plaintiff's prior arrests nevertheless should be excluded because of their inherently prejudicial nature or because those arrests potentially would confuse or mislead the jury. Rivers v. K-Mart Corp., 321 Ga. App. 788, 743 S.E.2d 464 (2013).

Irrelevant Evidence in Criminal Cases

Medical records. — In a malice murder case, the trial court did not err when the court refused to admit medical records indicating the second victim was diagnosed with homicidal ideations sometime after the stabbing and assault as the evidence was not relevant because the diagnosis of homicidal ideation was made sometime after the criminal offenses in the case; and the diagnosis of homicidal ideation allegedly concerned thoughts the second victim had about the second victim's girlfriend and the second victim's child and not any thoughts the second victim had about the first victim, who had been murdered. Drews v. State, 810 S.E.2d 502, No. S17A1873, 2018 Ga. LEXIS 109 (2018).

RESEARCH REFERENCES

ALR. — Admissibility of evidence of medical defendant's apologetic statements or the like as evidence of negligence, 97 A.L.R.6th 519.

24-4-403. Exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time.

Law reviews. — For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

When evidence of other crime admissible. — Trial court's ruling that the other-acts evidence would not be admitted was vacated because the appellate court could not discern whether the trial court considered whether the defendants had taken affirmative steps to withdraw intent as an element to be proved by the state or whether it compared the state of mind involved in the extrinsic offenses with that involved in the charged offenses before finding that the other-acts evidence constituted nothing more than inadmissible propensity evidence. State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27 (2015).

In the defendant's DUI trial, the state offered evidence concerning the defendant's December 2011 DUI for the valid purpose of proving the defendant's knowledge and intent, and the probative value of the 2011 DUI was not substantially outweighed by the danger of unfair prejudice or the confusion of issues or misleading the jury. The state had proffered sufficient evidence, in the form of both the officer's testimony and the certified conviction, that the defendant in fact committed the prior act. Danley v. State, 342 Ga. App. 61, 802 S.E.2d 851 (2017).

In a robbery case, the trial court erred by finding that the prosecutor's "in her place" proffer in support of a pretrial notice under O.C.G.A. § 24-4-404(b) seeking to admit evidence of another robbery committed by the defendant provided insufficient proof that the defendant committed the other acts, in the absence of objection by the defendant. State v. Battle, 344 Ga. App. 565, No. A17A1753, 2018 Ga. App. LEXIS 68 (2018).

Evidence improperly admitted to show course of conduct. — Defendant was granted a new trial because the evidence of a subsequent armed robbery was not admissible to show motive since that later act was not connected to the murders, and the only similarities it shared with the murders were the all-too-common elements of guns and an assortment of co-conspirators. Thompson v. State, 302 Ga. 533, 807 S.E.2d 899 (2017).

Evidence in medical malpractice cases.

In a medical malpractice case arising out of a mother's premature delivery of her baby, the trial court did not err in admitting the doctor's note on the mother's chart that the doctor had examined her, which was later marked through with a note "patient not seen, out of room," was probative of the doctor's untruthfulness under O.C.G.A. § 24-6-608(b)(1), given that the mother had not left her room that day. The note was not unduly prejudicial under O.C.G.A. § 24-4-403. Cent. Ga. Women's Health Ctr., LLC v. Dean, 342 Ga. App. 127, 800 S.E.2d 594 (2017).

Victim's false accusation of sexual abuse improperly barred. — Trial court erred in granting the state's motion in limine to exclude evidence that the

General Consideration (Cont'd)

alleged victim had previously made a false accusation of sexual abuse against another individual based on a lack of specificity and a creation unfair prejudice and confusion of the issues because it was not clear how a false accusation could contain adequate specificity about an incident that never occurred; and because evidence of an allegation against a totally unrelated third party did not seem to present danger of unfair prejudice or confusion of the issues in the prosecution against one defendant, for sexual acts committed on one day, against one individual. Burns v. State, No. A18A0227, 2018 Ga. App. LEXIS 226 (Apr. 19, 2018).

Prejudicial impact outweighed probative value in child abuse case. — While the physician's opinion regarding the victim's hymen being intact and then later not intact was compelling evidence that the victim had been sexually abused, it was much less probative of the question of whether it was the defendant who had molested the victim because the defendant lacked access to the victim during the relevant time period and, thus, should not have been admitted into evidence. State v. Chapman, 322 Ga. App. 82, 744 S.E.2d 77 (2013).

Trial court did not abuse the court's discretion by admitting evidence of prior molestation acts upon a minor victim witness because the jury could have concluded by a preponderance of the evidence that the defendant committed the acts described by the witness and the probative value was great based on the overall similarity of the acts, each involved inappropriate sexual contact between the defendant and a child of similar age to whom the defendant gained access through a relationship with the child's mother. Dixon v. State, 341 Ga. App. 255, 800 S.E.2d 11 (2017).

Prejudicial impact outweighed probative value in rape case. — Trial court disagreed that the other acts evidence was especially probative of the credibility of the defendant and the victim, given the lack of similarity between the other acts evidence of child molestation and the charged offense of rape, the decade separating the other acts from the charged offense, and the defendant's immaturity at the time the other acts were committed; however, the trial court believed that, under the circumstances, admitting extrinsic evidence of acts of alleged child molestation would lure the jury into finding the defendant guilty based on proof that was not specific to the crime charged, thereby infecting the proceedings with unfair prejudice and undermining the presumption of innocence. State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138 (2016).

In a rape case, the record showed that the trial court made a common sense assessment of the circumstances surrounding the use of the other acts evidence, including prosecutorial need, similarity between the other acts and the charged offense, temporal remoteness, the likelihood of jury confusion by a trial involving three separate incidents, and the unfair prejudice that would flow from the introduction of prior crimes involving allegations of child molestation; thus, the state did not show that the trial court applied the wrong legal standard, misunderstood the nature or scope of the court's discretion, or clearly abused that discretion in excluding the evidence of the other acts in the defendant's case. State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138 (2016).

In a rape case, the trial court was not unaware that excluding evidence under this rule was an extraordinary remedy that should be applied sparingly because the trial judge stated that the judge would have been happy to allow the other acts evidence if the judge thought the evidence was appropriate, but the trial court believed that the state was attempting to compensate for a weak case by piling on bad character evidence of scant probative value in an effort to undermine the presumption of innocence; and the trial court was clearly concerned that the admission of the other acts would transform what should be a straightforward case into a trial involving three separate incidents, distracting the jury from the issues central to the crime charged. State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138 (2016).

Trial court did not commit reversible

error when the court permitted the state to bring the first victim into the courtroom because evidence of the first victim's condition was clearly relevant to the state's cruelty to children in the first and second charges, including that the defendant caused the first victim bodily harm by rendering the first victim's brain, a member of the first victim's body, useless by violently shaking the victim, causing permanent brain damage; the probative value of viewing the victim was not substantially outweighed by the danger of unfair prejudice; and under the Crime Victims' Bill of Rights statute, O.C.G.A. § 17-7-1 et seq., the first victim had the right to be present at the trial. Freeman v. State, 333 Ga. App. 6, 775 S.E.2d 258 (2015).

Trial court did not err by admitting evidence that the defendant committed prior acts of child molestation as the circumstances were similar, the age of the victim during the abuse overlapped with the age of the victim in the instant case, and the manner of abuse was the same, making the prior offense highly probative with regard to the defendant's intent. Eubanks v. State, 332 Ga. App. 568, 774 S.E.2d 146 (2015).

Probative value not outweighed by prejudicial effect in murder case. — Probative value of the probation officer's testimony about a phone number that the defendant had given to the officer that linked the defendant to the phone from which numerous calls were placed to one of the murder victims on the day of the murders was not substantially outweighed by its prejudicial effect because the testimony of the probation officer was clearly relevant; it had substantial probative value; although other evidence in the record tended to establish the connection between the defendant and one of the murder victims, none of it established a connection as directly or strongly as the testimony of the probation officer; and other evidence informed the jury that the defendant was on probation. Huff v. State, 299 Ga. 801, 792 S.E.2d 368 (2016).

In a malice murder and aggravated assault case, the trial court abused the court's discretion by admitting the defendant's 2006 convictions for aggravated assault for the purpose of showing intent because, by asserting self-defense, the defendant did not deny the intent to inflict injury, but claimed authority for the act under the legal excuse of reasonable fear of immediate serious harm to oneself or another; and because the prior aggravated assaults were clearly more prejudicial than probative as the fact that the defendant had committed an assault on another person nine years earlier had nothing to do with the defendant's reason for shooting the victim, and really had no purpose other than to show the defendant's propensity toward violence. Brown v. State, 810 S.E.2d 145, No. S17A1582, 2018 Ga. LEXIS 136 (2018).

Evidence of bar's reputation for violent incidents inadmissible. — When the defendant was convicted of, inter alia, the malice murder of the first victim and the attempted murder of the second victim, to the extent that the bar's reputation for violent incidents influenced the defendant's state of mind, that reputation and its effect on the defendant was well established through other evidence admitted at trial; thus, even if the proffered incidents had some marginal relevance to the defendant's self-defense claim, any slight probative value was substantially outweighed by considerations of a waste of time or needless presentation of cumulative evidence, and the trial court acted within the court's discretion in excluding the evidence. Ramirez v. State, No. S17A1662, 2018 Ga. LEXIS 129 (Mar. 5, 2018).

Probative value not outweighed by prejudicial effect. — Trial court did not err when the court allowed the state to introduce evidence that, on the date of the death of the defendant's wife, the defendant received an email notifying the defendant that the defendant had insufficient funds in the defendant's bank account because it was within the discretion of the trial court to conclude that the evidence was relevant to show that the defendant was under some degree of financial stress and had some reason to be upset on the day of the killing; and the prejudicial effect of the evidence, if any, was minimal and not unfair. McClain v. State, 303 Ga. 6, 810 S.E.2d 77 (2018).

General Consideration (Cont'd)

Evidence of gang membership improperly admitted. — Because there was no evidence whatsoever that the robberies were gang-related, and the defendant's prior gang affiliation had minimal probative value with regard to identity, the trial court abused the court's discretion in admitting the evidence of the defendant's gang membership; however, the error was harmless and did not require reversal as the victim identified the defendant in court; a police officer saw the defendant in the same apartment complex where the crimes occurred on the day of the crimes' commission; and the defendant was apprehended two days after the robbery in the same apartment complex wearing a red hat and red jacket matching that described by the victim. Lingo v. State, 329 Ga. App. 528, 765 S.E.2d 696 (2014).

Evidence of gang activity. — Trial court did not abuse the court's discretion by admitting evidence of the defendant's alleged membership in a gang because the evidence of gang membership was relevant to and probative of motive based on two witnesses testifying as to the defendant's gang affiliation. Anglin v. State, 302 Ga. 333, 806 S.E.2d 573 (2017).

Crime spree evidence. — In the defendant's burglary trial, evidence of five uncharged burglaries was admissible because the uncharged and six charged burglaries were part of a two-week crime spree committed by a burglary crew of which the defendant was a part, even if the defendant did not directly participate in some; the uncharged crimes did not fall within O.C.G.A. § 24-4-404(b). Baughns v. State, 335 Ga. App. 600, 782 S.E.2d 494 (2016).

Improper prejudice from admission of criminal record during damage phase of trial. — Trial court did not abuse the court's discretion in ruling that the probative value of the defendant's criminal record, introduced during the damages stage only when the jury could be instructed on the proper use of the evidence, was not substantially outweighed by the danger of improper prejudice. Rivers v. K-Mart Corp., 329 Ga. App. 495, 765 S.E.2d 671 (2014).

Prejudice of cocaine conviction must substantially outweigh probative value. — Although the victim's conviction for possession of cocaine might have been admissible as the conviction was less than 10 years old and constituted a crime punishable by imprisonment in excess of one year, the trial court erred in merely finding that the probative value of the victim's prior conviction for possession of cocaine was outweighed by the conviction's prejudicial effect and by not requiring the state to show that such prejudice substantially outweighed any probative value; however, the error was harmless because the admission of the victim's prior conviction would have been cumulative of the victim's own damaging testimony. Williams v. State, 328 Ga. App. 876, 763 S.E.2d 261 (2014).

Probative value of stipulation not outweighed by prejudicial impact. — Because the final decision at the administrative license suspension hearing, which contained the defendant's stipulation that the defendant would plead guilty to driving under the influence of alcohol in exchange for the return of defendant's driver's license, was neither of scant or cumulative probative force nor introduced by the state merely for the sake of its prejudicial effect, and because its probative value was not substantially outweighed by its prejudicial effect, the trial court properly allowed admission of the final decision in the defendant's criminal case over the defendant's objection. Flading v. State, 327 Ga. App. 346, 759 S.E.2d 67 (2014).

Trial court did not abuse the court's discretion by allowing the state to introduce evidence of the defendant's prior driving under the influence (DUI) conviction because the evidence was not unduly prejudicial as the relevance of the prior DUI was heightened since the defendant's defense was that the defendant did not drive the vehicle while intoxicated but drank after stopping; thus, the prior DUI was relevant to the intent to drive while intoxicated since the defendant did so before. King v. State, 338 Ga. App. 783, 792 S.E.2d 414 (2016).

Implicit finding that probative value not outweighed by prejudicial

effect. — Notwithstanding the defendant's waiver of the enumeration of error that the trial court erred by admitting the prior bad acts without undertaking the balancing test, it presented no basis for reversal because the appellate court's review of the record showed that, although the trial court did not make specific findings regarding whether the probative value of the prior crimes was outweighed by its prejudicial impact, it explicitly referenced the balancing test and noted that the evidence had to satisfy the balancing test rule; thus, by admitting the evidence, the trial court implicitly found that the evidence was admissible pursuant to the balancing test rule. Entwisle v. State, 340 Ga. App. 122, 796 S.E.2d 743 (2017).

Probative value outweighed prejudice in use of previous DUI conviction. — Defendant's conviction for driving under the influence (DUI) and other crimes was affirmed because the defendant's prior DUI conviction was properly admitted since the conviction was relevant to the issue of the defendant's knowledge of the consequences of both consenting to and refusing the tests, and its probative value outweighed any prejudice. Kim v. State, 337 Ga. App. 155, 786 S.E.2d 532 (2016).

Defendant's trial counsel was not ineffective for failing to object to the evidence of the defendant's prior driving under the influence conviction as the evidence was properly introduced by the state to show knowledge or awareness on the defendant's part; was not offered solely for its prejudicial effect; and was not merely of scant or cumulative probative value. Gibbs v. State, 341 Ga. App. 316, 800 S.E.2d 385 (2017).

After the defendant was arrested for driving under the influence (DUI) and refused to submit to a state administered breath test, the state's motion to introduce evidence of other DUI violations was improperly denied as the danger of undue prejudice did not substantially outweigh the probative value of the evidence of other occasions when the defendant drove under the influence because the state demonstrated the state's prosecutorial need for the extrinsic act evidence; the close proximity in time between the three prior DUI arrests and the charged offense; and the overall similarity between the three prior arrests and the current charge, especially with regard to the defendant's experiences with the requested state administered tests. State v. Voyles, No. A18A0771, 2018 Ga. App. LEXIS 251 (May 7, 2018).

Probative value outweighed any undue prejudice in criminal case. — In an armed robbery case, the trial court did not err in admitting a prior armed robbery conviction because the defense's theory that the defendant was present during the current armed robbery but had not participated in robbing the victim squarely challenged the element of intent; there was sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the 2008 armed robbery; the 2008 armed robbery was factually similar to the current armed robbery; and the probative value outweighed any undue prejudice as intent was contested, in that the defendant had admitted to being present but denied participating in the armed robbery. Logan-Goodlaw v. State, 331 Ga. App. 671, 770 S.E.2d 899 (2015).

Trial court did not abuse the court's discretion by admitting evidence from another burglary because the defendant pled not guilty to the burglary charges, thus making intent a material issue, and the defendant's actions in committing the other burglary and pawning the class ring involved the same mental state as burglarizing a house to obtain gold jewelry to sell for cash; thus, the evidence from the other burglary was relevant to establish intent. Silvey v. State, 335 Ga. App. 383, 780 S.E.2d 708 (2015).

Evidence of an earlier altercation between the defendant and a former girlfriend was admissible in the aggravated assault of the victim, the former girlfriend's brother, because the state of mind required for the charged offense of aggravated assault against the victim was the same as the state of mind required for the uncharged act against the former girlfriend, which could have constituted an aggravated assault; the other act was probative of the issue of the defendant's intent, which defense counsel argued to the

General Consideration (Cont'd)

jury was the biggest issue in the case; and the evidence was sufficient to show that the prior bad act occurred and that the defendant was the person who accosted and threatened the former girlfriend with the knife. Wilson v. State, 336 Ga. App. 60, 783 S.E.2d 662 (2016).

Appellant failed to establish that trial counsel was ineffective for failing to object to the admission of the autopsy photographs as the photographs were relevant and a competent attorney in the position of appellant's trial lawyers would have had every reason to believe that an objection to the autopsy evidence based on O.C.G.A. § 24-4-403 would fail, even if the appellant did not affirmatively dispute the state's proof that the victim was shot to death. Moss v. State, 298 Ga. 613, 783 S.E.2d 652 (2016).

In a DUI case, the trial court did not abuse the court's discretion in finding that the probative value of evidence of the defendant's prior conviction was not substantially outweighed by the prejudicial effect of the evidence, after finding that the circumstances surrounding the prior conviction were similar to the circumstances involving the charged offenses and the charged offenses occurred five to six years after the extrinsic offense, when the defendant would have known it was less safe because it was less safe before. Jones v. State, 335 Ga. App. 563, 782 S.E.2d 466 (2016).

Trial court did not abuse the court's discretion in determining that the prejudicial value of the gun did not substantially outweigh the probative value as it was very probative as rebuttal to the defense that the defendant did not intend to threaten or terrorize but only to warn the judge's family. Satterfield v. State, 339 Ga. App. 15, 792 S.E.2d 451 (2016).

Probative value of the other act evidence was not substantially outweighed by its prejudicial effect as it was unlikely that the jury would be more inflamed in any appreciable measure by the relatively minor other acts evidence than the jury already was by the heinous sexual offenses against children with which the defendant was actually charged. The impact of the other acts evidence was thus relatively minimal. Gerbert v. State, 339 Ga. App. 164, 793 S.E.2d 131 (2016).

Other acts evidence was relevant and admissible and the trial court did not abuse the court's discretion in declining to exclude the evidence regarding two earlier instances in which the defendant obstructed a law enforcement officer because there was a significant connection between the other acts evidence and the required element of the defendant's knowledge, giving the other acts evidence probative value; and the defendant's knowledge was a material issue in the case. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156 (2016).

Other acts evidence that the defendant resorted to violence towards other women who did not accede to the defendant's demands was needed to counter the defense and support the defense case that the defendant intentionally hit the victim after the victim refused the defendant's sexual advances. This evidence added significantly to the other proof used to establish that the defendant hit the victim, and although prejudicial, any prejudice did not substantially outweigh the probative value of the evidence. Harris v. State, 338 Ga. App. 778, 792 S.E.2d 409 (2016).

In an armed robbery case, the trial court did not err in admitting the defendant's prior robbery conviction because, although the defendant contended that intent was not an issue in the case, the defendant's defense that the defendant was merely present in the car when the police stopped the car, and that, if the co-defendant had committed the robbery, the co-defendant committed the robbery with somebody else, squarely challenged the element of intent; furthermore, in light of the similar nature of the acts and the strength of the prior act's connection to demonstrating the defendant's intent, the trial court did not abuse the court's discretion in determining that the probative value of the prior conviction was not outweighed by the prejudicial effect. Turner v. State, No. A17A1625, 2018 Ga. App. LEXIS 160 (Mar. 6, 2018).

Prejudicial impact outweighed probative value in use of previous DUI conviction. — In a driving under the

influence (DUI) per se case, the defendant's prior DUI conviction was improperly admitted to show intent as the probative value of the evidence was substantially outweighed by the danger of unfair prejudice because the jury could infer intent from the defendant's act of driving after admittedly consuming alcohol without considering the prior DUI, and there was a danger of interjecting unfair prejudice at trial; however, admission of that evidence was harmless as the direct evidence of the defendant's guilt for the DUI-per se charge was overwhelming as the defendant admitted to consuming alcohol, and the breath tests showed the defendant's blood alcohol content was substantially in excess of 0.08 grams. Jones v. State, 301 Ga. 544, 802 S.E.2d 234 (2017).

Probative value not outweighed by prejudicial effect in theft by taking case. — In a theft by taking case, because intent was put in issue by the defendant, evidence of the other acts that two witnesses paid the defendant money but never received completed cabinets nor a refund of the witnesses' money was relevant and admissible under O.C.G.A. § 24-4-404(b); furthermore, the probative value of the similar acts was not outweighed by their prejudicial effect pursuant to O.C.G.A. § 24-4-403. Graham v. State, 337 Ga. App. 664, 788 S.E.2d 555 (2016).

Trial court did not abuse the court's considerable discretion when the court admitted the photograph depicting the contents of the trunk of the victim's car showing numerous items found in the trunk, including the victim's body wrapped in a comforter, a gasoline-soaked towel, several articles of clothing, and a photograph of an unidentified young girl sitting in a field because the photographs' potential for prejudice did not substantially outweigh its probative value as the exhibit was of particular importance because it showed how the victim's body was located in relation to both the gasoline-soaked towel and the bottom of the trunk; and the jury heard no testimony about the photograph of the girl. Cheley v. State, 299 Ga. 88, 786 S.E.2d 642 (2016).

Probative value not weighed by prejudicial effect. — Probative value of the similar transaction evidence was not outweighed by its prejudicial effect given the similarity between the robbery crimes and the fact that the trial court instructed the jury that the similar transaction evidence could only be considered for the limited purpose of showing the defendant's knowledge and intent. McCoy v. State, 332 Ga. App. 626, 774 S.E.2d 179 (2015).

Allowing evidence of witness's compensation. — In a products liability case, the prejudicial effect of admitting evidence of a car manufacturer's CEO's compensation did not so dramatically outweigh its probative value that it required reversal of the jury verdict; the actions of the CEO in allegedly interfering with a government recall of the vehicle made the CEO's credibility and bias relevant. Chrysler Group LLC v. Walden, No. S17G0832, 2018 Ga. LEXIS 154 (Mar. 15, 2018).

Incomplete record on appeal hampered review of application of balancing test. — Because the defendant in the defendant's notice of appeal designated only certain portions of the record for inclusion in the record on appeal, the appellate record did not include, among other things, opening statement and closing argument of defense counsel, and the portion of the record where the defense would have presented its case-in-chief or rested without presenting any such evidence; and, given that incomplete record, the defense theory of the case was unclear, which hampered the appellate court's review of the trial court's application of the balancing test in O.C.G.A. § 24-4-403. Adams v. State, 344 Ga. App. 159, 809 S.E.2d 87 (2017).

Risk of prejudice reduced by limiting instruction. — Admission of prior acts evidence was not an abuse of discretion as the similarity between the charged offense and an altercation two days earlier in which the defendant poked the victim with a knife made the former act highly probative of the defendant's intent and the risk of undue prejudice to the defendant was reduced by the court's limiting instruction, charging the jury that the evidence could not be used to infer that the defendant was of a character that

General Consideration (Cont'd)

would commit such crimes. Powell v. State, 332 Ga. App. 437, 773 S.E.2d 399 (2015).

Photographs of the victim of a crime are admissible. — Trial court did not abuse the court's discretion in admitting the autopsy photographs of the victim because the photographs were relevant as the medical examiner testified that the photographs showed the internal injuries that caused the victim's death that were not evident from the pre-incision photographs; the fact that the defendant might not have disputed the cause of death did not diminish the relevance of the photographs; and the trial court considered whether the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. Dailey v. State, 297 Ga. 442, 774 S.E.2d 672 (2015).

In the defendant's trial for the murder of a family friend as the victim was showering, crime scene photos showing the victim's genitals were not required to be excluded under O.C.G.A. § 24-4-403 because the photos were probative of the question of whether the victim was killed with malice. Plez v. State, 300 Ga. 505, 796 S.E.2d 704 (2017).

Trial court did not err in allowing certain autopsy photographs of the victim to be admitted because the challenged photographs did not depict the victim's autopsy incisions, and the photographs were not especially gory or gruesome in the context of autopsy photographs in a murder case; the photographs were relevant to show the nature and location of the victim's injuries, which corroborated the state's evidence of the circumstances of the killing; contrary to the defendant's assertion, the victim did not die solely from manual strangulation, but also from blunt force head trauma, and the photographs illustrated the nature and extent of the physical beating and resulting trauma sustained by the victim; and exclusion based on unfair prejudice was not warranted. Pike v. State, 302 Ga. 795, 809 S.E.2d 756 (2018).

Photographs more prejudicial than probative. — With no serious question as to the victim's existence of identity, any probative value of the photographs of the victim while in life, depicting the victim alone and with family, was outweighed by the cumulative prejudice therefrom, and the trial court erred in admitting the photographs. Ragan v. State, 299 Ga. 828, 792 S.E.2d 342 (2016).

"Selfie" videos prejudicial. — Even if the "selfie" videos of the defendant talking about ways to make money, including robbery, were relevant, the videos were properly excluded because the videos included statements as to the defendant's involvement in drug dealing, an illegal activity that had no relevance to the charged crime, but references to which would have been highly prejudicial. State v. Spriggs, 338 Ga. App. 655, 791 S.E.2d 440 (2016).

Photos were arguably objectionable. — Three photos from the hospital series that did not depict the victim at all were arguably objectionable by counsel and an objection may have been sustained under O.C.G.A. § 24-4-403 as to relevancy but no ineffective assistance of counsel was shown based on the other evidence against the appellant being strong and the appellant failing to show a reasonable probability that the result of the trial would have been different. Davis v. State, 299 Ga. 180, 787 S.E.2d 221 (2016).

Probative value of jail phone call not outweighed by prejudicial effect. — Trial court did not err in admitting an audio recording of a five-minute phone call that the defendant made from jail to a friend because the recording was relevant to show that the defendant made statements that were not consistent with either the defendant's statements at the defendant's second police interview or the defense theory of justification presented at trial; and the derogatory terms used by the defendant during the phone call did not create a risk of unfair prejudice that substantially outweighed the recording's probative value as the words that the defendant used had lost much of their shock value in contemporary culture and were unlikely to induce the jury to return a conviction based on a generalized assessment of character. Smith v. State, 302 Ga. 717, 808 S.E.2d 661 (2017).

Evidence admissible.

Defendant failed to establish that the trial court abused the court's discretion by admitting evidence of the defendant's 2001 conviction for possessing cocaine with the intent to distribute because the defendant placed the defendant's intent in issue by pleading not guilty to the charges of trafficking in cocaine and possessing cocaine with the intent to distribute; the defendant did nothing to remove intent as an issue as the defendant told law enforcement that the defendant did not live in the house throughout which the drugs and drug-distribution paraphernalia were found; and the prior conviction was relevant as the defendant's participation in the earlier crime required the same intent as the charged crimes. Gunn v. State, 342 Ga. App. 615, 804 S.E.2d 118 (2017).

When the defendant was convicted of two counts of aggravated sodomy and one count each of family violence aggravated assault, family violence battery, terroristic threats, and family violence simple battery against a live-in girlfriend, evidence of prior sexual assaults was properly admitted because it was relevant to show the defendant's intent, which was put in issue when the defendant entered a plea of not guilty; the prior sexual assaults were sufficiently similar to the charged sexual assaults; the state was able to use the evidence to bolster the victim's credibility by demonstrating that the victim's circumstances were not unique; and any risk of unfair prejudice was mitigated by the trial court's limiting instruction. Benning v. State, 344 Ga. App. 397, 810 S.E.2d 310 (2018).

Evidence not relevant. — In a wrongful death action, the trial court did not abuse the court's discretion by refusing plaintiff's request to have evidence of the doctor's medical condition and history admitted because the trial court found that it was not relevant without evidence of such condition and history existing on and during treatment of the plaintiff's decedent. Doherty v. Brown, 339 Ga. App. 567, 794 S.E.2d 217 (2016).

Trial court did not err by permitting a law-enforcement officer to testify about the pernicious effects of heroin and addiction because the testimony put in context what heroin was and the testimony was relevant to explain why someone might engage in an enterprise to distribute heroin and possess a trafficking amount, and to explain why heroin was a Schedule I controlled substance. Jones v. State, 339 Ga. App. 95, 791 S.E.2d 625 (2016).

Admission of letter written by defendant. — Trial court properly admitted a letter in the defendant's trial for convictions in connection with a drive-by shooting because the state properly authenticated the letter as authored by the defendant since the letter was given to the prosecution by defense counsel and was properly introduced as evidence of the defendant's guilty consciousness relating to the shooting and the letter's relevance was substantially outweighed by any danger of unfair prejudice. Amey v. State, 337 Ga. App. 480, 788 S.E.2d 80 (2016).

Evidence of videotape admissible in DUI case. — Trial court did not err by allowing the state to admit demonstrative evidence of video clips showing three types of horizontal gaze nystagmus because the officer's testimony made clear that the video clips were not of the defendant, but that in the substantial particulars, the conditions of the video clips and the officer's observations of the defendant were similar as both showed the same kind of nystagmus. Monroe v. State, 340 Ga. App. 373, 797 S.E.2d 245 (2017).

Character evidence admissible for intent. — Trial court did not abuse the court's discretion in finding that the defendant's prior bad acts were admissible because the defendant pled not guilty, thereby making intent a material issue; thus, the defendant's position of intending only to help the victims, but not to commit any criminal offenses, squarely challenged the element of intent and the witness testified that the defendant sold the witness as a prostitute and held the witness against their will, just like the defendant did with the victims in the case. Curry v. State, 330 Ga. App. 610, 768 S.E.2d 791 (2015), cert. dismissed, No. S16C0519, 2016 Ga. LEXIS 278 (Ga. 2016).

Trial court did not abuse the court's discretion by excluding evidence of one appellant's intent as to the reconveyance

General Consideration (Cont'd)

of certain funds because no abuse of discretion occurred by excluding evidence of a cumulative nature that could have confused the jury about the primary issue under consideration and created a re-trial. Interfinancial Midtown, Inc. v. Choate Constr. Co., 343 Ga. App. 793, 806 S.E.2d 255 (2017).

Statement of employee nurse of defendant relevant. — Trial court did not abuse the court's discretion in admitting the testimony of the plaintiff's daughter over the defendant's objection as an admission by a party opponent because the statement was made by a nurse employed by the defendant and was relevant to the slip and fall case. Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 760 S.E.2d 674 (2014).

Probative value not substantially outweighed by danger of unfair prejudice. — Defendant's recorded telephone conversations made from jail were relevant and admissible: (1) to show the defendant's consciousness of guilt for the armed robbery as the defendant admonished a witness for divulging the defendant's name to the police; the defendant asked the witness if the witness told the police that the defendant had a gun; and the defendant told the witness that the police pressure should not get to the witness as the witness had not done anything; and (2) to corroborate the witness's testimony that the defendant had told the witness not to give the defendant's name to the police; further, the probative value of the recorded telephone calls was not substantially outweighed by the danger of unfair prejudice. Anderson v. State, 337 Ga. App. 739, 788 S.E.2d 831 (2016).

Under a plain error review, since the defendant failed to object at trial, the trial court did not abuse the court's discretion by allowing various autopsy photographs to be admitted into evidence at trial because the photos were not particularly gory or gruesome and were relevant to show the nature and location of the victim's injuries, which corroborated the account of the shooting given by the eyewitnesses who saw the defendant. Benton v. State, 301 Ga. 100, 799 S.E.2d 743 (2017).

Trial court did not err in granting the state's motion to present evidence of the armed robbery of a residence two days before the victim's murder because the evidence of the armed robbery was admissible to show the motive to commit the victim's murder as the defendant and the co-defendant were concerned that the victim would turn them into the police; evidence of motive was relevant even if the evidence incidentally placed the defendant's character in issue; there was sufficient proof that the defendant committed the prior armed robbery; and the trial court did not err in finding that the probative value of the evidence outweighed any prejudice from admission. Pike v. State, 302 Ga. 795, 809 S.E.2d 756 (2018).

Cited in Edmonson v. State, 336 Ga. App. 621, 785 S.E.2d 563 (2016).

RESEARCH REFERENCES

ALR. — Propriety and prejudicial effect of witness testifying while in prison attire, 1 A.L.R.7th 5.

24-4-404. Character evidence not admissible to prove conduct; exceptions; other crimes.

Law reviews. — For annual survey of evidence law, see 67 Mercer L. Rev. 63 (2015). For annual survey on criminal law, see 68 Mercer L. Rev. 93 (2016). For annual survey on evidence law, see 68 Mercer L. Rev. 1019 (2017). For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

JUDICIAL DECISIONS

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General Consideration

Construction with O.C.G.A. § 24-4-413. — Provisions of O.C.G.A. § 24-4-413(a) supersede the provisions of O.C.G.A. § 24-4-404(b) in sexual assault cases. O.C.G.A. § 24-4-413(a) is the more specific statute regarding admission of prior acts of child molestation and is, therefore, controlling over O.C.G.A. § 24-4-404(b). Steele v. State, 337 Ga. App. 562, 788 S.E.2d 145 (2016).

Criminal Cases

1. In General

Proper admission of similar transaction evidence, etc.

Trial court did not abuse the court's discretion in denying the defendant's motion to sever because the defendant failed to carry the burden of making a clear showing that the joint trial was prejudicial and a denial of due process as evidence of another crime committed by the co-defendant did not directly implicate the defendant and the trial court gave appropriate limiting instructions, indicating that the similar transaction evidence could be considered only as to the co-defendant. Brooks v. State, 332 Ga. App. 396, 772 S.E.2d 838 (2015), cert. denied, No. S15C1472, 2015 Ga. LEXIS 587 (Ga. 2015); cert. denied, No. S15C1548, 2015 Ga. LEXIS 573 (Ga. 2015).

Section not applicable to intrinsic evidence. — Nurse's testimony that the defendant told the nurse, when being admitted to the hospital, that the defendant had smoked marijuana earlier that day was not subject to an objection under O.C.G.A. § 24-4-404(b) because it was intrinsic evidence. Gibbs v. State, 340 Ga. App. 723, 798 S.E.2d 308 (2017).

Evidence of gang activity. — Sufficient evidence, including expert testimony, supported the appellants' convictions because the evidence established that the appellants were associated with a criminal street gang and that the armed robbery and aggravated assault the appellants engaged in constituted criminal street gang activity and were intended to further the interests of the gang. Lupoe v. State, 300 Ga. 233, 794 S.E.2d 67 (2016).

Trial court did not abuse the court's discretion by admitting evidence of the defendant's alleged membership in a gang because the evidence of gang membership was relevant to and probative of motive based on two witnesses testifying as to the defendant's gang affiliation. Anglin v. State, 302 Ga. 333, 806 S.E.2d 573 (2017).

Admission of other crimes, wrongs, or acts did not constitute plain error.

In an armed robbery case, pretermitting whether admission of evidence of the defendant's prior armed robbery conviction amounted to clear or obvious error, the admission of that evidence did not constitute plain error that affected the defendant's substantial rights because the defendant testified and admitted that the defendant pled guilty to the prior charge; although the defendant claimed the defendant acted in self-defense, eyewitnesses testified that they saw no weapons on the victims, saw the defendant rifling the victims' pockets, and heard one of the victims

Criminal Cases (Cont'd)
1. In General (Cont'd)

pleading with the defendant not to kill the victim; and the evidence indicated that both victims were shot from behind, undermining the defendant's claim of self-defense. Nations v. State, No. S17A1597, 2018 Ga. LEXIS 137 (Mar. 5, 2018).

Logical connection between crimes. — Trial court properly admitted certain statements made by the defendant during telephone conversations while in custody at a jail because while the statements related to a prior wrong or act which would generally be irrelevant character evidence, the statements indicated the defendant's disdain for law enforcement intervention and a desire to seek revenge; thus, these statements were relevant to show motive and intent in committing the crimes. Summerlin v. State, 339 Ga. App. 148, 793 S.E.2d 477 (2016).

Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct.

Trial court did not err in admitting evidence of the defendant's prior convictions after determining that the convictions were relevant to show intent, knowledge, plan, and motive. Morris v. State, 340 Ga. App. 295, 797 S.E.2d 207 (2017).

Defendant's prior conviction for theft was properly admitted as the conviction was being offered to show motive and, thus, the state was not required to show an overall similarity between the prior offense and the violation of the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq. Whaley v. State, 343 Ga. App. 701, 808 S.E.2d 88 (2017).

Implicit finding that probative value not outweighed by prejudicial effect. — Notwithstanding the defendant's waiver of the enumeration of error that the trial court erred by admitting the prior bad acts without undertaking the balancing test, it presented no basis for reversal because the appellate court's review of the record showed that, although the trial court did not make specific findings regarding whether the probative value of the prior crimes was outweighed by its prejudicial impact, the court explicitly referenced the balancing test and noted that the evidence had to satisfy the balancing test rule; thus, by admitting the evidence, the trial court implicitly found that the evidence was admissible pursuant to the balancing test rule. Entwisle v. State, 340 Ga. App. 122, 796 S.E.2d 743 (2017).

Similar transaction evidence admissible.

In a theft by taking case, because intent was put in issue by the defendant, evidence of the other acts that two witnesses paid the defendant money but never received completed cabinets nor a refund of their money was relevant and admissible under O.C.G.A. § 24-4-404(b); furthermore, the probative value of the similar acts was not outweighed by their prejudicial effect pursuant to O.C.G.A. § 24-4-403. Graham v. State, 337 Ga. App. 664, 788 S.E.2d 555 (2016).

Past physical and verbal abuse admissible. — Evidence of the defendant's past physical and verbal abuse of the victim was admissible as proof of the relationship between the defendant and the victim and to show the defendant's motive and intent. Faircloth v. State, 293 Ga. 134, 744 S.E.2d 52 (2013).

Admission of similar transaction evidence not proper. — State failed to prove that the defendant's prior attempted robbery was so similar to the charged offense that the charged offense must have been the defendant's handiwork as robbery of a woman alone at night after the woman had parked the car was not in the nature of a signature so as to be proof of the perpetrator's identity. Amey v. State, 331 Ga. App. 244, 770 S.E.2d 321 (2015), cert. denied, No. S15C1089, 2015 Ga. LEXIS 395 (Ga. 2015).

Evidence of other conduct or crimes was admissible in the following cases.

Since the prior incidents and the incident for which the defendant was being prosecuted all involved the defendant or an accomplice being in employee-only areas when the stores were open and employees were present, the similarities were adequate to satisfy the state's burden of showing a sufficient connection

between similar offenses and the instant offense. Spinks v. State, 322 Ga. App. 387, 745 S.E.2d 653 (2013).

Evidence of prior difficulties between the defendant and the victim was admissible to show an ongoing scheme and given that the evidence was not so complex that the jury was unable to distinguish the evidence. Madison v. State, 329 Ga. App. 856, 766 S.E.2d 206 (2014).

Admission of prior acts evidence was not an abuse of discretion as the similarity between the charged offense and an altercation two days earlier in which the defendant poked the victim with a knife made the former act highly probative of the defendant's intent. Powell v. State, 332 Ga. App. 437, 773 S.E.2d 399 (2015).

In the defendant's murder trial, other acts evidence, including the defendant's act of following the defendant's spouse and slashing the spouse's tire on two occasions, was admissible as relevant to the defendant's motive to take revenge on the victim, with whom the spouse was having an affair, and to provoke confrontation; the evidence also countered the defendant's theory of self-defense. Anthony v. State, 298 Ga. 827, 785 S.E.2d 277 (2016).

Testimony by the sister of the defendant's ex-wife regarding prior acts of domestic violence committed by the defendant was properly admitted for purposes of showing the defendant's motive to control family members with violence, the intent to harm intimate partners, and to show the absence of mistake or accident. Smart v. State, 299 Ga. 414, 788 S.E.2d 442 (2016).

Other acts evidence, showing that the defendant engaged in voyeuristic activity involving the defendant's minor sister-in-law, was relevant because it made it more probable that the defendant took the nude pictures of the defendant's step-daughter with the intent to arouse the defendant's sexual desire and was indicative of the defendant's state of mind. Gerbert v. State, 339 Ga. App. 164, 793 S.E.2d 131 (2016).

Other acts evidence was properly admitted against the appellant because while the tire cutting and surveillance incidents showed only that the appellant was hurt by the wife's decision to divorce the appellant and the appellant was gathering evidence for the pending divorce action, it was also readily understood as demonstrating the appellant's desire to take revenge and to provoke confrontation in response to the wife's affair with the victim. Anthony v. State, 298 Ga. 827, 785 S.E.2d 277 (2016).

Cross-examination of the defendant's mother and sister were for the purpose of impeaching their testimony about the defendant's whereabouts at the time of the crimes on trial and demonstrating their motives for offering alibi testimony, a fear of violent reprisal from the defendant, and O.C.G.A. § 24-4-404(b) did not prevent such examination. Davis v. State, 302 Ga. 576, 805 S.E.2d 859 (2017).

Evidence of other conduct or crimes was inadmissible in the following cases.

Trial court disagreed that the other acts evidence was especially probative of the credibility of the defendant and the victim, given the lack of similarity between the other acts evidence of child molestation and the charged offense of rape, the decade separating the other acts from the charged offense, and the defendant's immaturity at the time the other acts were committed; however, the trial court believed that, under the circumstances, admitting extrinsic evidence of acts of alleged child molestation would lure the jury into finding the defendant guilty based on proof that was not specific to the crime charged, thereby infecting the proceedings with unfair prejudice and undermining the presumption of innocence. State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138 (2016).

No ineffective counsel shown since state's motion to introduce was granted. — Appellant failed to show that trial counsel performed deficiently by informing the jury that appellant had a lifelong drug and alcohol problem and had more than 20 criminal charges because the trial court had granted the state's motion to introduce other acts evidence under O.C.G.A. § 24-4-404(b), thus, it could not be said that any attempt trial counsel may have made to short-circuit its impact was deficient. Dickson v. State, 339 Ga. App. 500, 793 S.E.2d 663 (2016).

Criminal Cases (Cont'd)
1. In General (Cont'd)

Cited in Latta v. State, 341 Ga. App. 696, 802 S.E.2d 264 (2017).

2. Character

Evidence of motive.

Trial court did not violate former O.C.G.A. § 24-2-2 in admitting evidence of the defendant's extramarital relationship with another woman as it showed that the defendant had a motive to conceal the defendant's extramarital affair with the victim not only from the defendant's wife, but from the other woman. Washington v. State, 294 Ga. 560, 755 S.E.2d 160 (2014) (decided under former O.C.G.A. § 24-2-2).

Admissison of defendant's violence-prone Facebook posts error. — Trial court erred in allowing the state to introduce evidence in its case in chief of threatening posts the defendant had made on Facebook as evidence of the defendant's allegedly violent character and behavior in conformity therewith because O.C.G.A. § 24-4-405 required such proof be made by testimony as to reputation or in the form of an opinion; however, the error was harmless. Timmons v. State, 302 Ga. 464, 807 S.E.2d 363 (2017).

Evidence incidentally reflecting on character not barred.

Testimony that the defendant had another child was admissible even though the testimony might incidentally place the defendant's character at issue because the testimony was relevant to explain why the 12-year-old victim, who had initially fabricated a story about the father of the child, later said that the victim had a sexual relationship with the defendant; and because, given the overwhelming evidence demonstrating that the defendant was the father of the defendant's 12-year-old niece's child, it was unlikely that the testimony negatively impacted the outcome of the defendant's case, and the failure to demonstrate harm from an alleged error precluded reversal. Andrews v. State, 331 Ga. App. 353, 771 S.E.2d 59 (2015).

Character evidence admissible.

Trial court did not abuse the court's discretion in finding that the defendant's prior bad acts were admissible because the defendant pled not guilty, thereby making intent a material issue; thus, the defendant's position of intending only to help the victims, but not to commit any criminal offenses, squarely challenged the element of intent and the witness testified that the defendant sold the witness as a prostitute and held the witness against their will, just like the defendant did with the victims in the case. Curry v. State, 330 Ga. App. 610, 768 S.E.2d 791 (2015), cert. dismissed, No. S16C0519, 2016 Ga. LEXIS 278 (Ga. 2016).

Trial court did not err in finding that the defense opened the door to the admission of character evidence because, although counsel's question to the witness might not have been specifically aimed at eliciting character evidence, it was, as admitted by counsel, part of counsel's trial strategy to allow the witness to give lengthy and nonresponsive answers to questioning; and the trial court exercised the court's discretion and concluded that counsel's conscious decision not to object or redirect the nonresponsive witness once the witness made a reference to the defendant's character created an inference that counsel intended to inject character evidence into the trial and thus triggered the state's right to explore and impeach that testimony. Harris v. State, 330 Ga. App. 267, 765 S.E.2d 369 (2014) (decided under former O.C.G.A. § 24-2-2).

3. Specific Crimes

a. Assault, Battery, and Homicide Crimes

Proper admission of similar transaction evidence.

Trial court did not abuse the court's discretion by admitting evidence of prior molestation acts upon a minor victim witness because the jury could have concluded by a preponderance of the evidence that the defendant committed the acts described by the witness and the probative value was great based on the overall similarity of the acts, each involved inappropriate sexual contact between the defendant and a child of similar age to whom the defendant gained access through a

relationship with the child's mother. Dixon v. State, 341 Ga. App. 255, 800 S.E.2d 11 (2017).

Trial court did not abuse the court's discretion in ruling that evidence of the 1993 murder was admissible as the evidence was similar transaction evidence as the state expressly sought to introduce evidence of the 1993 murder for an appropriate purpose, there was no question that the defendant committed the murder, and, in both instances, the defendant used a gun to shoot someone in the presence of one's peers, the defendant did so with little provocation, and the defendant had engaged in drug transactions with the victim. Norman v. State, No. S18A0331, 2018 Ga. LEXIS 286 (May 7, 2018).

Admission of similar transaction proper.

Trial court did not err in admitting evidence of the 1999 incident in which the defendant was standing on the defendant's ex-girlfriend's porch with the ex-girlfriend, the ex-girlfriend's daughter, and other children when the defendant pulled out a handgun, pointed the handgun at the people on the porch, and pulled the trigger, although the gun did not fire, because, in both the current and prior incident, the defendant pulled out a handgun and aimed the handgun at a person with whom the defendant had a dispute, in a residential area, ignoring the presence of innocent bystanders, including a child. Brown v. State, 295 Ga. 804, 764 S.E.2d 376 (2014).

When the defendant was convicted of malice murder for setting the victim on fire and burning the victim's apartment building with a Molotov cocktail, the state was properly allowed to introduce similar transaction evidence that the defendant attempted to burn down the house of the defendant's sister using a Molotov cocktail because the evidence was introduced for the proper purpose of showing the defendant's intent, bent of mind, course of conduct, and identity; there were clear similarities between the current and previous crimes, including that the victims were women with whom the defendant had a close relationship; and the choice of a unique weapon, a Molotov cocktail, was the same. Scruggs v. State, 295 Ga. 840, 764 S.E.2d 413 (2014).

Defendant's conviction for impersonating a law enforcement officer was affirmed and the trial court did not err by admitting evidence of the defendant's prior convictions for financial identity fraud, forgery, and stealing public documents because intent was in issue and the prior criminal acts and the crime at issue involved a similar mental state or intent, namely, to obtain an advantage through misrepresentation or use of someone else's identifying information. Chase v. State, 337 Ga. App. 449, 787 S.E.2d 802 (2016).

Trial court did not err in admitting evidence of the defendant's involvement in a prior murder as both offenses involved strangers, the murders were not planned well in advance, and the motives for both were related to a relatively minor dispute. Blackledge v. State, 299 Ga. 385, 788 S.E.2d 353 (2016).

Trial court did not abuse the court's discretion in admitting evidence the defendant previously committed an act of family violence battery and simple battery against the defendant's estranged wife and the wife's sister because that evidence was relevant to shed light on why the defendant reacted as the defendant did when the victim did not acquiesce to sexual advances, hitting the victim when the victim would not let the defendant force the defendant's penis into the victim's mouth. Harris v. State, 338 Ga. App. 778, 792 S.E.2d 409 (2016).

While the trial court erred when the court admitted the defendant's 24-year-old prior conviction for aggravated assault, because the defendant's intent when the defendant committed the prior assault had nothing to do with the defendant shooting the victim and the case had no purpose other than to show the defendant's propensity toward violence, the error was harmless given the substantial evidence of the defendant's guilt. Parks v. State, 300 Ga. 303, 794 S.E.2d 623 (2016).

Trial court did not abuse the court's discretion in admitting evidence of a prior difficulty with an individual who was not the victim of the assault because the prior difficulty was relevant to show motive as the jury would be authorized to conclude that the defendant's actions toward the

Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
a. Assault, Battery, and Homicide Crimes (Cont'd)

individual were motivated by the defendant's desire to retaliate against the victim for continuing to intervene in the defendant's physical abuse of the individual. Person v. State, 340 Ga. App. 252, 797 S.E.2d 172 (2017).

Trial court properly permitted the state to introduce evidence of the defendant's two prior bad acts, a 2009 incident of exposure in front of underage girls and a 2012 incident of attempt to sexually assault a female neighbor, because they were not the faultless acts of an innocent child, but rather demonstrated evidence of the defendant's lustful disposition and were relevant. Robinson v. State, 342 Ga. App. 624, 805 S.E.2d 103 (2017).

Evidence improperly admitted to show intent. — In a malice murder and aggravated assault case, the trial court abused the court's discretion by admitting the defendant's 2006 convictions for aggravated assault for the purpose of showing intent because, by asserting self-defense, the defendant did not deny the intent to inflict injury, but claimed authority for the act under the legal excuse of reasonable fear of immediate serious harm to oneself or another; and because the prior aggravated assaults were clearly more prejudicial than probative as the fact that the defendant had committed an assault on another person nine years earlier had nothing to do with the defendant's reason for shooting the victim, and really had no purpose other than to show the defendant's propensity toward violence. Brown v. State, 810 S.E.2d 145, No. S17A1582, 2018 Ga. LEXIS 136 (2018).

Evidence of prior difficulties between victim and defendant, etc.

Because the dispute regarding the prior altercation between the defendant and the victim was not limited to whether the defendant had been arrested, but also included whether the prior altercation had actually occurred as recounted by the victim, the unredacted accusation bore directly on the victim's credibility, and its admission, even if it incidentally reflected on the defendant's character, was proper; and redacting the accusation to show only the conviction of disorderly conduct and not the charge of simple battery would not have served its rehabilitative purpose as the victim testified that the victim was attacked by the defendant and that the defendant was arrested for simple battery. Pittman v. State, 343 Ga. App. 580, 807 S.E.2d 492 (2017).

Admission of evidence of subsequent shooting involving defendant harmless error. — Assuming without deciding that the admission of the other acts evidence that the defendant was involved in a second shooting approximately a month after the murders was erroneous, any error was harmless as the evidence of the defendant's guilt was strong because the defendant was identified as the shooter by the surviving victim; the defendant was discovered with the murder weapon while driving a vehicle that had been spotted leaving the murder scene by a second witness; the defendant's mother resembled the description of the woman driving the car on the night in question; and the defendant's mother's cell phone, which the defendant was known to share with the defendant's mother, was in the vicinity of the shooting on the night in question. Douglas v. State, No. S17A1348, 2018 Ga. LEXIS 128 (Mar. 5, 2018).

Admission of evidence of defendant's prior involuntary manslaughter conviction was harmless error. — Assuming (without deciding) that the trial court was correct in concluding that the similar transaction evidence of the 2002 incident in which the defendant pled guilty to involuntary manslaughter after being involved in a drug deal and shooting that resulted in the death of an innocent female bystander should not have been admitted at trial, the admission of that evidence was harmless, in that it was highly probable that the assumed error did not contribute to the verdict as there was overwhelming evidence of the defendant's guilt of the crimes charged in the current case; thus, it was not an abuse of discretion for the trial court to decline to grant a mistrial when the evidence was harmless. Saffold v. State, 298 Ga. 643, 784 S.E.2d 365 (2016).

Admission of other acts evidence in murder trial constituted harmless error. — When the defendant was convicted of, inter alia, malice murder, although other acts evidence might have been improperly admitted, any error was harmless because, considering the quantity and strength of the evidence against the defendant, it was highly probable that any error did not contribute to the verdict as the defendant was heard by multiple people threatening the lives of the victims the night of the murders; the defendant made numerous incriminating statements after the murders — some of which concerned information only the killer could have known; and the defendant's jailhouse confession was both detailed and consistent with the defendant's statements to other parties before the murders. Fletcher v. State, 303 Ga. 43, 810 S.E.2d 101 (2018).

Evidence improperly admitted to show course of conduct. — In a home invasion, although course of conduct was no longer a viable exception to the admissibility of other acts, and the trial court erred in admitting the defendant's 1989 convictions for that purpose, the defendant's current convictions did not need to be reversed because the trial court's error in admitting the defendant's prior convictions was harmless, given the overwhelming evidence of the defendant's guilt, including that the defendant and an accomplice planned and committed the home invasion together, and that, when found by a deputy the day after the offense near the woods around the victim's residence, the defendant gave the deputy a false name, and then ran from the deputy to dispose of the gun used in the home invasion. Paschal v. State, 335 Ga. App. 411, 780 S.E.2d 681 (2015).

Evidence improperly admitted to show plan. — Defendant was granted a new trial because the evidence of a subsequent armed robbery was not admissible to show motive since that later act was not connected to the murders, and the only similarities it shared with the murders were the all-too-common elements of guns and an assortment of co-conspirators. Thompson v. State, 302 Ga. 533, 807 S.E.2d 899 (2017).

In a malice murder and aggravated assault case, the defendant's 2006 convictions for aggravated assault were improperly admitted because the convictions did not tend to establish a larger goal, the convictions were not so connected with the crime charged that the murder could not be fully shown without proving the prior assaults, and the convictions were not relevant to the ultimate issue of whether the defendant acted in self-defense; furthermore, the evidence primarily established the defendant's propensity toward violence. Brown v. State, 810 S.E.2d 145, No. S17A1582, 2018 Ga. LEXIS 136 (2018).

Similar transaction evidence admissible.

Evidence relating to a North Carolina traffic stop and seizure of currency was properly admissible as the stop, also involving both defendants, a car registered in Massachusetts, with dark tinted windows, a single key in the ignition, religious insignias throughout, and a hidden compartment with shrink-wrapped items, was sufficiently similar that proof of that incident tended to prove the current incident. Betancourt v. State, 322 Ga. App. 201, 744 S.E.2d 419 (2013).

Evidence of six prior incidents of assaulting young African-American sex workers admissible. — In defendant's prosecution for the strangulation death of the victim at the victim's home, six similar transactions between 1991 and 2005 were admissible: in each case, the victims were young African-American women who either were sex workers or had substance abuse problems, or both, and the victims were sexually or physically abused, often by choking. The sheer number of the incidents did not preclude their admissibility. Dillard v. State, 297 Ga. 756, 778 S.E.2d 184 (2015) (decided under former law).

Evidence of victim's gang membership properly excluded. — Trial court did not commit plain error by excluding evidence that the first victim was a member of a street gang because any such affiliation was irrelevant and had no connection to the shooting; and the defendant provided nothing to indicate that the motivation for the shooting, or anything related to the shooting for that matter, was

Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
a. Assault, Battery, and Homicide Crimes (Cont'd)

related to street gang activity. Walton v. State, 303 Ga. 11, 810 S.E.2d 134 (2018).

Evidence not relevant. — In a wrongful death action, the trial court did not abuse the court's discretion by refusing the plaintiff's request to have evidence of the doctor's medical condition and history admitted because the trial court found that it was not relevant without evidence of such condition and history existing on and during treatment of the plaintiff's decedent. Doherty v. Brown, 339 Ga. App. 567, 794 S.E.2d 217 (2016).

In a malice murder and aggravated assault case, because the defendant never claimed, nor was there any evidence to suggest, that the shooting was the result of an accident or mistake, whether the defendant's actions were the result of an accident or mistake was irrelevant, and it was error for the trial court to admit the 2006 guilty pleas to aggravated assault. Brown v. State, 810 S.E.2d 145, No. S17A1582, 2018 Ga. LEXIS 136 (2018).

Admission of previous murder improperly admitted. — In a murder case, under the new evidence code, the trial court erred in admitting the other acts evidence that the defendant and an accomplice murdered a Mississippi state trooper in 1983 because evidence of the Mississippi murder was not admissible to prove identity or motive as the crimes were not so similar as to mark the murders as the handiwork of the defendant; the dissimilarities were stark and militated against the supposition that the murders were committed by the same person; the evidence of the Mississippi murder during a prison escape was unrelated and unnecessary to prove why the defendant murdered a security guard in the course of a theft seven years earlier; and admission of the evidence was not harmless. Brooks v. State, 298 Ga. 722, 783 S.E.2d 895 (2016).

Admission of prior aggravated assault conviction error. — In a malice murder and aggravated assault case, the admission of the defendant's 2006 convictions for aggravated assault did not constitute harmless error as the evidence underlying the defendant's guilt was not overwhelming, and there was ample conflicting evidence concerning whether the defendant acted in self-defense. Brown v. State, 810 S.E.2d 145, No. S17A1582, 2018 Ga. LEXIS 136 (2018).

Evidence of other conduct or crimes was admissible.

Evidence of the defendant's prior participation in crimes in which the co-defendant shot a man in order to steal the man's car was admissible to show that the defendant had knowledge of, and shared, the co-defendant's criminal intent in the instant case. Brannon v. State, 298 Ga. 601, 783 S.E.2d 642 (2016).

Evidence of an earlier altercation between the defendant and a former girlfriend was admissible in the aggravated assault of the victim, the former girlfriend's brother, because the state of mind required for the charged offense of aggravated assault against the victim was the same as the state of mind required for the uncharged act against the former girlfriend, which could have constituted an aggravated assault; the other act was probative of the issue of the defendant's intent, which defense counsel argued to the jury was the biggest issue in the case; and the evidence was sufficient to show that the prior bad act occurred and that the defendant was the person who accosted and threatened the former girlfriend with the knife. Wilson v. State, 336 Ga. App. 60, 783 S.E.2d 662 (2016).

Contention that the trial court abused the court's discretion when the court admitted evidence concerning the defendant's prior assaults on other women required further consideration in light of the supreme court's clarification of the law, including that the defendant's not guilty plea put the prosecution's burden of proving every element of the crime, including intent, evidence of other acts that tends to make the requisite intent more or less probable to any extent is relevant. Olds v. State, 299 Ga. 65, 786 S.E.2d 633 (2016).

Testimony regarding similar transactions that occurred years earlier was properly admitted as it was relevant to show the defendant's lustful disposition with

respect to preteen or teenaged girls and the defendant's pattern of molesting young girls with whom the defendant was living. Harris v. State, 340 Ga. App. 865, 798 S.E.2d 498 (2017).

Other sexual offense relevant for sentencing. — Trial court properly refused to deviate from the mandatory minimum sentence for child molestation under O.C.G.A. § 17-10-6.2(c)(1)(C) because the court found the defendant's conviction for sexual exploitation of children was a relevant similar transaction and the phrase relevant similar transaction under § 17-10-6.2(c)(1)(C) included a conviction for a sexual offense charged within the same indictment as the offense for which a deviation from the mandatory minimum sentence was considered. Evans v. State, 334 Ga. App. 104, 778 S.E.2d 360 (2015), aff'd, 794 S.E.2d 40 (Ga. 2016).

Admission of similar transaction evidence proper in kidnapping case. — Defendant's convictions for kidnapping, attempted kidnapping, and criminal trespass were erroneously reversed as the fact that the state did not file criminal charges against the defendant based directly on three prior pool incidents with young children did not mean that those incidents were non-criminal or not indicative of the defendant's state of mind. State v. Ashley, 299 Ga. 450, 788 S.E.2d 796 (2016).

Notice not required for uncharged wrong. — When the defendant was convicted of felony murder, aggravated assault, and possession of a firearm during the commission of a felony, the testimony of two witnesses who stated that the defendant threatened to kill the victim's brother if the victim's brother disciplined the defendant's granddaughter was admissible as intrinsic evidence, bearing directly on the charged conduct, and was not subject to the notice requirements for an uncharged wrong. Wimberly v. State, 302 Ga. 321, 806 S.E.2d 599 (2017).

b. Robbery, Burglary, and Theft Crimes

Admission of similar transaction evidence proper.

Trial court did not abuse the court's discretion by allowing the state to introduce the evidence of a similar robbery to show the defendant's intent and modus operandi or course of conduct, which were legitimate purposes at the time of trial, because the state presented sufficient evidence that the defendant committed the other robbery, which involved robbing a restaurant night manager at closing time while concealing the face with clothing. Martin v. State, 324 Ga. App. 252, 749 S.E.2d 815 (2013).

In an armed robbery case, the trial court did not err in admitting a prior armed robbery conviction because the defense's theory that the defendant was present during the current armed robbery but had not participated in robbing the victim squarely challenged the element of intent; there was sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the 2008 armed robbery; the 2008 armed robbery was factually similar to the current armed robbery; and the probative value outweighed any undue prejudice as intent was contested in that the defendant had admitted to being present but denied participating in the armed robbery. Logan-Goodlaw v. State, 331 Ga. App. 671, 770 S.E.2d 899 (2015).

Trial court did not err in admitting other acts evidence as the other burglaries were factually similar to the charged offense as all three targeted convenience stores and entry was made by breaking the glass front door, the other acts occurred one day after the charged offense, and evidence recovered from the other burglaries connected those acts to the charged offense. York v. State, 334 Ga. App. 581, 780 S.E.2d 352 (2015).

Trial court did not err in finding that the similar transaction, in which the defendant jumped into a car, robbed a victim and drove off in their vehicle, was admissible to show the defendant's intent in robbing the victim in the instant case. McCoy v. State, 332 Ga. App. 626, 774 S.E.2d 179 (2015).

Trial court did not abuse the court's discretion in admitting prior act evidence in the form of testimony from two witnesses that the witnesses each purchased prescription pain pills from the defendant on numerous occasions as the testimony was relevant to the issue of the defen-

Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
b. Robbery, Burglary, and Theft Crimes (Cont'd)

dant's intent and the state was entitled to reject the defendant's offer to stipulate to the commission of the crime of possession of a controlled substance with intent to distribute. Hood v. State, 299 Ga. 95, 786 S.E.2d 648 (2016).

Trial court did not err in admitting evidence of the defendant's identity as a participant in a prior robbery as the incidents occurred within one month of each other, both involved the armed robbery of a purse of a Hispanic woman walking alone, the perpetrators wore dark clothing, used a small handgun, and used a white SUV, and the stolen purses were later found discarded on a roadway, allowing the trial court to find that the modus operandi for each robbery was sufficiently similar. Martin v. State, 340 Ga. App. 773, 798 S.E.2d 326 (2017).

Defendant's convictions for burglary and smash and grab burglary under O.C.G.A. §§ 16-7-1(c) and 16-7-2(b) were supported by circumstantial evidence, including cell phone evidence that the defendant was near the scenes of the two burglaries and DNA evidence from a cigarette butt found in a very similar burglary days after the charged crimes; the defendant's prior conviction for a similar burglary was also properly admitted and supported the conviction. Nations v. State, 345 Ga. App. 92, No. A17A1444, 2018 Ga. App. LEXIS 176 (2018).

Evidence of the defendant's prior guilty plea to six separate residential burglaries was admissible to show intent, absence of mistake, and motive, in a case that was sufficiently similar and any danger of unfair prejudice was mitigated by the trial court's limiting instruction. Harvey v. State, 344 Ga. App. 761, No. A17A1789, 2018 Ga. App. LEXIS 133 (2018).

Appeal by state permitted from pretrial exclusions. — In a robbery case, the state's direct appeal under O.C.G.A. § 5-7-1(a)(5) from an order excluding evidence of a similar robbery under O.C.G.A. § 24-4-404(b) was accepted because, although the trial court was not required to treat the state's pretrial notice of other crimes evidence as a motion under § 5-7-1(a)(5), the state complied with the provisions of the statute. An order excluding intrinsic evidence was not appealable because the pretrial notice did not cover intrinsic evidence. State v. Battle, 344 Ga. App. 565, No. A17A1753, 2018 Ga. App. LEXIS 68 (2018).

Prior crimes properly admitted.

Trial court did not abuse the court's discretion by admitting evidence from another burglary because the defendant pled not guilty to the burglary charges, thus making intent a material issue, and the defendant's actions in committing the other burglary and pawning the class ring involved the same mental state as burglarizing a house to obtain gold jewelry to sell for cash; thus, the evidence from the other burglary was relevant to establish intent. Silvey v. State, 335 Ga. App. 383, 780 S.E.2d 708 (2015).

Prior crimes evidence should have been admitted. — After the defendant was charged with second-degree burglary, second-degree criminal damage to property, possession of tools for the commission of crime, and smash-and-grab burglary, the trial court erred in denying the state's motion to introduce the other-act evidence of a different second-degree burglary in the same county to which the defendant had pled guilty because the two burglaries at issue both occurred within three weeks of each other and used virtually identical tools, including crowbars and an orange concrete saw, as well as methods, including prying doors and breaking windows, to accomplish the objective of obtaining cash from an ATM after business hours. State v. Plaines, No. A17A1433, 2018 Ga. App. LEXIS 201 (Mar. 15, 2018).

In an armed robbery case, the trial court did not err in admitting the defendant's prior robbery conviction because, although the defendant contended that intent was not an issue in the case, the defendant's defense that the defendant was merely present in the car when the police stopped the car, and that, if the co-defendant had committed the robbery, the co-defendant committed the robbery with somebody else, squarely challenged

the element of intent; furthermore, in light of the similar nature of the acts and the strength of the prior act's connection to demonstrating the defendant's intent, the trial court did not abuse the court's discretion in determining that the probative value of the prior conviction was not outweighed by the prejudicial effect. Turner v. State, No. A17A1625, 2018 Ga. App. LEXIS 160 (Mar. 6, 2018).

Trial court did not err in granting the state's motion to present evidence of the armed robbery of a residence two days before the victim's murder because the evidence of the armed robbery was admissible to show the motive to commit the victim's murder as the defendant and the co-defendant were concerned that the victim would turn them into the police; evidence of motive was relevant even if the evidence incidentally placed the defendant's character in issue; there was sufficient proof that the defendant committed the prior armed robbery; and the trial court did not err in finding that the probative value of the evidence outweighed any prejudice from admission. Pike v. State, 302 Ga. 795, 809 S.E.2d 756 (2018).

Admission of prior guilty pleas proper. — Trial court did not abuse the court's discretion in admitting evidence of the defendant's two prior guilty pleas to armed robbery because the defendant's testimony that the victim pulled out the gun made intent a challenged element and, thus, the evidence was relevant. Jones v. State, 299 Ga. 377, 788 S.E.2d 477 (2016).

Evidence of gang membership improperly admitted. — Because there was no evidence whatsoever that the robberies were gang-related, and the defendant's prior gang affiliation had minimal probative value with regard to identity, the trial court abused the court's discretion in admitting the evidence of the defendant's gang membership; however, the error was harmless and did not require reversal as the victim identified the defendant in court; a police officer saw the defendant in the same apartment complex where the crimes occurred on the day of the crimes' commission; and the defendant was apprehended two days after the robbery in the same apartment complex wearing a red hat and red jacket matching that described by the victim. Lingo v. State, 329 Ga. App. 528, 765 S.E.2d 696 (2014).

Act of armed robbery and "selfie" videos not similar. — State failed to show that the defendant's making of "selfie" videos in which the defendant talked about making money by various means, including armed robbery, amounted to any criminal act, let alone that it required the same or similar intent as the charged offense of armed robbery and, thus, the acts of making the videos and committing the armed robbery were not "similar acts" because they did not share the same intent. State v. Spriggs, 338 Ga. App. 655, 791 S.E.2d 440 (2016).

Similar transaction evidence admissible.

Because the evidence of the four independent offenses that included car jackings and robberies were sufficiently similar to the charged crimes in the defendant's current case in that the offenses involved the use of a handgun to subdue the victims, cooperation between the defendant and the first co-defendant, the common motive of robbery, and luring the victims to the crime scenes where the victims were assaulted and robbed, the trial court did not err in admitting evidence of the four independent offenses at trial. Geiger v. State, 295 Ga. 648, 763 S.E.2d 453 (2014).

Evidence of conduct as corroboration may be circumstantial or direct in home invasion case. — Modus operandi evidence in the case was sufficient to corroborate a witness's testimony identifying the appellant as a participant in two additional home invasion crimes because the perpetrators were all Spanish speaking and conducted themselves the same way as to all four home invasions that occurred and each happened over the course of only three weeks and were committed within the same county. Cisneros v. State, 299 Ga. 841, 792 S.E.2d 326 (2016).

Evidence of uncharged burglaries. — In the defendant's burglary trial, evidence of five uncharged burglaries was admissible because the uncharged and six charged burglaries were part of a two-week crime spree committed by a bur-

Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
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glary crew of which the defendant was a part, even if the defendant did not directly participate in some; the uncharged crimes did not fall within O.C.G.A. § 24-4-404(b). Baughns v. State, 335 Ga. App. 600, 782 S.E.2d 494 (2016).

Prosecutor's statement "in her place" that defendant committed the other crimes. — In a robbery case, the trial court erred by finding that the prosecutor's "in her place" proffer in support of a pretrial notice under O.C.G.A. § 24-4-404(b) seeking to admit evidence of another robbery committed by the defendant provided insufficient proof that the defendant committed the other acts, in the absence of objection by the defendant. State v. Battle, 344 Ga. App. 565, No. A17A1753, 2018 Ga. App. LEXIS 68 (2018).

c. Controlled Substances

Admission of similar transaction evidence proper.

Defendant failed to establish that the trial court abused the court's discretion by admitting evidence of the defendant's 2001 conviction for possessing cocaine with the intent to distribute because the defendant placed the defendant's intent in issue by pleading not guilty to the charges of trafficking in cocaine and possessing cocaine with the intent to distribute; the defendant did nothing to remove intent as an issue as the defendant told law enforcement that the defendant did not live in the house throughout which the drugs and drug-distribution paraphernalia were found; and the prior conviction was relevant as the defendant's participation in the earlier crime required the same intent as the charged crimes. Gunn v. State, 342 Ga. App. 615, 804 S.E.2d 118 (2017).

Victim's alleged involvement in the drug trade, without more, was insufficient to permit admission of that evidence to show that the victim was likely to be armed. Wilson v. State, 302 Ga. 106, 805 S.E.2d 98 (2017).

Similar transaction evidence admissible.

When the defendant was convicted of armed robbery and possession of a firearm during the commission of a felony, the trial court did not err in admitting evidence of the 2005 robbery charge as similar transaction evidence under the former evidence code because the evidence was admissible for the state's requested purposes of showing course of conduct and bent of mind; and because the evidence was sufficient to show that the defendant was one of the perpetrators in the 2005 offense as the defendant was arrested shortly thereafter in possession of a gun and the victim's belongings after initially fleeing from police. Demps v. State, 337 Ga. App. 657, 788 S.E.2d 525 (2016).

Evidence too attenuated to be intrinsic. — Defendant's conviction on one count of trafficking in cocaine was reversed because the trial court abused the court's discretion in admitting the evidence of the United States Drug Enforcement Administration (DEA) investigation as intrinsic evidence of the charged trafficking offense since the state failed to sufficiently link the DEA evidence to the events immediately surrounding the defendant's arrest as it was too attenuated in time and space from the events leading up to the charged offense. Sanchez-Villa v. State, 341 Ga. App. 264, 799 S.E.2d 364 (2017).

Intrinsic evidence admissible. — Although the defendant's character might have been incidentally placed into evidence, the trial court did not abuse the court's discretion in admitting portions of the defendant's statement at issue as intrinsic evidence because the defendant used the defendant's consumption of drugs to explain the defendant's condition on the night of the murder to excuse the defendant's partial lack of recollection, and to deny the defendant's involvement in the shooting; and the portions of the defendant's initial statement to police that admitted the defendant's illicit drug use were inextricably intertwined with the evidence regarding the charged offenses, and were relevant to the defendant's justification defense. Smith v. State, 302 Ga. 717, 808 S.E.2d 661 (2017).

Trial court failed to make findings of proper purpose and similarity. — Defendant's conviction for possession of cocaine, O.C.G.A. § 16-13-30(a), was reversed because the trial court did determine under former Ga. Unif. Super. Ct. R. 31.3(B) (now O.C.G.A. § 24-4-404(b)) whether the state possessed a proper purpose for admission of similar transaction evidence, or whether the two offenses were sufficiently connected or similar; the error was not harmless because the state could not establish that the defendant had actual possession of the cocaine found in the defendant's girlfriend's vehicle. McCrory v. State, 341 Ga. App. 174, 798 S.E.2d 385 (2017).

d. Miscellaneous Crimes

Admission of similar transaction evidence proper.

Trial court did not err by allowing evidence that the defendant actually infected a similar transaction witness with HIV as the similar transaction witness's testimony about the witness's HIV status before and after having sexual relations with the defendant, as well as medical testimony verifying the witness's negative status, allowed the jury to find that the defendant transmitted HIV to the witness. Davis v. State, 342 Ga. App. 889, 806 S.E.2d 3 (2017).

Evidence of prior difficulties between victim and defendant. — Trial counsel was not ineffective in failing to raise a lack of notice objection to the prior bad acts evidence because, contrary to the defendant's argument, the victim's testimony was not introduced as evidence of prior bad acts by the defendant against third parties but, rather, the testimony constituted evidence of prior difficulties between the defendant and the victim, and notice was not required for evidence of prior difficulties between the accused and the alleged victim. Furthermore, prior difficulties evidence between the accused and the victim was admissible in an aggravated stalking case because the state had to show that the indicted act was committed for the purpose of harassment and intimidation, an essential element of stalking. Lopez v. State, 332 Ga. App. 518, 773 S.E.2d 787 (2015).

Similar transaction evidence admissible.

Trial court did not err in admitting evidence of prior bad acts because, as to both the victim and the other act students, the defendant used the defendant's position of authority as a band director to prey on the girls under the defendant's supervision through suggestive acts and sexual banter, and inappropriate touching, which the defendant intended to entice the girls into indecent or sexual acts arousing their sexual desires or the defendant's sexual desires. Blevins v. State, 343 Ga. App. 539, 808 S.E.2d 740 (2017).

Evidence admissible in sexual crime. — Even if the trial court erred in admitting evidence of the defendant's other acts, the error was not prejudicial under O.C.G.A. § 24-4-403 as it was harmless given the overwhelming evidence of the defendant's guilt, including the victim's testimony, the testimony of the defendant's roommate that the roommate saw the victim performing oral sex on the defendant and that the victim looked scared, and the recording of a call between the defendant and the defendant's roommate in which they were attempting to cover up the incident. Edmonson v. State, 336 Ga. App. 621, 785 S.E.2d 563 (2016).

Trial court did not err by denying the defendant's request for a continuance after allowing the state to present evidence of prior bad acts, specifically the defendant's relationship with the victim's mother that began when the victim was 14 years old, because the state moved to allow such evidence prior to trial and, thus, there was no surprise to the defendant. Aguilar v. State, 340 Ga. App. 522, 798 S.E.2d 60 (2017).

Evidence of prior conviction for DUI. — Trial court did not abuse the court's discretion in admitting evidence of the defendant's prior DUI conviction as it was relevant for the limited purpose of establishing the defendant's intent and knowledge in the charged crimes of DUI per se and DUI less safe in that a jury could have inferred from the defendant's intent to drive while under the influence on a prior occasion that the defendant possessed the requisite intent on the sub-

Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
d. Miscellaneous Crimes (Cont'd)

ject occasion. State v. Jones, 297 Ga. 156, 773 S.E.2d 170 (2015).

Trial court did not abuse the court's discretion by allowing the state to introduce evidence of the defendant's prior driving under the influence (DUI) conviction because it was not unduly prejudicial as the relevance of the prior DUI was heightened since the defendant's defense was that the defendant did not drive the vehicle while intoxicated but drank after stopping; thus, the prior DUI was relevant to the intent to drive while intoxicated since the defendant did so before. King v. State, 338 Ga. App. 783, 792 S.E.2d 414 (2016).

Trial court did not err in admitting the defendant's prior driving under the influence (DUI) conviction to show intent because the same state of mind was required for committing the prior DUI and the charged crime of driving under the influence of alcohol to the extent that the defendant was a less safe driver, which was the general intent to drive while under the influence of alcohol. Monroe v. State, 340 Ga. App. 373, 797 S.E.2d 245 (2017).

In a driving under the influence (DUI) per se case, the defendant's prior DUI conviction was improperly admitted to show intent as the probative value of the evidence was substantially outweighed by the danger of unfair prejudice because the jury could infer intent from the defendant's act of driving after admittedly consuming alcohol without considering the prior DUI, and there was a danger of interjecting unfair prejudice at trial; however, admission of that evidence was harmless as the direct evidence of the defendant's guilt for the DUI-per se charge was overwhelming as the defendant admitted to consuming alcohol, and the breath tests showed the defendant's blood alcohol content was substantially in excess of 0.08 grams. Jones v. State, 301 Ga. 544, 802 S.E.2d 234 (2017).

Evidence of methadone use. — Evidence that the defendant had previously hit a parked car with the defendant's truck after taking a dose of methadone earlier in the day was properly admitted into evidence as the evidence was relevant to whether the defendant intentionally drove while under the influence of methadone. Diaz v. State, 344 Ga. App. 291, 810 S.E.2d 566 (2018).

Evidence of prior obstruction of police officers admissible. — Other acts evidence regarding two earlier instances of obstructing a law enforcement officer was relevant and admissible because, by expressly challenging whether the officer was lawfully discharging the officer's official duties, the defendant implicitly challenged the defendant's own knowledge that the officer's commands to the defendant were lawful; and it established that, on past occasions, the defendant had encountered officers under similar circumstances and been apprehended or accused of obstructing the officers when the defendant fled, such that the defendant knew that the officer's command that the defendant talk with the officer was made in the lawful discharge of the officer's official duties and that the defendant was not free to flee. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156 (2016).

Prior action of burning sibling. — Evidence that the victim's parent had burned the victim's sibling on another occasion by spilled hot chocolate while in the parent's care could not be used by the jury to show that the parent burned the victim without relying on the impermissible inference that the parent's bad parenting of the sibling made it more likely the parent burned the victim. Pittmon v. State, 342 Ga. App. 874, 805 S.E.2d 628 (2017).

4. Victim's Character

Long-standing requirement for admission of victim's character evidence not changed. — There is no reason to construe the rules regarding the admission of character evidence as a modification of Georgia's long-standing requirement that a defendant must first make a prima facie showing of self-defense before requiring a trial court to determine whether evidence pertaining to the victim's character is admissible.

Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Evidence of victim's violent character may be admitted when defendant acted in self-defense.

Because the defendant failed to make a prima facie showing that the defendant acted in self-defense and evidence of the victim's propensity for violence could not be introduced, the defendant could not satisfy the requirement of demonstrating a pertinent trait of character of the alleged victim of the crime, and there was no need to address the defendant's contention that the court incorrectly applied the rule regarding the methods of proving character. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Since the defendant failed to make a prima facie showing that the defendant acted in self-defense when the defendant shot the victim because the defendant was the aggressor and the victim would have been justified in using force to subdue the defendant, the trial court did not abuse the court's discretion in excluding evidence of the victim's propensity for violence. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Evidence of victim's good character. — Trial counsel performed deficiently as counsel should have objected to the inadmissible statements of three witnesses that improperly placed the victim's good character in issue, but counsel's deficient performance was not prejudicial because, considering the totality of the evidence, there was no reasonable probability that, had trial counsel objected to that testimony, the outcome in the defendant's case would have been different. Revere v. State, 302 Ga. 44, 805 S.E.2d 69 (2017).

Evidence of victim's violent acts.

Trial court did not err in refusing to let the defendants call the co-indictee as a witness to testify about the prior acts of violence the co-indictee committed in 1994 for choking the co-indictee's mother and in 2004 for choking another person because the co-indictee's counsel announced that the co-indictee would invoke the co-indictee's privilege against self-incrimination as to any questions about those prior acts and the trial court reasonably concluded that any questions as to the co-indictee's past violent acts could incriminate the co-indictee and affect the co-indictee's pending trial. Brown v. State, 295 Ga. 804, 764 S.E.2d 376 (2014).

Even if the first defendant's counsel performed deficiently by failing to obtain the victim's criminal history, which the first defendant alleged would have shown the existence of a prior incident of domestic violence in Alabama and the victim's propensity for violence, the first defendant failed to show prejudice because it was not clear that any such specific incident of violence would have been admissible at the first defendant's trial as the first defendant's case was tried after the enactment of Georgia's new Evidence Code; and because, at the motion for new trial hearing, the first defendant did not present any witnesses to authenticate the Alabama domestic violence police report. Ballard v. State, 297 Ga. 248, 773 S.E.2d 254 (2015).

Even if any of the victim's alleged prior crimes involved specific acts of violence, because the defendant never introduced into evidence at the motion for new trial hearing any of the victim's alleged prior convictions, the defendant could not support the defendant's claim that the defendant's counsel could have been ineffective for failing to attempt to introduce such evidence at trial. Revere v. State, 302 Ga. 44, 805 S.E.2d 69 (2017).

5. Jury Instructions

Jury charge on similar transaction evidence admissibility correct. — Trial court did not commit plain error by charging the jury concerning the limited use of sexual assault extrinsic evidence admitted pursuant to O.C.G.A. § 24-4-413 because the charge was not erroneous as such evidence was admissible as relevant. Marlow v. State, 337 Ga. App. 1, 785 S.E.2d 583 (2016), overruled on other grounds by Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

Mistrial not warranted when curative instruction given.

Trial court did not err in failing to grant a mistrial based on the prosecutor's allegedly impermissible argument because the

Criminal Cases (Cont'd)
5. Jury Instructions (Cont'd)

trial court immediately reminded the jury of the limited purpose for which the jury could consider the other acts evidence regarding two earlier instances in which the defendant obstructed a law enforcement officer; and that reminder supplemented the other points in the trial when the trial court instructed the jury as to the limited purpose of the other acts evidence. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156 (2016).

Limiting instruction on consideration of prior conviction proper. — Trial court's charge on the jury's consideration of the defendant's prior 1989 convictions did not likely affect the outcome of the proceedings because the trial court gave the jurors a limiting instruction prohibiting the jurors from considering the 1989 convictions for any purpose other than course of conduct and modus operandi; and the jury charge as given and when considered as a whole properly set forth the elements of the charged crimes, instructed the jury on the state's burden of proof and burden to show intent, and instructed the jury that only slight evidence from another source was necessary to support the accomplice's testimony. Paschal v. State, 335 Ga. App. 411, 780 S.E.2d 681 (2015).

RESEARCH REFERENCES

ALR. — Application of "doctrine of chances" in homicide, sexual crimes, and other offenses against the person, 11 A.L.R.7th 1.

Application of "doctrine of chances" in criminal offenses against property, 11 A.L.R.7th 2.

Law reviews. — For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

24-4-405. Methods of proving character.

JUDICIAL DECISIONS

Good character conduct evidence in child molestation trial. — In a child molestation case, the appellate court could not reach the merits of the defendant's claim regarding the exclusion of specific instances of conduct testimony from character witnesses for the defense because the affidavits from three of the character witnesses who testified at trial failed to identify any specific instance of the defendant's conduct that the witnesses were unable to testify to; furthermore, the defendant was able to present a variety of evidence regarding the defendant's good character, including specific instances of conduct. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

Testimony regarding defendant's character trait of moral behavior and trustworthiness. — In a child molestation case, the trial court did not restrict the defendant's character witnesses' ability to testify as to the defendant's character trait of moral behavior and trustworthiness with children as three witnesses testified as to that character trait, and any additional testimony regarding the defendant's morality and trustworthiness with children would have been cumulative. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

Jury charge regarding character evidence. — Trial court did not commit plain error in the court's charge to the jury on good character evidence because the defendant used the idea that the defendant did not have a reputation for violence as a means of attempting to show the defendant's good character, and the trial court merely reflected that in the court's charge to the jury; and the jury was properly left to determine whether the defendant would have acted consistently with the defendant's purported character with

respect to violence, which was to not act violently towards anyone, including the victim; further, giving that proper charge did not amount to the trial court commenting on the evidence. Jacobs v. State, No. S17A1892, 2018 Ga. LEXIS 144 (Mar. 5, 2018).

Admission of defendant's violence-prone Facebook posts error. — Trial court erred in allowing the state to introduce evidence in its case in chief of threatening posts the defendant had made on Facebook as evidence of the defendant's allegedly violent character and behavior in conformity therewith because O.C.G.A. § 24-4-405 required such proof be made by testimony as to reputation or in the form of an opinion; however, the error was harmless. Timmons v. State, 302 Ga. 464, 807 S.E.2d 363 (2017).

Long-standing requirement for admission of victim's character evidence not changed. — There is no reason to construe the rules regarding the admission of character evidence as a modification of Georgia's long-standing requirement that a defendant must first make a prima facie showing of self-defense before requiring a trial court to determine whether evidence pertaining to the victim's character is admissible. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Failure to obtain victim's criminal history not prejudicial. — Even if the first defendant's counsel performed deficiently by failing to obtain the victim's criminal history, which the first defendant alleged would have shown the existence of a prior incident of domestic violence in Alabama and the victim's propensity for violence, the first defendant failed to show prejudice because it was not clear that any such specific incident of violence would have been admissible at the first defendant's trial as the first defendant's case was tried after the enactment of Georgia's new Evidence Code; and because, at the motion for new trial hearing, the first defendant did not present any witnesses to authenticate the Alabama domestic violence police report. Ballard v. State, 297 Ga. 248, 773 S.E.2d 254 (2015).

Failure to make prima facie case of self defense meant victim's propensity for violence irrelevant. — Because the defendant failed to make a prima facie showing that the defendant acted in self-defense and evidence of the victim's propensity for violence could not be introduced, the defendant could not satisfy the requirement of demonstrating a pertinent trait of character of the alleged victim of the crime, and there was no need to address the defendant's contention that the court incorrectly applied the rule regarding the methods of proving character. Oliver v. State, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Evidence of victim's prior convictions. — Even if any of the victim's alleged prior crimes involved specific acts of violence, because the defendant never introduced into evidence at the motion for new trial hearing any of the victim's alleged prior convictions, the defendant could not support the defendant's claim that the defendant's counsel could have been ineffective for failing to attempt to introduce such evidence at trial. Revere v. State, 302 Ga. 44, 805 S.E.2d 69 (2017).

Limiting evidence as cumulative. — Trial court did not err in limiting the scope of evidence regarding the defendant's good character as the additional testimony the defendant sought to have introduced would have been cumulative. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

Evidence of victim's good character. — Trial counsel performed deficiently as counsel should have objected to the inadmissible statements of three witness that improperly placed the victim's good character in issue, but counsel's deficient performance was not prejudicial because, considering the totality of the evidence, there was no reasonable probability that, had trial counsel objected to that testimony, the outcome in the defendant's case would have been different. Revere v. State, 302 Ga. 44, 805 S.E.2d 69 (2017).

Cited in Gibson v. State, 300 Ga. 494, 796 S.E.2d 712 (2017).

24-4-406. Habit; routine practice.

JUDICIAL DECISIONS

Not habit evidence. — Testimony about the defendant's prior driving on the curve in question was not habit evidence. Evans-Glodowski v. State, 335 Ga. App. 484, 781 S.E.2d 591 (2016).

24-4-407. Subsequent remedial measures.

JUDICIAL DECISIONS

Doctor's remedial measure not admissible for impeachment purposes. — In a medical malpractice case in which the doctor placed a halo device on the patient with the opening in the front, the trial court erred in holding that evidence of the doctor's alleged remedial measure of placing the opening of the halo device in the rear was admissible by the patient for impeachment purposes because the deposition testimony of the president of the company that manufactured the halo device was that there was nothing wrong, from a structural engineering standpoint, with placing the halo opening in the front and that placement decisions were left to the surgeon; and the company president's testimony did not contradict the doctor's later decision to exercise the doctor's discretion to position the halo openings in the rear. Mark v. Agerter, 332 Ga. App. 879, 775 S.E.2d 235 (2015).

24-4-408. Compromises and offers to compromise.

Law reviews. — For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

JUDICIAL DECISIONS

Analysis

Application and Illustrations

Application and Illustrations

Documents of offers and counteroffers in divorce proceedings. — In a divorce proceeding, the trial court did not err by excluding certain written documents exchanged between the parties that, according to the wife, showed the parties reached an agreement regarding the wife's support because at no time prior to trial did the wife claim a financial settlement and, at most, those documents were evidence of the parties' offers and counteroffers made in attempts to negotiate the issues raised in the divorce proceeding and were not admissible at trial. Frost v. Frost, 299 Ga. 278, 787 S.E.2d 693 (2016).

24-4-411. Liability insurance.

JUDICIAL DECISIONS

Testimony from passenger on receipt of settlement. — Trial court did not abuse the court's discretion by ruling that a second passenger's testimony was admissible because the jury heard no direct evidence regarding the defendant's

liability insurance, only that the second passenger and others had received money to settle any claims against the defendant and that the truck driver had not paid any money and the court properly balanced the plaintiff's interest in showing that the second passenger could possibly be biased against the defendant's interest. Brown v. Tucker, 337 Ga. App. 704, 788 S.E.2d 810 (2016).

24-4-412. Complainant's past sexual behavior not admissible in prosecutions for certain sexual offenses; exceptions.

JUDICIAL DECISIONS

Analysis

General Consideration
Child Molestation
Rape

General Consideration

Evidence of prior false claims improperly barred.

Evidence of the admittedly false accusation by the victim, the defendant's stepdaughter, was not barred by the rape shield statute as evidence of the victim's alleged false allegations of sexual misconduct by persons other than the defendant did not involve the victim's past sexual conduct but rather the victim's propensity to make false statements regarding sexual misconduct. Burns v. State, No. A18A0227, 2018 Ga. App. LEXIS 226 (Apr. 19, 2018).

Identification of alternate sexual partner. — When the defendant was convicted of rape, aggravated child molestation, and enticing a child for indecent purposes, trial counsel was not ineffective in failing to investigate alternate sources of the victim's pregnancy and injuries because trial counsel testified that identifying an alternate sexual partner might have conflicted with the rape shield statute; any sexual contact after the crime would not have been relevant to the victim's injuries and would have been highly prejudicial; and, in light of the victim's testimony, the victim's immediate outcry, and the evidence of male DNA found inside the victim and the victim's vaginal injury, it was not reasonably likely that the result of the trial would have been different. Davis v. State, 329 Ga. App. 797, 764 S.E.2d 588 (2014) (decided under former O.C.G.A. § 24-2-3).

Child Molestation

Evidence of a child sexual abuse victim's previous sexual activity was properly excluded, etc.

Trial court did not err by excluding the victim's false claims of "molestation" against the victim's stepfather because the trial court determined that the facts the victim alleged were true and, even if the victim had used the term "molestation" to describe the allegations involving the stepfather, the imprecise use of legal terminology did not render truthful allegations false. Morgan v. State, 337 Ga. App. 29, 785 S.E.2d 667 (2016).

Trial court did not violate Georgia's rape shield statute, O.C.G.A. § 24-4-412, in determining that proposed testimony regarding a separate, independent investigation into child molestations allegations by the victim against another man was inadmissible because the proposed statements were not false allegations of sexual misconduct but were statements that another man had not engaged in sexual misconduct with the victim when, in fact, some sort of sexual misconduct had occurred. Frye v. State, 344 Ga. App. 704, No. A17A1554, 2018 Ga. App. LEXIS 128 (2018).

Charge stating child under 16 could not consent to sexual intercourse. — Trial court did not plainly err in charging the jury that a child under the age of 16 years could not consent to sexual intercourse. Algren v. State, 330 Ga. App. 1, 764 S.E.2d 611 (2014).

Rape

Evidence not admissible in rape case.

Trial counsel was not deficient for failing to seek to introduce evidence at trial that the victim had consensual sexual intercourse with the victim's partner before the sexual assault because the defendant failed to show any prejudice resulting from the alleged deficiency as the victim identified the defendant as the victim's attacker at trial and in a show-up identification and photographic lineup before trial and unequivocally testified that the defendant forced the victim to have sexual intercourse. Lanham v. State, No. A18A0644, 2018 Ga. App. LEXIS 239 (Apr. 26, 2018).

Evidence of past sexual behavior not admissible when it did not involve participation by defendant. — When the state also prosecuted the defendant for the rape of the victim's older sister, the rape shield statute barred the evidence sought by the defendant because the evidence related to the past sexual behavior of the older sister and did not fall within the statutory exceptions as the past sexual behavior of the older sister having sex with boys for money did not involve the participation of the defendant and did not support an inference that the defendant reasonably believed that the older sister consented to the defendant's alleged sexual activities with the older sister. Jones v. State, 340 Ga. App. 568, 798 S.E.2d 87 (2017).

In statutory rape case, victim's pregnancy with another's child excluded. — In the defendant's trial for statutory rape, the 13-year-old victim's prior statements to police, which were consistent with her trial statements, provided corroboration as required by O.C.G.A. § 16-6-3(a); evidence regarding the paternity of a child that the victim had aborted was excluded under the Rape Shield statute, O.C.G.A. § 24-4-412(b). Atkins v. State, 342 Ga. App. 422, 803 S.E.2d 122 (2017).

Exclusion of previous consensual sexual relationship. — In a case decided under former O.C.G.A. § 24-2-3, the trial court did not err in granting the state's motion in limine to exclude evidence that the defendant and the victim had a prior sexual relationship as there was no way, given the circumstances of the episode, that the defendant reasonably believed the victim consented to sexual intercourse, even if the victim had previously done so. Johnson v. State, 322 Ga. App. 612, 744 S.E.2d 903 (2013) (decided under former O.C.G.A. § 24-2-3).

Evidence of victim's prior prostitution properly excluded. — Trial court properly excluded evidence of the victim previously engaging in prostitution because the defendant pointed to nothing, other than rank speculation, linking the July 14, 2008 sexual assault to the victim's prior prostitution with other men as there was no evidence that the victim was previously threatened or physically injured by any of those individuals and the exclusion was harmless because the defendant testified to paying the victim for sex in the past. Bill v. State, 341 Ga. App. 340, 799 S.E.2d 28 (2017).

RESEARCH REFERENCES

ALR. — Admissibility in civil case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior, 12 A.L.R. Fed. 3d 6.

Admissibility in criminal case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior, 15 A.L.R. Fed. 3d 1.

24-4-413. Evidence of similar transaction crimes in sexual assault cases.

Law reviews. — For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

JUDICIAL DECISIONS

Three affirmative showings required for admission of similar offenses.

Trial court did not err in denying the state's motion to introduce other acts evidence in the state's prosecution against the defendant on the charge of rape because, although the trial court did not expressly evaluate in the court's order whether the other acts evidence was relevant to any specific matter at trial — a threshold inquiry — or that the evidence satisfied the prerequisites for admission, the trial court properly focused the court's analysis on whether the other acts evidence (assuming that it was relevant and admissible) should be excluded on the ground that the evidence's probative value was substantially outweighed by the danger of unfair prejudice, and it was not improper for the trial court to frame the court's analysis in that way. State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138 (2016).

Admission of similar transaction proper.

Trial court did not abuse the court's discretion in admitting the evidence of 11-year-old and 15-year-old similar transactions because both similar transactions and the instant crimes involved defendant committing sexual acts against children with the second similar transaction and the instant crimes having defendant in a position of authority over the victims; thus, the similarity to the present crimes and their probative value to show unique bent of mind made those crimes admissible. Arbegast v. State, 332 Ga. App. 414, 773 S.E.2d 283 (2015).

Testimony regarding another sexual assault was admissible on any matter to which it was relevant and, thus, trial counsel's failure to request a limiting instruction did not support a claim of ineffective assistance. Cook v. State, 338 Ga. App. 489, 790 S.E.2d 283 (2016).

Trial court did not abuse the court's discretion by admitting evidence of prior molestation acts upon a minor victim witness because the jury could have concluded by a preponderance of the evidence that the defendant committed the acts described by the witness and the probative value was great based on the overall similarity of the acts, each involved inappropriate sexual contact between the defendant and a child of similar age to whom the defendant gained access through a relationship with the child's mother. Dixon v. State, 341 Ga. App. 255, 800 S.E.2d 11 (2017).

Trial court correctly held that O.C.G.A. § 24-4-413(a) governed the admissibility of the other acts evidence because the defendant was accused of an offense of sexual assault and the other acts evidence concerned the defendant's commission of another offense of sexual assault. Latta v. State, 341 Ga. App. 696, 802 S.E.2d 264 (2017).

Trial court properly permitted the state to introduce evidence of the defendant's two prior bad acts, a 2009 incident of exposure in front of underage girls and a 2012 incident of attempt to sexually assault a female neighbor, because they were not the faultless acts of an innocent child, but rather demonstrated evidence of the defendant's lustful disposition and were relevant. Robinson v. State, 342 Ga. App. 624, 805 S.E.2d 103 (2017).

Trial court did not err in admitting, pursuant to O.C.G.A. §§ 24-4-413 and 24-4-414, evidence of the defendant's sexual behavior toward another student as a jury could have determined that the defendant acted with the intent to arouse the defendant's sexual desires, especially given that while driving the student home from a music lesson, the defendant said the defendant was taking the student to the defendant's house to "make whoopee," a clear reference to sex. Blevins v. State, 343 Ga. App. 539, 808 S.E.2d 740 (2017).

When the defendant was convicted of two counts of aggravated sodomy and one count each of family violence aggravated assault, family violence battery, terroristic threats, and family violence simple battery against a live-in girlfriend, evidence of prior sexual assaults was properly admitted because the evidence was relevant to show the defendant's intent, which was put in issue when the defendant entered a plea of not guilty; the prior

sexual assaults were sufficiently similar to the charged sexual assaults; the state was able to use the evidence to bolster the victim's credibility by demonstrating that the victim's circumstances were not unique; and any risk of unfair prejudice was mitigated by the trial court's limiting instruction. Benning v. State, 344 Ga. App. 397, 810 S.E.2d 310 (2018).

Admission of prior incident of statutory rape. — In a defendant's prosecution for statutory rape and child molestation of a 14-year-old girl in her parents' trailer while the parents were home, evidence of a similar incident in the same trailer park involving another trailer and another 14-year-old girl was admissible under O.C.G.A. § 24-4-413 to show the defendant's knowledge, motive, preparation, and intent. Steele v. State, 337 Ga. App. 562, 788 S.E.2d 145 (2016).

Similar transaction evidence admissible.

Trial court did not commit plain error by charging the jury concerning the limited use of sexual assault extrinsic evidence admitted pursuant to O.C.G.A. § 24-4-413 because the charge was not erroneous as such evidence was admissible as relevant. Marlow v. State, 337 Ga. App. 1, 785 S.E.2d 583 (2016), overruled on other grounds by Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

Evidence of other conduct or crimes was inadmissible in the following case.

Trial court disagreed that the other acts evidence was especially probative of the credibility of the defendant and the victim, given the lack of similarity between the other acts evidence of child molestation and the charged offense of rape, the decade separating the other acts from the charged offense, and the defendant's immaturity at the time the other acts were committed; however, the trial court believed that, under the circumstances, admitting extrinsic evidence of acts of alleged child molestation would lure the jury into finding the defendant guilty based on proof that was not specific to the crime charged, thereby infecting the proceedings with unfair prejudice and undermining the presumption of innocence. State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138 (2016).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of Fed. R. Evid. 413 permitting admission in prosecution for sexual assault of evidence of defendant's commission of other sexual offense, A.L.R. Fed. 2d 577.

24-4-414. Evidence of similar transaction crimes in child molestation cases.

Law reviews. — For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

JUDICIAL DECISIONS

Analysis

General Consideration
Other Crimes
Time Lapse

General Consideration

Notice was sufficient. — Defendant failed to demonstrate that the state's notice of the state's intent to present evidence of similar transactions, provided under the old evidence code which was in effect at the time, was insufficient to satisfy the requirements under the new evidence code. Harris v. State, 340 Ga. App.

865, 798 S.E.2d 498 (2017).

Evidence of prior bad acts. — Trial court did not err by denying the defendant's request for a continuance after allowing the state to present evidence of prior bad acts, specifically the defendant's relationship with the victim's mother that began when the victim was 14 years old, because the state moved to allow such evidence prior to trial and, thus, there was no surprise to the defendant. Aguilar v. State, 340 Ga. App. 522, 798 S.E.2d 60 (2017).

Similar transaction evidence admissible.

Trial court did not err in allowing similar transaction evidence because a jury could determine that the defendant took the actions in the similar transaction with the intent to arouse the defendant's sexual desires, especially given that the defendant asked that victim if the victim felt like the defendant would molest the victim. Dority v. State, 335 Ga. App. 83, 780 S.E.2d 129 (2015).

Trial court did not abuse the court's discretion by admitting evidence of prior molestation acts upon a minor victim witness because the jury could have concluded by a preponderance of the evidence that the defendant committed the acts described by the witness and the probative value was great based on the overall similarity of the acts, each involved inappropriate sexual contact between the defendant and a child of similar age to whom the defendant gained access through a relationship with the child's mother. Dixon v. State, 341 Ga. App. 255, 800 S.E.2d 11 (2017).

Trial court abused the court's discretion by excluding prior acts of child molestation allegedly committed by the defendant because such evidence was admissible under O.C.G.A. § 24-4-414(a), and nothing in the record supported the extraordinary remedy of exclusion as unduly prejudicial under O.C.G.A. § 24-4-403, particularly given the statutory presumption of admissibility and the close similarities between the crimes at issue. State v. McPherson, 341 Ga. App. 871, 800 S.E.2d 389 (2017).

Trial court did not err in admitting, pursuant to O.C.G.A. §§ 24-4-413 and 24-4-414, evidence of the defendant's sexual behavior toward another student as a jury could have determined that the defendant acted with the intent to arouse the defendant's sexual desires, especially given that while driving the student home from a music lesson, the defendant said the defendant was taking the student to the defendant's house to "make whoopee," a clear reference to sex. Blevins v. State, 343 Ga. App. 539, 808 S.E.2d 740 (2017).

Other sexual offense relevant for sentencing. — Trial court properly refused to deviate from the mandatory minimum sentence for child molestation under O.C.G.A. § 17-10-6.2(c)(1)(C) because the court found the defendant's conviction for sexual exploitation of children was a relevant similar transaction and the phrase relevant similar transaction under § 17-10-6.2(c)(1)(C) included a conviction for a sexual offense charged within the same indictment as the offense for which a deviation from the mandatory minimum sentence was considered. Evans v. State, 334 Ga. App. 104, 778 S.E.2d 360 (2015), aff'd, 794 S.E.2d 40 (Ga. 2016).

Other Crimes

Evidence of similar prior offense held admissible.

Trial court properly permitted the state to introduce evidence of the defendant's two prior bad acts, a 2009 incident of exposure in front of underage girls and a 2012 incident of attempt to sexually assault a female neighbor, because they were not the faultless acts of an innocent child, but rather demonstrated evidence of the defendant's lustful disposition and were relevant. Robinson v. State, 342 Ga. App. 624, 805 S.E.2d 103 (2017).

Evidence of similar or connected sexual offenses against children.

Trial court did not err by admitting evidence that the defendant committed prior acts of child molestation as the circumstances were similar, the age of the victim during the abuse overlapped with the age of the victim in the instant case, and the manner of abuse was the same, making the prior offense highly probative with regard to the defendant's intent. Eubanks v. State, 332 Ga. App. 568, 774 S.E.2d 146 (2015).

Time Lapse

Time lapse still showed bent of mind or lustful disposition.

Trial court did not abuse the court's discretion in admitting the evidence of 11-year-old and 15-year-old similar transactions because both similar transactions and the instant crimes involved defendant committing sexual acts against children with the second similar transaction and the instant crimes having defendant in a position of authority over the victims; thus, the similarity to the present crimes and their probative value to show unique bent of mind made them admissible. Arbegast v. State, 332 Ga. App. 414, 773 S.E.2d 283 (2015).

24-4-415. Evidence of similar acts in civil or administrative proceedings concerning sexual assault or child molestation.

Law reviews. — For annual survey on evidence law, see 69 Mercer L. Rev. 101 (2017).

24-4-417. Evidence of similar acts in prosecutions for violations of Code Section 40-6-391.

Law reviews. — For annual survey on evidence law, see 68 Mercer L. Rev. 121 (2016).

JUDICIAL DECISIONS

Prior DUI convictions admissible. — Trial court did not abuse the court's discretion by allowing the state to introduce evidence of the defendant's prior DUI convictions, after the defendant refused to undergo sobriety testing, stating that it was the defendant's third DUI. Hammond v. State, 334 Ga. App. 781, 780 S.E.2d 440 (2015).

Defendant's conviction for driving under the influence (DUI) and other crimes was affirmed because the defendant's prior DUI conviction was properly admitted since the conviction was relevant to the issue of the defendant's knowledge of the consequences of both consenting to and refusing the tests, and its probative value outweighed any prejudice. Kim v. State, 337 Ga. App. 155, 786 S.E.2d 532 (2016).

Trial court did not err in admitting the defendant's prior driving under the influence (DUI) conviction because the trial court did not abuse the court's discretion in finding that the prior DUI was relevant to prove knowledge; and proof of the defendant's prior DUI conviction could strengthen the inference that the fact-finder could draw from the defendant's refusal to take the state-administered test in the current DUI prosecution, that had the defendant done so, it would have shown the presence of alcohol. Monroe v. State, 340 Ga. App. 373, 797 S.E.2d 245 (2017).

Evidence of the defendant's prior driving under the influence (DUI) conviction was admissible because, based on the presence of the word "shall," the supreme court concluded that this rule contained a presumption in favor of the admission of such evidence; proof of the defendant's prior DUI could allow the factfinder to infer that the defendant had an awareness that the defendant's ingestion of an intoxicant impaired the defendant's ability to drive safely; and such awareness might help to explain the defendant's refusal to submit to the portable breath test. Gibbs v. State, 341 Ga. App. 316, 800 S.E.2d 385 (2017).

In the defendant's DUI case, in which the defendant refused to submit to a blood test, the defendant's December 2011 DUI

was properly admitted to prove the defendant's knowledge and intent, pursuant to O.C.G.A. § 24-4-417(a)(1). Danley v. State, 342 Ga. App. 61, 802 S.E.2d 851 (2017).

Eight-year lapse between a prior conviction for DUI and the charges at issue did not presumptively lessen the probative value of the prior act, but was a factor to be considered when balancing the probative value of the evidence against the potentially prejudicial impact of the evidence, and the trial court was authorized to find that the probative value was not substantially outweighed by the prejudicial impact of the evidence. Miller v. State, 343 Ga. App. 197, 806 S.E.2d 648 (2017).

Defendant failed to show that the trial court abused the court's discretion in admitting evidence of a prior driving under the influence (DUI) incident because the state proffered the deputy's testimony about the June 2011 driving incident for the purpose of proving that the defendant had acquired knowledge of the testing procedures used by the state to secure a DUI conviction and had developed a similar plan to refuse consent in the present case as part of an effort to avoid a DUI conviction; and, in light of the state's proffer, the defendant's prior DUI incident was relevant for proving knowledge and plan. Adams v. State, 344 Ga. App. 159, 809 S.E.2d 87 (2017).

Defendant failed to show that the trial court abused the court's discretion in admitting evidence of a prior driving under the influence (DUI) incident because, by choosing the word "commission" rather than "conviction" in this rule, the General Assembly intended for a prior DUI incident to be admissible when there was evidence that the DUI was committed by the criminal defendant, even if the defendant was not convicted of that offense. Adams v. State, 344 Ga. App. 159, 809 S.E.2d 87 (2017).

After the defendant was arrested for driving under the influence (DUI) and refused to submit to a state administered breath test, the state's motion to introduce evidence of other DUI violations was improperly denied as the danger of undue prejudice did not substantially outweigh the probative value of the evidence of other occasions when the defendant drove under the influence because the state demonstrated the state's prosecutorial need for the extrinsic act evidence; the close proximity in time between the three prior DUI arrests and the charged offense; and the overall similarity between the three prior arrests and the current charge, especially with regard to the defendant's experiences with the requested state administered tests. State v. Voyles, No. A18A0771, 2018 Ga. App. LEXIS 251 (May 7, 2018).

Use of prior DUI conviction. — Trial court erred in limiting the state's use of evidence of the defendant's prior DUI conviction to the state's rebuttal case because O.C.G.A. § 24-4-417(a)(1) permitted the state to introduce such evidence in the state's case in chief. State v. Tittle, 335 Ga. App. 588, 782 S.E.2d 487 (2016).

Cited in State v. Brown, 333 Ga. App. 643, 777 S.E.2d 27 (2015).

24-4-418. Admissibility of criminal gang activity, disclosure.

(a) In a criminal proceeding in which the accused is accused of conducting or participating in criminal gang activity in violation of Code Section 16-15-4, evidence of the accused's commission of criminal gang activity, as such term is defined in Code Section 16-15-3, shall be admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a proceeding in which the prosecution intends to offer evidence under this Code section, the prosecutor shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten

days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section. (Code 1981, § 24-4-418, enacted by Ga. L. 2016, p. 793, § 6/HB 874.)

Effective date. — This Code section became effective May 3, 2016.

JUDICIAL DECISIONS

No abuse of discretion in admitting evidence of alleged gang membership. — Trial court did not abuse the court's discretion by admitting evidence of the defendant's alleged membership in a gang because the evidence of gang membership was relevant to and probative of motive based on two witnesses testifying as to the defendant's gang affiliation. Anglin v. State, 302 Ga. 333, 806 S.E.2d 573 (2017).

CHAPTER 5

PRIVILEGES

Sec.
24-5-501. Certain communications privileged.
24-5-510. (For effective date, see note.) Privileged communications between law enforcement officers and peer counselors.

24-5-501. Certain communications privileged.

(a) There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to, the following:

(1) Communications between husband and wife;

(2) Communications between attorney and client;

(3) Communications among grand jurors;

(4) Secrets of state;

(5) Communications between psychiatrist and patient;

(6) Communications between licensed psychologist and patient as provided in Code Section 43-39-16;

(7) Communications between a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor and patient;

(8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privileged by paragraph (5), (6), or (7) of this subsection; and

(9) Communications between accountant and client as provided by Code Section 43-3-29.

(b) As used in this Code section, the term:

(1) "Psychotherapy" means the employment of psychotherapeutic techniques.

(2) "Psychotherapeutic techniques" shall have the same meaning as provided in Code Section 43-10A-3. (Code 1981, § 24-5-501, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2014, p. 136, § 2-1/HB 291.)

The 2014 amendment, effective July 1, 2014, substituted "Code Section 43-3-29" for "Code Section 43-3-32" in paragraph (a)(9).

Law reviews. — For annual survey of tort laws, see 67 Mercer L. Rev. 237 (2015).

For comment, "Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia's Children," see 31 Ga. St. U.L. Rev. 643 (2015).

JUDICIAL DECISIONS

Analysis

Communications Between Husband and Wife
1. In General
Communications Between Attorney and Client
3. By Reason of Anticipated Employment
11. Application in Other Specific Actions
Other Mental Health Professionals
Communications between Physician and Patient

Communications Between Husband and Wife

1. In General

No valid marriage proven. — Jailhouse conversations between the defendant and a boyfriend or fiance were properly admitted despite a claim of marital privilege because there was sufficient evidence to support the trial court's implicit finding that no legal marriage existed; it was defendant's burden to prove a valid marriage, and the defendant failed to do so. Wiggins v. State, 338 Ga. App. 273, 787 S.E.2d 357 (2016).

Communications Between Attorney and Client

3. By Reason of Anticipated Employment

Privilege continues after client's death.

While a civil action arising out of the patient's suicide may be authorized under Georgia law and application of the protec-

Communications Between Attorney and Client (Cont'd)

3. By Reason of Anticipated Employment (Cont'd)

tions afforded psychiatrist-patient communications by O.C.G.A. § 24-5-501(a) may pose a hardship to the patient's parents in the investigation of potential claims against the doctor, neither of those factors authorized the trial court to require the production of privileged communications contrary to § 24-5-501(a). Cooksey v. Landry, 295 Ga. 430, 761 S.E.2d 61 (2014).

11. Application in Other Specific Actions

Attorney attacking judgment.

Attorney-client privilege applies to communications between a law firm's attorneys and its in-house counsel regarding a client's potential claims against the firm when: (1) there is a genuine attorney-client relationship between the firm's lawyers and in-house counsel; (2) the communications in question were intended to advance the firm's interests in limiting exposure to liability rather than the client's interests in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence; and (4) no exception to the privilege applies. St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 293 Ga. 419, 746 S.E.2d 98 (2013).

Other Mental Health Professionals

Communication with licensed associate professional counselor via grief journal. — Widow's grief journal was privileged because the journal was created as part of a treatment plan developed by both the licensed associate professional counselor, acting as an agent for the licensed professional counselor, and the licensed professional counselor and the journal's contents were communicated to the associate professional counselor as part of the widow's therapy. Gwinnett Hosp. Sys. v. Hoover, 337 Ga. App. 87, 785 S.E.2d 918 (2016).

Communications between Physician and Patient

If nurse is agent of hospital rather than communicant's doctor, etc.

In the plaintiff's suit against various medical providers for their alleged negligence during the delivery of the plaintiff's daughter, because some of the documents requested by the medical providers could be both relevant and non-privileged, the trial court erred by concluding that all of the mental health documents other than the produced billing documents were privileged, and any relevant and non-privileged documents should be produced even if redactions were necessary; however, because the appellate court was unable to complete the review of the documents, the case was remanded to the trial court for an in camera review to separate privileged versus non-privileged information and provide a redacted copy. Brown v. Howard, 334 Ga. App. 182, 778 S.E.2d 810 (2015).

RESEARCH REFERENCES

ALR. — Applicability of attorney-client privilege to communications made in presence of or solely to or by nonattorney consultants, professionals, and similar contractors, 66 A.L.R.6th 83.

Applicability of attorney-client privilege to communications made in presence of or solely to or by family members or companion, confidant, or friend of attorneys or client or attesting witnesses for client's will, 67 A.L.R.6th 341.

Construction and application of self-protection or self-defense exception to attorney-client privilege, 71 A.L.R.6th 249.

24-5-502. Communications to clergyman privileged.

Law reviews. — For annual survey on domestic relations, see 69 Mercer L. Rev. 83 (2017).

For comment, "Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia's Children," see 31 Ga. St. U.L. Rev. 643 (2015).

JUDICIAL DECISIONS

Marriage counseling meeting with pastor privileged. — Trial court did not abuse the court's discretion by excluding a recording made by the wife of a meeting with the wife, husband, and their pastor because the totality of the admitted circumstances surrounding the meeting was that it was a marriage counseling session with the parties' minister and, therefore, was properly excluded as privileged under O.C.G.A. § 24-5-502. Frost v. Frost, 299 Ga. 278, 787 S.E.2d 693 (2016).

Waiver of privilege.

When the defendant was convicted of malice murder, aggravated assault, and possession of a firearm during the commission of a crime in connection with the deaths of his wife and her cousin, because the defendant made no objection to the testimony of the assistant pastor when the assistant pastor's testimony regarding what the defendant had told the assistant pastor was offered, appellate review of the issue regarding the privilege between the defendant and the assistant pastor was waived. Crosdale v. State, 297 Ga. 244, 774 S.E.2d 87 (2015) (decided under former O.C.G.A. § 24-9-22).

24-5-503. Husband and wife as witnesses for and against each other in criminal proceedings.

Law reviews. — For comment, "Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia's Children," see 31 Ga. St. U.L. Rev. 643 (2015).

JUDICIAL DECISIONS

No privilege when case involved a minor. — Any error in advising the defendant's wife that she could invoke the marital privilege, despite the fact that the case involved a minor, was harmless as the wife would have confirmed the defendant's erectile function diagnosis but was in no position to testify as to his ability to achieve sexual arousal and her testimony would not have negated an element of the crime. Underwood v. State, 344 Ga. App. 403, 810 S.E.2d 315 (2018).

If evidence was in conflict as to existence of marriage, etc.

Jailhouse conversations between the defendant and a boyfriend or fiance were properly admitted despite a claim of marital privilege because there was sufficient evidence to support the trial court's implicit finding that no legal marriage existed; it was the defendant's burden to prove a valid marriage, and the defendant failed to do so. Wiggins v. State, 338 Ga. App. 273, 787 S.E.2d 357 (2016).

24-5-505. Party or witness privilege.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Cited in State v. Wakefield, 324 Ga. App. 587, 751 S.E.2d 199 (2013).

24-5-506. Privilege against self-incrimination; testimony of accused in criminal case.

JUDICIAL DECISIONS

ANALYSIS

SELF-INCRIMINATION
1. IN GENERAL
TREATMENT OF DEFENDANT AS WITNESS

Self-Incrimination

1. In General

Defendant's right to testify. — Trial court did not err by allowing the defendant to testify at trial because, although the defendant contended that the defendant was not sufficiently competent to knowingly waive the right to remain silent, the record showed that experts found the defendant competent to stand trial prior to the proceedings; the trial court engaged in a full and extensive colloquy with the defendant about the right to remain silent before the defendant took the stand at trial; and the defendant rejected counsel's strong recommendation that the defendant should not testify; thus, the defendant knowingly waived the right against self-incrimination and exercised the right to testify at trial after being fully informed of the consequences. Owens v. State, 298 Ga. 813, 783 S.E.2d 611 (2016), cert. denied, 137 S. Ct. 143, 196 L. Ed. 2d 110 (U.S. 2016).

Treatment of Defendant as Witness

Counsel's errors in opening door to damaging testimony. — Defendant's convictions were reversed because the defendant showed the required prejudice to prevail on an ineffective assistance claim based on trial counsel's errors of opening the door to damaging testimony that introduced evidence into the record that directly contradicted the defendant's trial testimony and allowed the admission of other evidence that further challenged the defendant's credibility, the combined effect of which was to severely undercut the defense's case. Tran v. State, 340 Ga. App. 546, 798 S.E.2d 71 (2017).

Striking defendant's testimony when defendant refused to be cross examined. — Once the defendant withdrew the defendant's consent to be cross-examined as a witness, the defendant could no longer be treated as a witness at all; thus, the trial court properly struck all of the defendant's direct testimony. McKoy v. State, No. S17A1994, 2018 Ga. LEXIS 175 (Mar. 15, 2018).

Striking of the defendant's testimony for refusing to be cross-examined did not deprive the defendant of the defendant's rights to present a defense and to due process because five other witnesses testified for the defense in support of the defendant's self-defense claim; the procedure the trial court followed before striking the defendant's testimony gave the defendant due process as the court clearly informed the defendant of the consequence if the defendant refused to retake the stand, allowed the defendant to consult with counsel, and then asked the defendant to make an informed decision; and the defendant elected not to retake the stand and thereby suffer the consequence of the defendant's testimony being excluded from the evidence. McKoy v. State, No. S17A1994, 2018 Ga. LEXIS 175 (Mar. 15, 2018).

24-5-507. Grant of immunity; contempt.

JUDICIAL DECISIONS

Analysis

Grant of Immunity

Grant of Immunity

Court cannot grant use immunity at request of defendant. — Trial court did not err in not granting use immunity to the co-indictee as Georgia law does not authorize a trial court to grant use immunity to a witness at the request of a defendant. Brown v. State, 295 Ga. 804, 764 S.E.2d 376 (2014) (decided under former O.C.G.A. § 24-9-28(a)).

24-5-510. (For effective date, see note.) Privileged communications between law enforcement officers and peer counselors.

(a) As used in this Code section, the term:

(1) "Client" means a law enforcement employee or a law enforcement officer's immediate family.

(2) "Immediate family" means the spouse, child, stepchild, parent, or stepparent.

(3) "Peer counselor" means an employee of a law enforcement agency who has received training to provide emotional and moral support to a client and was designated by a sheriff, police chief, or other head of a law enforcement agency to counsel clients.

(b) Except as provided in subsection (c) of this Code section, communications between a client and a peer counselor shall be privileged. A peer counselor shall not disclose any such communications made to him or her and shall not be competent or compellable to testify with reference to any such communications in any court.

(c) The privilege created by subsection (b) of this Code section shall not apply when:

(1) The disclosure is authorized by the client, or if the client is deceased, by his or her executor or administrator, and if an executor or administrator is not appointed, by the client's next of kin;

(2) Compelled by court order;

(3) The peer counselor was an initial responding officer, witness, or party to an act that is the subject of the counseling;

(4) The communication was made when the peer counselor was not performing official duties; or

(5) The client is charged with a crime.

(d) The privilege created by this Code section shall not be grounds to fail to comply with mandatory reporting requirements as set forth in Code Section 19-7-5 or Chapter 5 of Title 30, the "Disabled Adults and Elder Persons Protection Act." (Code 1981, § 24-5-510, enacted by Ga. L. 2014, p. 339, § 1/HB 872; Ga. L. 2018, p. 716, § 1/HB 703.)

Delayed effective date. — Ga. L. 2018, p. 716, § 3/HB 703, not codified by the General Assembly, provides that the 2018 amendment becomes effective only when funds are specifically appropriated for purposes of the Act, in an Appropriations Act. When funds are so appropriated, then the amendment shall become effective on the later of the date on which such appropriations Act becomes effective or the beginning date of the fiscal year for which such appropriations are made. This Code section, as set out above, does not reflect the amendment by that Act owing to the delayed effective date. Funds were not appropriated at the 2018 session of the General Assembly. After the appropriation is made, this Code section will read as follows:

"(a) As used in this Code section, the term:

"(1) 'Client' means a public safety officer.

"(2) 'Peer counselor' means:

"(A) An employee of the Office of Public Safety Officer Support within the Department of Public Safety; or

"(B) An individual who is certified by the support coordinator of the Office of Public Safety Officer Support within the Department of Public Safety pursuant to subsection (b) of Code Section 35-2-163 who is an employee of a public entity that employs public safety officers and who is designated by the executive head of such public entity.

"(3) 'Public entity' shall have the same meaning as provided for in Code Section 35-2-160.

"(4) 'Public safety officer' means a peace officer, correctional officer, emergency health worker, firefighter, highway emergency response operator, jail officer, juvenile correctional officer, probation officer, or emergency services dispatcher.

"(b) Except as provided in subsection (c) of this Code section, communications between a client and a peer counselor shall be privileged. A peer counselor shall not disclose any such communications made to him or her and shall not be competent or compellable to testify with reference to any such communications in any court.

"(c) The privilege created by subsection (b) of this Code section shall not apply when:

"(1) The disclosure is authorized by the client, or if the client is deceased, by his or her executor or administrator, and if an executor or administrator is not appointed, by the client's next of kin;

"(2) Compelled by court order;

"(3) The peer counselor was an initial responding public safety officer, witness, or party to an act that is the subject of the counseling;

"(4) The communication was made when the peer counselor was not performing official duties; or

"(5) The client is charged with a crime.

"(d) The privilege created by this Code section shall not be grounds to fail to comply with mandatory reporting requirements as set forth in Code Section 19-7-5 or Chapter 5 of Title 30, the 'Disabled Adults and Elder Persons Protection Act.'"

Effective date. — This Code section became effective July 1, 2014.

The 2018 amendment substituted "public safety officer" for "law enforcement employee or a law enforcement officer's immediate family" in paragraph (a)(1); deleted former paragraph (a)(2), which read: "'Immediate family' means the spouse, child, stepchild, parent, or stepparent."; redesignated former paragraph (a)(3) as present paragraph (a)(2), and, in paragraph (a)(2), substituted the present provisions for the former provisions, which read: "'Peer counselor' means an employee of a law enforcement agency who has received training to provide emotional and moral support to a client and was designated by a sheriff, police chief, or other head of a law enforcement agency to counsel clients."; added paragraphs (a)(3)

and (a)(4); and inserted "public safety" in the middle of paragraph (c)(3). For effective date of this amendment, see the delayed effective date note.

CHAPTER 6

WITNESSES

ARTICLE 1

GENERAL PROVISIONS

24-6-602. Lack of personal knowledge.

JUDICIAL DECISIONS

Cited in Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 760 S.E.2d 674 (2014).

24-6-604. Interpreters.

RESEARCH REFERENCES

ALR. — Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through interpreter — state cases, 97 A.L.R.6th 567.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter — federal cases, 91 A.L.R. Fed. 2d 187.

24-6-606. Juror as witness.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PRACTICE AND PROCEDURE

General Consideration

Jurors' statements upon reassembling cannot alter plain import of verdict.

Parents' motion for a new trial was properly denied because no testimony was elicited regarding the substance of the definitions found by jurors using cellphones, and no showing has been made that the information obtained was prejudicial, or even that the information differed from the trial court's written instructions which went out with the jury. Armstrong v. Gynecology & Obstetrics of DeKalb, P.C., 327 Ga. App. 737, 761 S.E.2d 133 (2014).

Cited in Ford Motor Co. v. Conley, 294 Ga. 530, 757 S.E.2d 20 (2014).

Practice and Procedure

New trial warranted due to ex parte communication with jury in civil case. — In a medical malpractice case, plaintiffs were entitled to a new trial

Practice and Procedure (Cont'd)

because the communication between the court and the jury was not disclosed to the plaintiffs or the plaintiffs' counsel until after the verdict, the note and response were not made a part of the record, recollections differed as to the nature and timing of the communication, and it was impossible for the appellate court to determine if a defense verdict would have been demanded regardless of the effect of the communication on the jury. Phillips v. Harmon, 328 Ga. App. 686, 760 S.E.2d 235 (2014), aff'd in part and rev'd on other grounds, 297 Ga. 386, 774 S.E.2d 596 (2015), vacated on other grounds, 335 Ga. App. 450, 780 S.E.2d 914 (2015).

24-6-607. Who may impeach.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
EXAMINATION OF OWN WITNESS

General Consideration

Cited in Lupoe v. State, 300 Ga. 233, 794 S.E.2d 67 (2016).

Examination of Own Witness

Use of inconsistent prior statements.

Because the prosecuting attorney laid a proper foundation for a witness's prior inconsistent statement by questioning the witness about the circumstances of the witness's earlier statement to investigators and affording the witness an opportunity to admit, explain, or deny the prior contradictory statement about not seeing a gun during the rough play between the defendant and others prior to the murders, the trial court did not abuse the court's discretion when the court admitted the witness's earlier statement. Edwards v. State, 293 Ga. 612, 748 S.E.2d 870 (2013).

Trial court did not err in admitting extrinsic evidence of the cousin's prior inconsistent statements because the state complied with the prerequisites of O.C.G.A. § 24-6-613(b) as both the prosecutor and defense counsel examined the witness as to each of the prior inconsistent statements and the witness was afforded an opportunity to explain or to deny the prior inconsistent statements, which entitled the prosecutor to ask leading questions. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290 (2014).

24-6-608. Evidence of character and conduct of witness.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PROOF OF BAD CHARACTER

General Consideration

Admission of testimony that does not speak directly to eyewitness's truthfulness. — On redirect, the trial court did not commit plain error by allowing the state to elicit testimony from an investigator, in which the investigator stated that the information that the investigator obtained from an eyewitness during the investigation was more consistent with other evidence collected than the information that the investigator obtained from the defendant, because the investigator's testimony did not speak directly to the eyewitness's truthfulness, but, rather, the testimony was elicited in

direct response to questions raised about the manner in which the investigator conducted the investigation, and involved whether aspects of that investigation lined up with information provided by the eyewitness. Jones v. State, 299 Ga. 40, 785 S.E.2d 886 (2016).

Failure to show ineffective assistance of counsel. — Trial counsel was not ineffective for failing to obtain and introduce evidence of the victim's mother's arrest for perjury, which charges were later dismissed, because the defendant did not call the mother to testify at the new trial hearing so there was no evidence as to what the testimony would have been regarding the arrest, thus, the defendant failed to make an affirmative showing that, had trial counsel attempted to cross-examine the mother regarding the arrest, the testimony would have been allowed. Gilmer v. State, 339 Ga. App. 593, 794 S.E.2d 653 (2016).

Trial court did not err by refusing to allow counsel to ask the victim whether the victim always told the truth or told the truth to figures of authority as those questions were so broadly phrased as to have no other effect than to prove a general character trait for untruthfulness; and the questions did not seek to investigate any specific act probative of untruthfulness; thus, counsel was not ineffective in failing to elicit testimony on that subject. Gonzales v. State, No. A17A1857, 2018 Ga. App. LEXIS 206 (Mar. 16, 2018).

Investigator's testimony did not bolster. — Trial court did not err in admitting testimony by the investigator because even though the state relied heavily on the co-defendant's testimony, the investigator's testimony did not give critical weight to that testimony and there was other evidence linking the defendant to the two burglaries. Silvey v. State, 335 Ga. App. 383, 780 S.E.2d 708 (2015).

Testimony on attempt to bribe witness to change testimony. — Trial court erred in permitting the state to elicit testimony that the co-defendant's father attempted to influence the victim by bribing the victim into changing the victim's account of what took place as a means of rehabilitating the victim's credibility because, assuming without deciding that the so-called brutal cross-examination to which the victim was subjected opened the door to rehabilitation, the testimony at issue was not the type of rehabilitative evidence allowed, which included testimony by a different witness regarding opinion or reputation of the victim's truthfulness. Belcher v. State, 344 Ga. App. 729, No. A17A1982, 2018 Ga. App. LEXIS 126 (2018).

Cited in Lupoe v. State, 300 Ga. 233, 794 S.E.2d 67 (2016).

Proof of Bad Character

Specific acts may not be shown. In a child molestation case, the trial court erred in denying the defendant's motion for new trial because it was an abuse of discretion to allow the prosecution to question the victim's mother listing the defendant's prior arrests for four offenses after the mother had already testified that the mother was aware of the defendant's prior arrests and that the arrests did not change the mother's opinion of the defendant's character; further, the admission of specific instances of conduct was not harmless as the victim's description of the defendant's improper conduct varied over time, and the appellate court could not say that the defendant's prior arrests did not enter into the jury's evaluation of the defendant's testimony and credibility. Gaskin v. State, 334 Ga. App. 758, 780 S.E.2d 426 (2015).

Trial court correctly excluded cross-examination about a detective's involvement with a website, "Uncle Wiggy's Secret Guide to Dealing With the Police;" statements as to the untruthfulness of police in the Guide were not untrue because, within limits, police could lie to or trick a suspect to obtain admissions; further, the Guide was not probative of the detective's own truthfulness or the detective's character for truthfulness as required for cross-examination under O.C.G.A. § 24-6-608(b)(1). Williams v. State, 332 Ga. App. 546, 774 S.E.2d 126 (2015).

Doctor's false note in patient chart. — In a medical malpractice case arising out of a mother's premature delivery of her baby, the trial court did not err in admitting the doctor's note on the moth-

Proof of Bad Character (Cont'd)

er's chart that the doctor had examined her, which was later marked through with a note "patient not seen, out of room," was probative of the doctor's untruthfulness under O.C.G.A. § 24-6-608(b)(1), given that the mother had not left her room that day. The note was not unduly prejudicial under O.C.G.A. § 24-6-403. Cent. Ga. Women's Health Ctr., LLC v. Dean, 342 Ga. App. 127, 800 S.E.2d 594 (2017).

Victim need not be shown to be assailant before victim can be impeached.

In an appeal from the defendant's convictions for aggravated sexual battery and child molestation, the defendant's trial counsel was ineffective for failing to ask the victim's mother the mother's opinion about the victim's truthfulness because trial counsel was mistaken about being unable to question the mother about the victim's untruthfulness as it was admissible, regardless of whether the victim testified about the victim's own truthfulness; and there was a reasonable probability that the outcome would have been different absent trial counsel error as the victim's credibility was a critical point as to all of the counts, and the evidence was not overwhelming. Gonzales v. State, No. A17A1857, 2018 Ga. App. LEXIS 206 (Mar. 16, 2018).

Cross-examination concerning specific facts.

In the defendant's trial for child molestation arising out of viewing a pornographic video with the defendant's four-year-old daughter, the trial court did not err in refusing to allow the defendant to cross-examine the child's mother pursuant to O.C.G.A. § 24-6-608 regarding her own accusations of molestation against her stepfather, who had been acquitted, because the charges were not shown to be false. Further, any error was harmless. Douglas v. State, 340 Ga. App. 168, 796 S.E.2d 893 (2017).

RESEARCH REFERENCES

ALR. — Propriety and prejudicial effect of witness testifying while in prison attire, 1 A.L.R.7th 5.

24-6-609. Impeachment by evidence of conviction of a crime.

JUDICIAL DECISIONS

Federal interpretation of balancing tests.

Trial court erred by permitting the state to impeach the defendant with evidence of a prior conviction from 1985 for impersonating a police officer without conducting the proper balancing tests under O.C.G.A. § 24-9-84.1(b) as the record showed that the trial court failed to make express findings in determining whether the 1985 conviction was admissible. Robinson v. State, No. A14A2206, 2015 Ga. App. LEXIS 208 (Mar. 26, 2015).

In determining whether to admit a prior conviction against a defendant for impeachment purposes, a court should consider: (1) the impeachment value of the crime; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Waye v. State, 326 Ga. App. 202, 756 S.E.2d 287 (2014).

On-the-record finding required.

Trial court erred by failing to make an on-the-record finding of whether the probative value of admitting the defendant's 1991 conviction substantially outweighed its prejudicial effect, and to enter express findings as to whether the probative value of defendant's 1987 conviction substantially outweighed its prejudicial effect. Waye v. State, 326 Ga. App. 202, 756 S.E.2d 287 (2014).

Trial court is required to make a different determination regarding a prior felony

conviction that is older than ten years and evidence of such a conviction is not admissible unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. Waye v. State, 326 Ga. App. 202, 756 S.E.2d 287 (2014).

Trial court must make an on-the-record finding of the specific facts and circumstances upon which the court relies in determining that the probative value of a prior conviction that is more than ten years old substantially outweighs its prejudicial effect before admitting evidence of the conviction for impeachment purposes Waye v. State, 326 Ga. App. 202, 756 S.E.2d 287 (2014).

In considering the admissibility of prior convictions less than ten years old, a trial court must make an on-the-record finding that the probative value of admitting the conviction substantially outweighs its prejudicial effect, but is not required to list the specific factors the court considered in making the court's decision. Waye v. State, 326 Ga. App. 202, 756 S.E.2d 287 (2014).

In an action decided under former O.C.G.A. § 24-9-84.1(a)(2), the trial court erred when the court did not make an on-the-record finding of the specific facts and circumstances on which the court relied in determining that the probative value of the 32-year-old convictions substantially outweighed their prejudicial effect, but only found on the record that despite the fact of their age, the convictions' probative value insofar as impeachment goes outweighed the prejudicial factor to the defendant. Peak v. State, 330 Ga. App. 528, 768 S.E.2d 275 (2015) (decided under former O.C.G.A. § 24-9-84.1(a)(2)).

Conviction did not show fraud and deceit.

Trial court did not abuse the court's discretion in preventing the defendant from cross-examining a witness regarding the fact that the witness was on probation because the witness was on probation for misdemeanor shoplifting and the defendant failed to show that such a conviction involved fraud or deceit. Campbell v. State, 329 Ga. App. 317, 764 S.E.2d 895 (2014).

Trial court must establish that it balanced use of defendant's prior conviction against risk of prejudice.

Defendant's convictions for rape, kidnapping, and armed robbery were vacated because the trial court failed to make express findings in determining whether the defendant's 1985 conviction for impersonating a police officer was admissible for impeachment purposes and the court failed to do so again in the court's order denying the defendant's motion for new trial. Robinson v. State, 332 Ga. App. 240, 771 S.E.2d 751 (2015).

Trial court did not abuse the court's discretion by admitting the defendant's prior burglary and armed robbery convictions, older than 10 years, for impeachment purposes because the trial court specifically addressed each Clay factor, finding that both felony convictions involved stealing of which the impeachment value was high. Peak v. State, 337 Ga. App. 441, 787 S.E.2d 792 (2016), cert. denied, No. S16C1773, 2017 Ga. LEXIS 121 (Ga. 2017).

Prior conviction of witness improperly admitted. — Trial court did not err when the court failed to give the defendant's requested charge on impeachment by a prior conviction because the statutory requirements had not been met, and the witness's 1988 conviction should not have been admitted, so the fact that the defendant was allowed to use the prior conviction evidence at all, inured to the defendant's benefit; the trial court's failure to give the charge requested was harmless error as it was not highly probable that the error contributed to the verdict; the jury was properly instructed on impeachment in general; and, during closing argument, defense counsel was able to use the prior conviction and other evidence to argue to the jury that the witness's testimony was not worthy of belief. Cannon v. State, 302 Ga. 327, 806 S.E.2d 584 (2017).

Because Georgia's new rules of evidence applied and the defendant's prior felony conviction was not more than 10 years old, the trial court was not required to list the specific factors the court considered in ruling that the prior conviction was ad-

missible for the purpose of generally attacking the defendant's credibility; nevertheless, the trial court did list the factors the court considered, including the fact that the defendant's credibility would be a substantial factor in the case, the probative value of the conviction, the nature of the prior crime of burglary as making it less likely to serve as improper propensity evidence of a drug possession offense, and the age of the prior conviction as mitigating an improper propensity inference. Smith v. State, 331 Ga. App. 296, 771 S.E.2d 8 (2015).

Prior acts discharged under first offender status excluded. — Trial court did not abuse the court's discretion in excluding impeachment evidence, prior bad acts by a deputy that were discharged under the first offender status, which were not pertinent to the traffic stop or the deputy's subsequent investigation. Anderson v. State, 338 Ga. App. 171, 789 S.E.2d 363 (2016).

First offender guilty plea not conviction. — There was no error in the trial court's refusal to give an instruction on impeachment by prior conviction since the defendant's first offender guilty plea was not a conviction for purposes of O.C.G.A. § 24-6-609. Manner v. State, 302 Ga. 877, 808 S.E.2d 681 (2017).

Prior conviction properly admitted.

Trial court did not err in admitting the defendant's prior theft-by-receiving convictions because that evidence was admissible, implicating a perpetrator's honesty. Stroud v. State, 301 Ga. 807, 804 S.E.2d 418 (2017).

Investigator's testimony did not bolster. — Trial court did not err in admitting testimony by the investigator because even though the state relied heavily on the co-defendant's testimony, the investigator's testimony did not give critical weight to that testimony and there was other evidence linking the defendant to the two burglaries. Silvey v. State, 335 Ga. App. 383, 780 S.E.2d 708 (2015).

Prior conviction of witness improperly excluded. — Although the victim's conviction for possession of cocaine might have been admissible as the conviction was less than 10 years old and constituted a crime punishable by imprisonment in excess of one year, the trial court erred in merely finding that the probative value of the victim's prior conviction for possession of cocaine was outweighed by the conviction's prejudicial effect and by not requiring the state to show that such prejudice substantially outweighed any probative value; however, the error was harmless because the admission of the victim's prior conviction would have been cumulative of the victim's own damaging testimony. Williams v. State, 328 Ga. App. 876, 763 S.E.2d 261 (2014).

Notice to the state was insufficient.

Trial court did not abuse the court's discretion in finding that a time period that the parties disputed but that was, at most, 11 business hours before the start of trial was insufficient to meet the notice requirement for use of the victim's old conviction for deposit account fraud. Green v. State, 339 Ga. App. 263, 793 S.E.2d 156 (2016).

Effective assistance of counsel.

Counsel was not ineffective in failing to move to exclude the defendant's statement to police because counsel's strategy was to put the defendant's version of the events forward without calling the defendant to the stand where the defendant would have been impeached with several prior felony convictions. Welch v. State, 298 Ga. 320, 781 S.E.2d 768 (2016) (decided under former O.C.G.A. § 24-9-84.1(a)(2)).

Trial counsel was not ineffective for failing to impeach a neighbor with a prior murder conviction because the prior conviction was beyond the 10-year time limit. Williams v. State, 302 Ga. 474, 807 S.E.2d 350 (2017).

Cited in Gilmer v. State, 339 Ga. App. 593, 794 S.E.2d 653 (2016).

RESEARCH REFERENCES

ALR. — Propriety and prejudicial effect of witness testifying while in prison attire, 1 A.L.R.7th 5.

24-6-611. Mode and order of witness interrogation and presentation.

Law reviews. — For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration
Scope of Cross-Examination
1. In General
2. Discretion of Judge
3. Specific Applications
Leading Questions
2. Permitted
Examination of Opposite Party
1. In General

General Consideration

Denial of grandparent's request to appear by telephone. — In a grandparent visitation matter, the trial court did not abuse the court's discretion in connection with the court's denial of the grandmother's request to appear by telephone, pursuant to O.C.G.A. § 19-9-50(b), because the trial court properly determined that the grandmother was not indigent based on the information provided that the grandmother's monthly income was $4,669. Devlin v. Devlin, 339 Ga. App. 520, 791 S.E.2d 840 (2016).

Use of doll for demonstration. — Trial court did not abuse the court's discretion in allowing the medical examiner to use a baby doll to demonstrate how some of the victim's injuries appeared to have been inflicted and the amount of force that would have been required to cause the victim's head and neck injuries. Smith v. State, 299 Ga. 424, 788 S.E.2d 433 (2016).

Cited in Lupoe v. State, 300 Ga. 233, 794 S.E.2d 67 (2016).

Scope of Cross-Examination

1. In General

Redirect examination.

On redirect, the trial court did not commit plain error by allowing the state to elicit testimony from an investigator, in which the investigator stated that the information that the investigator obtained from an eyewitness during the investigation was more consistent with other evidence collected than the information that the investigator obtained from the defendant because the investigator's testimony did not speak directly to the eyewitness's truthfulness, but, rather, the testimony was elicited in direct response to questions raised about the manner in which the investigator conducted the investigation, and involved whether aspects of that investigation lined up with information provided by the eyewitness. Jones v. State, 299 Ga. 40, 785 S.E.2d 886 (2016).

Scope of Cross-Examination (Cont'd)

2. Discretion of Judge

Regulation of scope of cross-examination, etc.

Because the trial court did not abuse the court's discretion in regulating cross-examination by instructing defense counsel to be clear with counsel's question, the defendant's constitutional right of confrontation was not violated. Baker v. State, 293 Ga. 811, 750 S.E.2d 137 (2013) (decided under former O.C.G.A. § 24-9-62).

In a quiet title action, the trial court erred by limiting the cross examination of a defense witness since O.C.G.A. § 24-6-611(b) differed from the federal rule and allowed seeking information on cross-examination despite not being brought out during direct. R. C. Acres, Inc. v. Cambridge Faire Props., LLC, 331 Ga. App. 762, 771 S.E.2d 444 (2015).

3. Specific Applications

Impeachment.

Trial court erred in allowing the state to impeach the defendant with evidence of a prior terroristic threats conviction after the defendant mentioned, in direct examination, that the defendant surrendered to the authorities after visiting the defendant's parole officer as the defendant was on parole for a theft by taking, not terroristic threats, and the trial court failed to make an on-the-record finding that the probative value of admitting the conviction outweighed the prejudicial effect. Williams v. State, 299 Ga. 834, 792 S.E.2d 336 (2016).

Use of videotape.

Trial court did not err by allowing the state to admit demonstrative evidence of video clips showing three types of horizontal gaze nystagmus tests because the officer's testimony made clear that the video clips were not of the defendant, but that in the substantial particulars, the conditions of the video clips and the officer's observations of the defendant were similar as both showed the same kind of nystagmus. Monroe v. State, 340 Ga. App. 373, 797 S.E.2d 245 (2017).

Prior convictions.

Trial court did not err when the court prevented the defendant from interrogating a witness about the specific facts of a prior offense as the witness explained that the witness was on parole for aggravated assault and made effort toward rehabilitation. Upshaw v. State, 300 Ga. 442, 796 S.E.2d 287 (2017) (decided under former O.C.G.A. §§ 24-9-62 and 24-9-64).

Questioning witness on immigration status. — Trial court did not err in disallowing cross-examination of a witness about the witness's immigration status as the notion that the witness was influenced in any way as to testimony by immigration status was speculative, such evidence had little probative value, and the defendant was not prohibited from cross-examining the witness about the witness's bias or partiality toward the prosecution. Lucas v. State, 810 S.E.2d 491, No. S17A1911, 2018 Ga. LEXIS 100 (2018).

Leading Questions

2. Permitted

Treatment of hostile witness.

Trial court did not err in allowing the state to treat one of the state's witnesses, the co-defendant, as a hostile witness, thereby allowing the state to ask leading questions because, although the co-defendant agreed in the plea agreement to testify truthfully about the methamphetamine operation and testify against the defendant, the co-defendant's testimony was not consistent with the proffer the state was given; the co-defendant professed ignorance about any of the items discovered during the search; and the co-defendant's testimony was evasive and unresponsive. Lopez-Vasquez v. State, 331 Ga. App. 570, 771 S.E.2d 218 (2015).

Examination of Opposite Party

1. In General

Impeachment on drug use. — Trial court did not err by prohibiting the defendant from questioning the witness about prior drug use in general as the defendant

was permitted to ask whether the witness was under the influence at the time the witness saw the two men outside the victim's house. Boothe v. State, 293 Ga. 285, 745 S.E.2d 594 (2013) (decided under former O.C.G.A. § 24-9-62).

RESEARCH REFERENCES

ALR. — Construction and application of provision of Rule 611(b) of federal rules of evidence that cross-examination should be limited to subject matter of direct examination, 93 A.L.R. Fed. 2d 243.

24-6-612. Writing used to refresh memory.

JUDICIAL DECISIONS

Analysis

General Consideration
Written Instrument or Memorandum

General Consideration

Cited in Sherod v. State, 334 Ga. App. 314, 779 S.E.2d 94 (2015).

Written Instrument or Memorandum

Memorandum prepared by another. Defendants' motions for mistrial were properly denied because the trial judge — who had the benefit of observing the work-detail guard's demeanor and judging the guard's credibility before ruling upon the motions for mistrial — determined that the guard did not actually use the notes prepared by the prosecutor to refresh the guard's recollection; on direct examination, the guard testified that the guard was not actually using the notes; and the guard's recollection was only refreshed after the guard was permitted to review the incident report that the guard created in the immediate wake of the day in question, after review of which the guard provided more detailed and substantial answers to the state's questions. Jones v. State, 340 Ga. App. 142, 796 S.E.2d 765 (2017).

24-6-613. Prior statements of witnesses.

JUDICIAL DECISIONS

Analysis

General Consideration
Admissibility of Statement
1. In General
2. What Statements Admissible
Foundation
Sustaining Witness

General Consideration

When prior inconsistent statement becomes admissible. Upon review of a witness's testimony and prior statement, trial counsel was not ineffective in failing to object to the detective's testimony about the witness's statement as hearsay because the trial court likely would have exercised the court's discretion to admit the evidence as a prior inconsistent statement as the defendant admitted that the witness's statement to the detective was a little bit contradictory to what the witness testified to. Faust v. State, 302 Ga. 211, 805 S.E.2d 826 (2017).

Attempt to bribe victim to change

General Consideration (Cont'd)

testimony. — Trial court erred in permitting the state to elicit testimony that the co-defendant's father attempted to influence the victim by bribing the victim into changing the victim's account of what took place as a means of rehabilitating the victim's credibility because, even assuming that the victim was cross-examined with charges of recent fabrication or improper influence, the victim was not rehabilitated with a prior consistent statement; and the testimony regarding the attempted bribery was not used in any way to explain the prior inconsistent statements to law enforcement about which the victim was cross examined. Belcher v. State, 344 Ga. App. 729, No. A17A1982, 2018 Ga. App. LEXIS 126 (2018).

Cited in Ryans v. State, 293 Ga. 238, 744 S.E.2d 759 (2013); Latta v. State, 341 Ga. App. 696, 802 S.E.2d 264 (2017).

Admissibility of Statement

1. In General

Pre-trial statements.

Because the prosecuting attorney laid a proper foundation for a witness's prior inconsistent statement by questioning the witness about the circumstances of the witness's earlier statement to investigators and affording the witness an opportunity to admit, explain, or deny the prior contradictory statement about not seeing a gun during the rough play between the defendant and others prior to the murders, the trial court did not abuse the court's discretion when the court admitted the witness's earlier statement. Edwards v. State, 293 Ga. 612, 748 S.E.2d 870 (2013).

Denial of prior statement.

Even if a witness's out-of-court statement to a detective was hearsay under former O.C.G.A. § 24-3-1(a), it was admissible as a prior inconsistent statement under former O.C.G.A. § 24-9-83 because the witness testified the witness did not remember meeting with the detective and the witness did not tell the detective that the witness's previous statement was incomplete. Welch v. State, 298 Ga. 320, 781 S.E.2d 768 (2016).

Admissible as substantive evidence.

Trial court did not abuse the court's discretion by admitting statements that the victim allegedly made to the victim's niece, who discovered the victim on the morning after the beating, as exceptions to the rule against hearsay as present sense impressions, excited utterances, and to impeach the niece's trial testimony as, under the totality of the circumstances, the victim was still suffering under the stress of the all-night beating such that the victim's statements were admissible. Robbins v. State, 300 Ga. 387, 793 S.E.2d 62 (2016).

2. What Statements Admissible

Prior inconsistent statement.

Trial court did not err in admitting extrinsic evidence of the cousin's prior inconsistent statements because the state complied with the prerequisites of O.C.G.A. § 24-6-613(b) as both the prosecutor and defense counsel examined the witness as to each of the prior inconsistent statements and the witness was afforded an opportunity to explain or to deny the prior inconsistent statements, which entitled the prosecutor to ask leading questions. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290 (2014).

Trial court properly allowed — over the defendant's hearsay objection — an investigating officer to testify about the content of the statement of the defendant's sister because, at trial, the sister testified that, although the sister remembered placing the 911 call and giving a statement to investigators, the sister could not recall the details of the shooting itself or the content of the sister's statement; and, even if there were some error in the admission of that testimony, it was — as the defendant conceded — cumulative of other evidence (including a recording of the 911 call), and any such error was harmless. Murdock v. State, 299 Ga. 177, 787 S.E.2d 184 (2016).

Allegation of inconsistent statements by witness. — Trial court did not err in admitting a witness's prior consistent statements because the defendant

attacked the witness's veracity by suggesting there were inconsistencies between the witness's trial testimony and the witness's written statement, and that the witness fabricated the witness's testimony after giving the written statement; furthermore, because the thrust of the defendant's cross-examination was a charge that the witness fabricated a different version of events after giving the witness's written statement, the trial court did not err in admitting the witness's videotaped interview with the police. Dorsey v. State, No. S18A0121, 2018 Ga. LEXIS 293 (May 7, 2018).

Prior consistent statement of co-defendant. — Defendant's trial counsel was not ineffective as counsel did not perform deficiently by failing to object on the grounds of hearsay and improper bolstering when two witnesses testified that the co-defendant told them within days of the shooting that the defendant shot the victim because the co-defendant's statements to the co-defendant's sister and to the mother of the co-defendant's two children were prior consistent statements, not hearsay, and were admissible to rehabilitate, rather than improperly bolster, the co-defendant's credibility. Brown v. State, 302 Ga. 454, 807 S.E.2d 369 (2017).

Admission of letter as prior inconsistent statement. — Trial counsel was not ineffective for failing to object to a letter signed by the victim and the victim's mother admitted into evidence stating they were hurt by someone they love, but chose to forgive and not feel resentment because the letter was admissible as a prior inconsistent statement, thus, counsel was not ineffective for failing to object to the letter's admission. Bradley v. State, 342 Ga. App. 486, 804 S.E.2d 144 (2017).

Prior consistent statement of victim.

Because the defendant attacked the victim's credibility by suggesting that the victim had misidentified the defendant's weapon during a 911 call and that the victim's account of the events was not believable due to the victim's heightened emotional state, the victim's prior statement to an officer that the assailant had wielded a knife logically rebutted the defendant's suggestion that the victim had misidentified the weapon, and the victim's prior statement that the victim did not scream and flee until the defendant pulled the knife logically rebutted the defendant's claim that the victim was so upset when the defendant initially approached the victim that the victim misconstrued the defendant's intentions. Walters v. State, 335 Ga. App. 12, 780 S.E.2d 720 (2015).

Although the defendant objected to the testimony of two of the four outcry witnesses, because the defendant's trial counsel challenged the veracity of the victim's trial testimony and questioned the victim about a meeting between the victim and the district attorney that had taken place shortly before trial, implying that the meeting might have shaped the victim's testimony, the trial court did not err in holding that that line of questioning raised the issue of recent fabrication, thereby permitting the admission of evidence of the victim's earlier statements that were consistent with the victim's testimony at trial. Jones v. State, 340 Ga. App. 568, 798 S.E.2d 87 (2017).

In the defendant's trial for rape of a mentally disabled relative under O.C.G.A. § 16-6-1(a)(1), given the defendant's cross-examinations suggesting that relatives and state officials had influenced the victim's trial testimony after an interview of the victim occurred, the trial court appropriately admitted the prior consistent statement to rebut the implied charge of recent undue influence under O.C.G.A. § 24-6-613(c). Ray v. State, No. A18A0333, 2018 Ga. App. LEXIS 168 (Mar. 7, 2018).

Witness's recorded statement to a detective was admissible as a prior consistent statement because the witness, who was an inmate in the jail, was present at trial and was cross-examined, during which defense counsel endeavored to show that the witness had a motive to fabricate — as the witness was facing serious criminal charges — that arose subsequent to the time the witness made a statement to the detective. Franklin v. State, 298 Ga. 636, 784 S.E.2d 359 (2016).

Prior consistent statement of accomplice admissible. — Because an accomplice testified at the defendant's trial

Admissibility of Statement (Cont'd)
2. What Statements Admissible (Cont'd)

and the accomplice's testimony was consistent with a witness's testimony that the accomplice told the witness the defendant shot the victim, the admission of the testimony of a prior consistent statement was not error. Mosley v. State, 298 Ga. 849, 785 S.E.2d 297 (2016).

Investigator's testimony did not bolster. — Trial court did not err in admitting testimony by the investigator because even though the state relied heavily on the co-defendant's testimony, the investigator's testimony did not give critical weight to that testimony and there was other evidence linking the defendant to the two burglaries. Silvey v. State, 335 Ga. App. 383, 780 S.E.2d 708 (2015).

Foundation

Witness given opportunity to admit, explain, or deny.

Trial court properly allowed the state to question a detective about one victim's initial statement identifying the defendant and co-defendant as assailants, and to admit a recording of that statement into evidence because a proper foundation was laid as through the testimony, the witness demonstrated that the state sufficiently called to the witness' mind the time, place, person, and circumstances of the statement such that the witness could explain or deny the statement. Williams v. State, 335 Ga. App. 841, 783 S.E.2d 362 (2016).

Sustaining Witness

Prior inconsistent statement admitted and counsel not ineffective for failing to object. — Appellant's claim of ineffective assistance of counsel due to trial counsel's failure to make an objection failed because the witness testimony challenged was properly admitted as a prior inconsistent statement under O.C.G.A. § 24-6-613(b); thus, the failure to make a meritless objection did not provide a basis upon which to find ineffective assistance of counsel. Burney v. State, 299 Ga. 813, 792 S.E.2d 354 (2016).

24-6-615. Exclusion of witnesses.

Law reviews. — For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
RIGHT OF SEQUESTRATION
EXCEPTIONS TO SEQUESTRATION RULE

General Consideration

Witness sequestration rule violated in driving under the influence case. — Trial court erred in denying the defendant's request to invoke the rule of sequestration and, thus, the defendant was granted a new trial with regard to the defendant's driving under the influence conviction because the trial court did not use the court's discretion to decide that a witness could remain to assist the state or to allow testimony despite an infraction of the rule; the court simply held, incorrectly, that the rule of sequestration did not apply until the first witness was called for trial. Smith v. State, 324 Ga. App. 100, 749 S.E.2d 395 (2013).

Cited in Scott v. State, 332 Ga. App. 559, 774 S.E.2d 137 (2015).

Right of Sequestration

When the rule of sequestration was never invoked, etc.

Trial counsel was not deficient in failing to properly invoke sequestration because the trial court did not abuse the court's

discretion in allowing the state's expert to testify in rebuttal based in part on their review of the recorded testimony of the appellant's expert; accordingly, even if the appellant's counsel had invoked the rule of sequestration earlier in the trial, the court would not have abused the court's discretion in excepting the state's expert from the rule. Davis v. State, 299 Ga. 180, 787 S.E.2d 221 (2016).

Exceptions to Sequestration Rule

Investigating officer.
Trial court's decision to allow the primary investigator to sit at the prosecution table during trial did not violate the rule of sequestration as the prosecutor explained that the investigator was needed to assist in the orderly presentation of the case. Moore v. State, 297 Ga. 773, 778 S.E.2d 210 (2015).

24-6-616. Presence in courtroom of victim of criminal offense.

JUDICIAL DECISIONS

Cited in Davis v. State, 299 Ga. 180, 787 S.E.2d 221 (2016).

ARTICLE 2

CREDIBILITY

24-6-620. Credibility a jury question.

JUDICIAL DECISIONS

Analysis

General Consideration
Civil Cases
Criminal Cases

General Consideration

Cited in Marlow v. State, 337 Ga. App. 1, 785 S.E.2d 583 (2016).

Civil Cases

Expert witness.
In a child molestation case, the state's expert's testimony that the children the expert saw in therapy were kids who had made "some sort of disclosure" of sexual abuse that the police found credible was not improper bolstering of the victim's testimony because the testimony was not a clear comment on the victim's credibility. Wiggins v. State, 338 Ga. App. 273, 787 S.E.2d 357 (2016).

Criminal Cases

Alleged improper comment on credibility of another witness. — In a criminal case, no harm and no reversible error occurred when the trial court allowed a witness to testify in a way that, appellant contended, amounted to an improper comment upon the credibility of another witness because the testimony was favorable to the appellant. Scudder v. State, 298 Ga. 438, 782 S.E.2d 638 (2016).

Failure to show ineffective assistance of counsel. — Despite the testimony of two witnesses improperly bolstering the testimony of the sex abuse victim, the defendant failed to show ineffective

Criminal Cases (Cont'd)

assistance of counsel as review of the record revealed that a reasonable lawyer might have decided not to object as sound trial strategy as one witness was an expert that may have hurt the defense if contradicted and the other was an emotional witness who cried and had no personal observations of anything testified to upon examination. Gilmer v. State, 339 Ga. App. 593, 794 S.E.2d 653 (2016).

Trial counsel did not perform deficiently by failing to object to a statement made during the detective's testimony, which the defendant claimed improperly bolstered the co-defendant's testimony, because the detective did not say that the co-defendant told the detective the ultimate truth; instead, the detective was explaining that, in general, when interviewing suspects, the suspects often make inconsistent statements and it often takes considerable time to get the suspects to provide the complete story; and counsel could reasonably have believed that an objection to that part of the detective's testimony would fail, and counsel thus was not ineffective in not making such an objection. Brown v. State, 302 Ga. 454, 807 S.E.2d 369 (2017).

Trial counsel was not ineffective because, in cross-examining the detective, trial counsel pursued a line of questioning designed to show the jury that the police did not conduct a thorough investigation of the murder and instead simply took the co-defendant's version of events at face value; and defense counsel then returned to that point in closing argument; thus, counsel reasonably could have chosen not to object to the detective's statements regarding the detective's personal belief in the co-defendant's account because that testimony supported the defense theory that the state cut short its investigation based on blind faith in the co-defendant, whose credibility trial counsel had already thoroughly attacked on cross-examination. Brown v. State, 302 Ga. 454, 807 S.E.2d 369 (2017).

24-6-621. Impeachment by contradiction.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Evidence of prior incident of sex with a minor. — In the defendant's child molestation trial, pursuant to O.C.G.A. § 24-6-621, the trial court properly allowed a rebuttal witness to testify that the defendant had sex with her when she was 14, because the defendant opened the door by testifying that the defendant's prior guilty plea to molestation was an isolated incident and that no other incidents had occurred. Harris v. State, 333 Ga. App. 118, 775 S.E.2d 602 (2015).

Evidence found admissible.

Trial court abused the court's discretion in excluding printouts from a medical device like the one used on the patient, which showed that the device had been used on other patients despite the doctor's prior claim to the contrary, to impeach the doctor as the court's ruling authorized the exclusion of relevant impeaching evidence and allowed the credibility of a crucial witness to go unchallenged. Hand v. S. Ga. Urology Ctr., P.C., 332 Ga. App. 148, 769 S.E.2d 814 (2015), cert. denied, No. S15C1304, 2015 Ga. LEXIS 594 (Ga. 2015), overruled in part by Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596 (2015).

State was allowed to disprove the fact the defendant testified to, that the defendant had not been in a situation like this before, by impeaching the defendant with a prior charge for aggravated assault, even though that charge resulted in a conviction on a lesser offense. Parker v. State, 339 Ga. App. 285, 793 S.E.2d 173 (2016).

Trial court did not err when the court allowed the state to cross-examine the

defendant about an altercation with the defendant's girlfriend because evidence about the nature of the altercation was admissible for purposes of impeachment inasmuch as the defendant testified dishonestly about the reasons why the defendant had been ejected from the girlfriend's car. Taylor v. State, 302 Ga. 176, 805 S.E.2d 851 (2017).

Counsel's errors in opening door to damaging testimony. — Defendant's convictions were reversed because the defendant showed the required prejudice to prevail on an ineffective assistance claim based on trial counsel's errors of opening the door to damaging testimony that introduced evidence into the record that directly contradicted the defendant's trial testimony and allowed the admission of other evidence that further challenged the defendant's credibility, the combined effect of which was to severely undercut the defense's case. Tran v. State, 340 Ga. App. 546, 798 S.E.2d 71 (2017).

24-6-622. Witness's feelings and relationship to parties provable.

JUDICIAL DECISIONS

Analysis

General Consideration
Feelings
Relationships

General Consideration

Criminal record.

In a claim by the first defendant, the trial court did not improperly limit the second defendant's ability to cross-examine one of the state's witnesses about an alleged prior arrest for prostitution because the right to inquire into partiality and bias was not without limits; neither the first defendant nor the co-defendants presented any evidence to show that the witness at issue had any bias in favor of the state based on an alleged prostitution charge; and, while the second defendant asserted at trial that a prostitution charge had been dismissed shortly before trial, there was nothing in the record supporting that claim. Anthony v. State, No. S17A1724, 2018 Ga. LEXIS 184 (Mar. 5, 2018).

Cited in Lupoe v. State, 300 Ga. 233, 794 S.E.2d 67 (2016).

Feelings

Bias and prejudice.

Trial counsel was not ineffective for failing to insist that the victim's entire diary go out with the jury in order to show the victim's animosity toward the defendant, the victim's father, as the diary showed only that the victim had negative feelings toward the victim's mother, not the defendant. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

Trial court did not err in allowing the state to impeach the defendant's girlfriend using the girlfriend's first-offender plea because the state did not use the girlfriend's guilty plea to impeach the girlfriend's general credibility, but instead used the plea to show bias through evidence that the defendant had previously attempted to accept responsibility for the girlfriend's criminal conduct in a different matter, and the trial court acted well within the court's discretion in allowing the state to explore whether the defendant's previous attempt to accept responsibility for the girlfriend's criminal conduct might have influenced the girlfriend's trial testimony. Hall v. State, 335 Ga. App. 895, 783 S.E.2d 400 (2016) (decided under former O.C.G.A. § 24-9-68).

Child molestation victim's feelings regarding parents. — In a child molestation case, trial counsel was not ineffective in failing to insist that the victim's entire diary go out with the jury because the evidence of the feelings of the victim, the defendant's daughter, toward the vic-

Feelings (Cont'd)

tim's parents showed that the victim had animosity toward the mother, rather than the defendant; and the diary entries which referenced the allegations that the defendant had fathered a child out of wedlock and failed to satisfy the financial obligations regarding the defendant's children would likely have undermined the defendant's good character defense. Goggins v. State, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

Relationships

Employer and employee.

In a vehicle collision that resulted in the death of the plaintiffs' four-year-old child, the trial court did not err in admitting evidence of the chief executive officer's compensation from the defendant because the chief executive officer was not a party, so the rule that the financial circumstances of a party were generally inadmissible did not apply; a jury could find that the chief executive officer's compensation package made the existence of bias in favor of the defendant more probable; and any concerns regarding prejudice had to yield to the statutory mandate that the state of a witness's feelings towards the parties and the witness's relationship to them could always be proved for the consideration of the jury. Chrysler Group, LLC v. Walden, 339 Ga. App. 733, 792 S.E.2d 754 (2016), aff'd, No. S17G0832, 2018 Ga. LEXIS 154 (Ga. 2018).

In a products liability case, the prejudicial effect of admitting evidence of a car manufacturer's CEO's compensation did not so dramatically outweigh its probative value that it required reversal of the jury verdict; the actions of the CEO in allegedly interfering with a government recall of the vehicle made the CEO's credibility and bias relevant. Chrysler Group LLC v. Walden, No. S17G0832, 2018 Ga. LEXIS 154 (Mar. 15, 2018).

CHAPTER 7

OPINIONS AND EXPERT TESTIMONY

24-7-701. Lay witness opinion testimony.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
OPINION TESTIMONY ADMISSIBLE
2. SPECIFIC EXAMPLES
MARKET VALUE EVIDENCE
1. DETERMINATION OF MARKET VALUE
2. APPLICATION IN SPECIFIC CASES

General Consideration

Statement not an opinion.

Investigator's testimony that early in the interrogation the defendant was playing games and did not want to give the police the full truth was admissible as the challenged evidence was not inadmissible opinion evidence under former O.C.G.A. § 24-9-65, but was relevant as to why the interview lasted several hours in response to a defense implication that the defendant was subjected to an overly burdensome interrogation. Jordan v. State, 293 Ga. 619, 748 S.E.2d 876 (2013) (decided under former O.C.G.A. § 24-9-65).

Cited in State v. Cooper, 324 Ga. App. 32, 749 S.E.2d 35 (2013); Sure, Inc. v. Premier Petroleum, Inc., 343 Ga. App.

219, 807 S.E.2d 19 (2017).

Opinion Testimony Admissible

2. Specific Examples

Identity.

In a malice murder case, the trial court did not err in denying the defendant's motion in limine to exclude testimony by lay witnesses identifying the defendant as one of the perpetrators in the video surveillance from the motel parking lot and photographs because the video recording was of such poor quality that the average juror would not be able to distinguish the faces by themselves; the witnesses, who had known the defendant prior to the crime, were in a better position to correctly identify the defendant in the video than the jurors; and the identification testimony of the defendant's ex-girlfriend was required to identify the defendant in the video as the defendant's appearance had changed since the time of the crime. Glenn v. State, 302 Ga. 276, 806 S.E.2d 564 (2017).

Intoxication.

When the plaintiff sued the defendant for expenses and damages that the plaintiff and the plaintiff's daughter incurred as a result of an accident, the trial court did not abuse the court's discretion in allowing a witness's opinion testimony because the witness's opinion that the defendant was impaired was helpful to understand the witness's testimony that the witness recommended to the responding officer that the officer perform a toxicology screen on the defendant; and because the witness's opinion was based on the witness's personal observations that the defendant was driving erratically prior to the accident. Dagne v. Schroeder, 336 Ga. App. 36, 783 S.E.2d 426 (2016).

Value of trust assets. — Probate court did not err in allowing a co-executor's husband to testify to an opinion about the value of real property contributed to the trust investments at issue because one need not be an expert or dealer in the article in question to testify to its value if an opportunity for forming a correct opinion has been had, and the husband had testified that to the familiarity with the properties at issue and with comparable properties, which were considered in reaching the opinion. In re Estate of Hubert, 325 Ga. App. 276, 750 S.E.2d 511 (2013).

Market Value Evidence

1. Determination of Market Value

Manager's authority and breach of responsibility created issues of fact. — Trial court did not err in denying a manager's motion for summary judgment as to the joint venturers' counterclaims for breach of contract and breach of the duty of good faith and fair dealing regarding its management of certain real estate because genuine issues of material fact existed as to whether the manager failed to meet the manager's contractual obligations to manage and control the business including acquiring, holding, maintaining, leasing, exchanging, and disposing of the properties owned. Maree v. ROMAR Joint Venture, 329 Ga. App. 282, 763 S.E.2d 899 (2014).

2. Application in Specific Cases

Value of dog.

Damages recoverable by the owners of a pet dog negligently killed by a kennel included both the dog's fair market value at the time of the loss plus interest and, in addition, any medical and other expenses reasonably incurred in treating the dog; application of an actual value to the owner standard was not the appropriate measure. Barking Hound Vill., LLC v. Monyak, 299 Ga. 144, 787 S.E.2d 191 (2016).

24-7-702. Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of federal law.

Law reviews. — For article, "Symposium on Evidence Reform: The Curious Case of Differing Literary Emphases: The Contrast Between the Use of Scientific

Publications at Pretrial Daubert Hearings and at Trial," see 47 Ga. L. Rev. 837 (2013). For annual survey on product liability, see 65 Mercer L. Rev. 221 (2013). For annual survey on torts law, see 66 Mercer L. Rev. 189 (2014). For annual survey on trial practice and procedure, see 66 Mercer L. Rev. 211 (2014). For article, "Fisher v. Gala: O.C.G.A. § 9-11-9.1(e) Keeping Malpractice Claims Afloat," see 66 Mercer L. Rev. 817 (2015). For annual survey of tort law, see 68 Mercer L. Rev. 279 (2016). For annual survey on product liability, see 69 Mercer L. Rev. 231 (2017).

JUDICIAL DECISIONS

Constitutionality.

O.C.G.A. § 24-7-702(c)(2)(A), governing expert qualifications in medical malpractice cases, was not unconstitutionally vague, did not violate equal protection or separation of powers, did not make irrevocable grants of special privileges and immunities, and was not a special law; however, the trial court erred in rejecting an expert simply because the expert had not performed the specific procedure at issue. The proper consideration was the expert's level of knowledge. Zarate-Martinez v. Echemendia, 299 Ga. 301, 788 S.E.2d 405 (2016).

Interpretation of paragraph (c)(2). — Georgia Supreme Court views the requirements of O.C.G.A. § 24-7-702 subparagraphs (c)(2)(A) and (c)(2)(B) as together being conjunctive with subparagraphs (c)(2)(C) and (c)(2)(D) and, thus, holds that, to be qualified to testify as an expert, the proffered witness must be a member of the same profession as the defendant whose conduct is at issue, or be a physician satisfying the supervision requirements of subparagraph (c)(2)(D). Hankla v. Postell, 293 Ga. 692, 749 S.E.2d 726 (2013).

Requirements of O.C.G.A. § 24-7-702(c) do not apply to causation testimony. Callaway v. O'Connell, 44 F. Supp. 3d 1316 (M.D. Ga. Aug. 29, 2014).

Expert's testimony on legal causation in mesothelioma case was improperly allowed. — After the independent contractor was diagnosed with mesothelioma, and the plaintiffs sued a textile manufacturer claiming that the manufacturer negligently exposed the contractor to asbestos and caused the contractor's mesothelioma, the plaintiffs' expert witness testimony was improperly admitted because the expert's testimony improperly told the jury that it was unnecessary to resolve the extent of asbestos exposure at the manufacturer's facility and that any asbestos exposure was a contributing cause of the mesothelioma as the plaintiffs had to show that exposure to asbestos at the facility made a meaningful contribution to the contractor's mesothelioma, and a de minimis contribution was not sufficient to establish legal causation. Scapa Dryer Fabrics, Inc. v. Knight, 299 Ga. 286, 788 S.E.2d 421 (2016) (decided under former O.C.G.A. § 24-9-67.1(b)).

Applicability to torts other than malpractice claim. — In a suit for simple negligence, negligence per se, wrongful death, intentional infliction of emotional distress, breach of contract, and negligent supervision and training, summary judgment was improperly granted to the defendants because the plaintiffs were not required to establish that the plaintiffs' expert met the requirements of O.C.G.A. § 24-7-702(c)(2)(D) as the plaintiffs' suit was not a medical malpractice action as the facility where the plaintiffs' son collapsed was a day facility that provided education, life skills, job assistance, and rehabilitation services to people with mental and physical disabilities, and the individual defendants listed in the case were non-medical personnel and personal care givers. Blake v. KES, Inc., 336 Ga. App. 43, 783 S.E.2d 432 (2016).

No error in excluding expert testimony.

Trial court did not err in the court's determinations that plaintiffs' expert was not qualified to serve as an expert in the case and that the expert's opinions were not sufficiently reliable on the question of whether a gas company was negligent because the expert failed to cite any treatise or authority supporting the belief

that, under readily ascertainable and verifiable standards recognized in the field, the gas company's actions in connection with the explosion fell below the standard of care. Anderson v. Atlanta Gas Light Co., 324 Ga. App. 801, 751 S.E.2d 589 (2013).

Trial court did not err in striking the plaintiffs' expert and granting summary judgment to the manufacturer of the car hauler because, although the expert opined that the car hauler from which the driver fell was defective and unreasonably dangerous, the expert admitted at a deposition that the expert never inspected or even saw the car hauler in the plaintiffs' case; had not been on the upper deck of any vehicle transport trailer; did not offer an opinion regarding the actual cause of the driver's fall; and had never inspected any fall protection designs or systems for similar car haulers, was unaware of their components or composition, and had never completed any scientific testing to support the expert's theories. Moore v. Cottrell, Inc., 334 Ga. App. 791, 780 S.E.2d 442 (2015), cert. denied, No. S16C0509, 2016 Ga. LEXIS 219 (Ga. 2016).

In a vehicle collision that resulted in the death of the plaintiffs' four-year-old child, the trial court did not err in excluding the testimony and statistical analyses of the defendant's two experts regarding the overall safety of the challenged design to the overall safety of available alternative designs because the evidence was irrelevant as it concerned the overall safety of various vehicles, but the plaintiffs' claims related only to the safety of the fuel system design in rear impacts; the prejudice and confusion from the proposed testimony outweighed the testimony's probative value; and neither expert satisfied the requirements for the admission of expert testimony. Chrysler Group, LLC v. Walden, 339 Ga. App. 733, 792 S.E.2d 754 (2016), aff'd, No. S17G0832, 2018 Ga. LEXIS 154 (Ga. 2018).

Trial court did not abuse the court's discretion by excluding evidence of one appellant's intent as to the reconveyance of certain funds because no abuse of discretion occurred by excluding evidence of a cumulative nature that could have confused the jury about the primary issue under consideration and created a re-trial. Interfinancial Midtown, Inc. v. Choate Constr. Co., 343 Ga. App. 793, 806 S.E.2d 255 (2017).

Standard for admissibility of expert testimony was governed by former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. § 24-7-702), which provided if scientific, technical, or other specialized knowledge would assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify thereto in the form of an opinion or otherwise, if: (1) the testimony was based upon sufficient facts or data which were or will be admitted into evidence at the hearing or trial; (2) the testimony was the product of reliable principles and methods; and (3) the witness had applied the principles and methods reliably to the facts of the case. Levine v. SunTrust Robinson Humphrey, 321 Ga. App. 268, 740 S.E.2d 672 (2013) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as an expert not satisfied.

Plaintiff's witness was not qualified to testify as an expert in a medical malpractice claim based on injuries and the death of an elderly patient because the witness was completely lacking in recent experience working with the type of patient at issue in the case since the witness never worked in a mental health unit or at any type of extended-stay facility housing elderly patients, and over the prior nine years, the witness had worked in neonatal or pediatric facilities, except for one year when the witness was working in intensive care units. Sanders v. United States, No. 109-164, 2011 U.S. Dist. LEXIS 155970 (S.D. Ga. Aug. 26, 2011).

After the pre-trial detainee died in an isolation cell, and the plaintiffs filed a civil action alleging that the medical defendants committed malpractice, because the trial court did not abuse the court's discretion in finding that the affidavit of the plaintiffs' expert witness was insufficient to satisfy the statutory qualifications for an expert witness, the plaintiffs failed to meet the threshold requirement of filing an affidavit of an expert competent to testify and their medical malpractice

claims failed as a matter of law; thus, the trial court properly granted summary judgment in favor of the medical defendants. McKuhen v. TransformHealthRX, Inc., 338 Ga. App. 354, 790 S.E.2d 122 (2016).

Plaintiffs' expert witness was not sufficiently qualified to render an expert opinion in support of their medical malpractice claims because, in contradiction to the expert's affidavits, the expert admitted in the expert's deposition that during the five years prior to the pre-trial detainee's death, the expert did not teach anyone how to monitor or treat inmates going through alcohol withdrawal; that, in Massachusetts, the expert did not provide daily or even regular patient care, and the expert could not estimate the amount of time the expert spent actually caring for patients; and that, in Nevada, the expert admitted the expert did not directly supervise any nurse in a correctional healthcare setting. McKuhen v. TransformHealthRX, Inc., 338 Ga. App. 354, 790 S.E.2d 122 (2016).

Same profession requirement applies to medical experts. — Georgia Supreme Court construes the same profession requirement to apply to all proffered medical experts, even those experienced in the procedure at issue through active practice. Hankla v. Postell, 293 Ga. 692, 749 S.E.2d 726 (2013).

Appellate court properly held that a trial court abused the court's discretion by allowing an obstetrician/gynecologist to testify as an expert witness regarding a nurse midwife's treatment rendered to a patient because the obstetrician/gynecologist was neither a member of the same profession as the midwife nor supervised midwives as required under O.C.G.A. § 24-7-702. Hankla v. Postell, 293 Ga. 692, 749 S.E.2d 726 (2013).

Qualification requirements under O.C.G.A. § 24-7-702 do not apply to a defendant physician. Chadwick v. Brazell, 331 Ga. App. 373, 771 S.E.2d 75 (2015).

Certified nurse midwife qualified to testify about standard of care for nurses. — In a medical malpractice case dealing with a child's permanent disabilities, the hospital's motion for a new trial was improperly granted on the ground that a certified nurse midwife (CNM) could not testify as to the standard of care exercised by the registered professional nurses (RN) because the CNM was a member of the same profession as the hospital's RNs because the Georgia Registered Professional Nurse Practice Act, O.C.G.A. § 43-26-1 et seq., required a CNM to be licensed as a RN, and both RNs and CNMs were regulated by the Georgia Board of Nursing; a review of the regulatory scheme revealed that a CNM was a RN who had advanced training in a specialized area; and the expert affidavit statute listed only nurses, and the statute did not have a separate listing for CNMs. Dempsey v. Gwinnett Hosp. Sys., 330 Ga. App. 469, 765 S.E.2d 525 (2014).

Expert's allegations of standard of care pertained to conduct beyond the scope of nursing care and was excluded. — In a medical malpractice case against a hospital and emergency room doctor and nurses, expert testimony against the nurses was properly excluded under O.C.G.A. § 24-7-702 because the deviations from the standard of care alleged pertained to conduct that was beyond the scope of nursing care allowed by Georgia law under O.C.G.A. § 43-26-3(8) (defining the practice of nursing). Everson v. Phoebe Sumter Med. Ctr., Inc., 341 Ga. App. 182, 798 S.E.2d 667 (2017).

Real estate appraiser qualified to testify. — In an action involving a permanent nuisance caused by noises from a power plant that used gas-fired combustion turbine units, a certified real estate appraiser with 22 years of experience in the area, described at length the methodology the appraiser used to arrive at a reduction in value for the property at issue as a result of the nuisance and the appraiser's reasons for employing that method, was properly allowed to testify under O.C.G.A. § 24-7-702. Oglethorpe Power Corp. v. Estate of Forrister, 332 Ga. App. 693, 774 S.E.2d 755 (2015).

Licensed contractor could opine what would be revealed by home inspection. — In a tenant's claim for injuries against the tenant's landlord after a staircase collapsed, the trial court erred in disregarding the tenant's expert's opinion

that a pre-purchase structural inspection would have led the landlord to discover the defects; although the expert was not a home inspector, the expert was a licensed residential and commercial contractor. Pajaro v. S. Ga. Bank, 339 Ga. App. 334, 793 S.E.2d 209 (2016).

Healthcare expert not qualified.

Estate administrator's federal Tort Claims Act medical malpractice claims against employees of a VA medical center failed as the testimony of the administrator's only expert was properly excluded; Georgia's evidentiary rules for a physician's expert testimony applied, and the administrator's expert was not qualified to testify because of the expert's lack of expertise as a vascular surgeon or in broadly treating a patient suffering from critical ischemia. Dutton v. United States, 621 Fed. Appx. 962 (11th Cir. Ga. 2015) (Unpublished).

Officer qualified as expert on gangs. — Police officer was properly qualified as an expert in gang identity and investigation as the officer was a state certified gang investigator; that the officer was trained in gang identity and investigation; that the officer trained new hires about gangs; and that the officer regularly monitored six Clayton County-based gangs, and was knowledgeable about the neighborhoods in which the gangs operated. The officer also testified that the officer knew the colors associated with the defendant's gang and had seen photographs of their gang signs. Burgess v. State, 292 Ga. 821, 742 S.E.2d 464 (2013).

Opinion testimony properly admitted.

In a breach of contract and bad faith refusal to pay claim under a policy of lender's title insurance, since a retrial was issued on another issue, whether environmental stigma was a title defect covered by the title insurance policy was an issue that could be addressed again as to actual damages but the trial court properly permitted the insured's expert to testify as to diminution of the subject property's value. Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC, 337 Ga. App. 638, 788 S.E.2d 542 (2016), cert. denied, No. S16C1843, 2017 Ga. LEXIS 117 (Ga. 2017).

Trial court did not abuse the court's discretion in a medical malpractice action by denying the hospital defendant's motion to exclude the expert opinions of one of the plaintiffs' experts because the expert's causation opinion that the patient plaintiff would have made a candidate for immediate surgical intervention rather than surgery down the road was reliable and, therefore, admissible. Hosp. Auth. v. Fender, 342 Ga. App. 13, 802 S.E.2d 346 (2017).

Limited qualification as expert.

Trial court did not err in granting the plaintiff's motion in limine as to the defendant's expert in a slip and fall case because the defendant did not identify the doctor as an expert witness until one business day before the consolidated pretrial order was filed, which reserved the plaintiff's right to file motions to challenge any late-disclosed experts. Vineyard Indus. v. Bailey, 343 Ga. App. 517, 806 S.E.2d 898 (2017).

Expert found not qualified to render opinion.

Since the plaintiff's witness was not qualified to testify as an expert in a medical malpractice claim based on injuries and the death of an elderly patient, in any event, the witness was not competent to testify based upon the witness's sheer lack of knowledge regarding fall prevention because the witness never authored a falls policy and the witness's knowledge of those policies was strictly limited to the policy in effect at the witness's place of employment, the witness had no knowledge of the Morse Fall Scale, which was the method of fall risk assessment utilized in this case, prior to being retained, and the witness admitted in deposition that the witness did not rely on any textbooks or teachings to base the witness's opinions and that the witness performed no literary searches prior to forming the witness's opinion. Sanders v. United States, No. 109-164, 2011 U.S. Dist. LEXIS 155970 (S.D. Ga. Aug. 26, 2011).

Expert qualified. — Trial court erred in granting the doctor's motion in limine to exclude the testimony of the patient's expert on the grounds that the expert was not qualified to provide an expert opinion on hysteroscopic removal of fibroids and that the expert's testimony was specula-

tive as the expert had significant experience in removing polyps though hysteroscopic procedures and the removal of fibroids via hysteroscopy was not markedly different from removal of polyps via that procedure. Cartledge v. Montano, 325 Ga. App. 322, 750 S.E.2d 772 (2013).

Trial court did not abuse the court's discretion in finding the plaintiffs' expert affiant competent to testify as the expert was a licensed medical doctor and did not have to have the same speciality as the physician to be considered a member of the same profession and the expert had taught in the area of cardiac electrophysiology during the relevant time period. Graham v. Reynolds, 343 Ga. App. 274, 807 S.E.2d 39 (2017).

Expert allowed to testify.

In a case decided under former O.C.G.A. § 24-9-67.1, a doctor was properly qualified as an expert since the doctor acted as a consultant on the causation of pulmonary embolisms and consulted emergency room physicians about some of the patient's tests and researched the issue. Bonds v. Nesbitt, 322 Ga. App. 852, 747 S.E.2d 40 (2013) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion by admitting the expert testimony proffered by the mortgagee because it was sufficient; competent evidence supported the finding that the foreclosure sale should be confirmed and provided proof of the true market value as of the date of the foreclosure sale. Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC, 325 Ga. App. 694, 754 S.E.2d 655 (2014).

Appraisal expert's testimony as to the value of foreclosed property at a confirmation proceeding did not violate former O.C.G.A. § 24-9-67.1(b) because the witness was certified as an appraiser in Georgia and had extensive experience, and the expert's conclusions as to the lot purchase agreement and buildability of certain lots were subject to cross-examination. The trial court, sitting without a jury, was not required to undertake a Daubert analysis of the expert's testimony. Harper v. Ameris Bank, 326 Ga. App. 67, 755 S.E.2d 872 (2014) (decided under former O.C.G.A.§ 24-9-67.1).

In a suit arising out of a collision at a highway construction site, the trial court did not err in allowing the plaintiffs' expert testimony on human factors theories, which had been subject to publishing and peer review; however, the expert was not qualified to give an opinion regarding the placement of traffic control signs. Ga. DOT v. Owens, 330 Ga. App. 123, 766 S.E.2d 569 (2014).

Medical expert proper.

In a medical malpractice action, the trial court's order granting the defending doctor's motion to exclude the patient's expert witness testimony as the testimony related to the causation and permanence of the patient's erectile dysfunction based on a certain test was vacated because the order could be interpreted as requiring the exclusion of all the expert's opinion testimony as to the cause and permanence of the patient's erectile dysfunction. Smith v. Rodillo, 330 Ga. App. 365, 765 S.E.2d 432 (2014).

Business valuation expert should have testified. — In a negligence and breach of trust action, the special master erred by excluding the expert testimony regarding the value of the plaintiff because the expert undertook the exact type of analysis as all other valuation specialists utilize in valuing a business enterprise when public information is not available, and the opinion was relevant for the jury to determine, in conjunction with other testimony and evidence, the amount of damages that the defendant's alleged actions may have caused, which necessarily required consideration of opinion evidence as to the value of the business. Levine v. SunTrust Robinson Humphrey, 321 Ga. App. 268, 740 S.E.2d 672 (2013) (decided under former O.C.G.A. § 24-9-67.1).

Use of deposition at trial subject to expert rules. — In a medical malpractice case, the patient's survivor could not use the deposition of a surgery center's representative taken under O.C.G.A. § 9-11-30(b)(6) to establish the doctor's standard of care without regard to O.C.G.A. § 24-7-702, governing the admissibility of expert testimony; O.C.G.A. § 9-11-32(a) allowed the use of such depositions for any purpose but required appli-

cation of the rules of evidence. Yugueros v. Robles, 300 Ga. 58, 793 S.E.2d 42 (2016).

Cited in Young v. State, 328 Ga. App. 857, 763 S.E.2d 137 (2014); SJN Props., LLC v. Fulton County Bd. of Assessors, 296 Ga. 793, 770 S.E.2d 832 (2015); Doctors Hosp. of Augusta, LLC v. Alicea, 332 Ga. App. 529, 774 S.E.2d 114 (2015); Mitchell v. State, 301 Ga. 563, 802 S.E.2d 217 (2017); Smith v. CSX Transp., Inc., 343 Ga. App. 508, 806 S.E.2d 890 (2017).

RESEARCH REFERENCES

ALR. — Qualification as expert to testify in legal malpractice action, 82 A.L.R.6th 281.

Admissibility and propriety of use of Abel Assessment for Sexual Interest test, 84 A.L.R.6th 263.

Use and effect of Comparative Bullet Lead Analysis (CBLA) in criminal cases, 92 A.L.R.6th 549.

Requirement for, and admissibility of, expert testimony to determine whether use of particular amount of force in course of making arrest was unreasonable, 95 A.L.R.6th 641.

Propriety of expert historian testimony, 4 A.L.R.7th 4.

Admissibility of expert testimony regarding false confessions, 11 A.L.R.7th 6.

Admissibility and effect of evidence of "psychosocial short stature," "psychosocial dwarfism," or the like in cases involving parent-child relationship, 13 A.L.R.7th 1.

Admissibility of expert testimony on grooming behavior involving sexual conduct with child, 13 A.L.R.7th 9.

Admissibility, sufficiency, and other issues concerning expert evidence to prove or disprove shaken baby syndrome, 16 A.L.R.7th 5.

24-7-703. Bases of expert opinion testimony.

JUDICIAL DECISIONS

Ineffective assistance of counsel not established as to sequestration of expert issue. — Trial counsel was not deficient in failing to properly invoke sequestration because the trial court did not abuse the court's discretion in allowing the state's expert to testify in rebuttal based in part on their review of the recorded testimony of the appellant's expert; accordingly, even if the appellant's counsel had invoked the rule of sequestration earlier in the trial, the court would not have abused the court's discretion in excepting the state's expert from the rule. Davis v. State, 299 Ga. 180, 787 S.E.2d 221 (2016).

Medical expert proper. — In a medical malpractice action, the trial court's order granting the defending doctor's motion to exclude the patient's expert witness testimony as the testimony related to the causation and permanence of the patient's erectile dysfunction based on a certain test was vacated because the order could be interpreted as requiring the exclusion of all the expert's opinion testimony as to the cause and permanence of the patient's erectile dysfunction. Smith v. Rodillo, 330 Ga. App. 365, 765 S.E.2d 432 (2014).

Psychologist testimony on bonding in parental rights termination case. — In a case terminating the mother's parental rights, the clinical psychologist's testimony regarding the psychologist's bonding evaluation on the child was properly admitted because the psychologist, who was tendered as an expert on child psychology and attachment and bonding without objection, explained that the psychologist formed the psychologist's opinions based on an interview, observation, and testing; the psychologist testified that the methods the psychologist used and the information the psychologist gathered were of the type regularly used by others in the psychologist's profession; and the psychologist's opinion was not objectionable on the grounds that the opinion embraced an ultimate issue to be decided by the trier of fact. In the Interest of R. S. T.,

No. A17A1595, 2018 Ga. App. LEXIS 208 (Mar. 16, 2018).

Expert testimony as to gang activity. — Sufficient evidence, including expert testimony, supported the appellants' convictions because the evidence established that the appellants were associated with a criminal street gang and that the armed robbery and aggravated assault the appellants engaged in constituted criminal street gang activity and were intended to further the interests of the gang. Lupoe v. State, 300 Ga. 233, 794 S.E.2d 67 (2016).

RESEARCH REFERENCES

ALR. — Admissibility and propriety of use of Abel Assessment for Sexual Interest test, 84 A.L.R.6th 263.

Use and effect of Comparative Bullet Lead Analysis (CBLA) in criminal cases, 92 A.L.R.6th 549.

Requirement for, and admissibility of, expert testimony to determine whether use of particular amount of force in course of making arrest was unreasonable, 95 A.L.R.6th 641.

Propriety of expert historian testimony, 4 A.L.R.7th 4.

Admissibility of expert testimony regarding false confessions, 11 A.L.R.7th 6.

Admissibility and effect of evidence of "psychosocial short stature," "psychosocial dwarfism," or the like in cases involving parent-child relationship, 13 A.L.R.7th 1.

Admissibility of expert testimony on grooming behavior involving sexual conduct with child, 13 A.L.R.7th 9.

Admissibility, sufficiency, and other issues concerning expert evidence to prove or disprove shaken baby syndrome, 16 A.L.R.7th 5.

24-7-704. Ultimate issue opinion.

JUDICIAL DECISIONS

Testimony regarding whether injuries were accidental admissible. — In the defendants' murder trial in which the defendants claimed a shooting was accidental as the parties struggled, because the medical examiner's testimony that the victim's injuries were inconsistent with an accidental shooting did not opine as to the defendants' mental intent for any crime or defense, there was no violation of O.C.G.A. § 24-7-704, and because the examiner's opinion was based on the examiner's specialized knowledge and training, O.C.G.A. § 24-7-707, any objection would have been meritless. Eller v. State, No. S17A1549, 2018 Ga. LEXIS 130 (Mar. 5, 2018).

Fire marshall's testimony regarding arson. — After being qualified as an expert witness, the fire marshal's testimony that the fire at the victims' residence was intentionally set did not invade the province of the jury in deciding whether the defendant had committed arson because the testimony did not address other elements of the crime of arson or directly implicate the defendant as the perpetrator of that crime; and the conclusion that the fire was intentionally set was not one jurors would ordinarily be able to draw for themselves. Saffold v. State, 298 Ga. 643, 784 S.E.2d 365 (2016).

Psychologist opinion testimony on ultimate issue properly admitted. — In a case terminating the mother's parental rights, the clinical psychologist's testimony regarding the psychologist's bonding evaluation on the child was properly admitted because the psychologist, who was tendered as an expert on child psychology and attachment and bonding without objection, explained that the psychologist formed the psychologist's opinions based on an interview, observation, and testing; the psychologist testified that the methods the psychologist used and the information the psychologist gathered were of the type regularly used by others in the psychologist's profession; and the psychologist's opinion was not objectionable on the grounds that the opinion embraced an ultimate issue to be decided by

the trier of fact. In the Interest of R. S. T., No. A17A1595, 2018 Ga. App. LEXIS 208 (Mar. 16, 2018).

Cited in State v. Cooper, 324 Ga. App. 32, 749 S.E.2d 35 (2013); Dority v. State, 335 Ga. App. 83, 780 S.E.2d 129 (2015).

24-7-707. Expert opinion testimony in criminal proceedings.

Law reviews. — For article, "Symposium on Evidence Reform: A Tale of Two Dauberts," see 47 Ga. L. Rev. 889 (2013).

JUDICIAL DECISIONS

Analysis

Qualification as Expert
Illustrations
1. Opinions Admissible
2. Opinions Inadmissible
3. Witness Qualified as Expert

Qualification as Expert

Expert testimony on absence of DNA. — Trial counsel was not ineffective in failing to object to the testimony of an expert witness that the absence of the defendant's DNA on a ski mask recovered from the scene of the crime did not rule out the possibility that the defendant wore the mask because the witness's testimony was admissible as the opinions of experts on any question of science, skill, trade, or like questions was always admissible; and counsel extensively cross-examined the witness on the witness's conclusions, eliciting an admission from the witness that no studies supported the witness's testimony, reiterating the absence of DNA evidence implicating the defendant, and introducing into evidence the expert's report containing that finding. Mitchell v. State, No. S18A0193, 2018 Ga. LEXIS 204 (Apr. 16, 2018) (decided under former O.C.G.A. § 24-9-67).

Qualification as expert satisfied.

Trial court did not abuse the court's discretion in qualifying a witness as an expert in commercial sexual exploitation of children as the witness testified that the witness was the director of forensic services at the Georgia Center for Child Advocacy; had conducted over one thousand forensic interviews; had been qualified as a forensic-interview expert approximately 46 times; had undergone training for mental health providers in the area of commercial sexual exploitation of children and become a facilitator to train others on the topic; and had attended symposiums and seminars with instruction from the Federal Bureau of Investigation on how to work with sexually exploited children. Pepe-Frazier v. State, 331 Ga. App. 263, 770 S.E.2d 654 (2015), cert. denied, No. S15C1105, 2015 Ga. LEXIS 412 (Ga. 2015).

Trial court did not abuse the court's discretion in qualifying a witness as an expert in pimping culture, terminology, and relationship dynamics between pimps and prostitutes because the witness testified that the witness was the director of forensic services for Fulton County, Georgia; worked with various law enforcement agencies in Georgia to train them in understanding cycles of abuse regarding sexual exploitation; had trained with the National Center for Missing and Exploited Children to study the effects of sexual exploitation, exploring the dynamics between demeanor of pimps and exploited teenagers; and had studied pimping and prostitution by extensive review of scholarly literature on the subject. Pepe-Frazier v. State, 331 Ga. App. 263, 770 S.E.2d 654 (2015), cert. denied, No. S15C1105, 2015 Ga. LEXIS 412 (Ga. 2015).

Trial court did not abuse the court's discretion by allowing one of the investigating police officers to testify as an expert

Qualification as Expert (Cont'd)

regarding interviewing witnesses to a crime because the officer testified that the officer had extensive training in conducting investigations and interviewing witnesses and 11 years of experience doing so and did not offer any opinion as to the truthfulness of the boys, who were the victims of the crime. Smith v. State, 342 Ga. App. 656, 805 S.E.2d 251 (2017).

Although the defendant argued that the trial court should have looked to the forensic interviewer's level of experience in 2012, when the interviewer conducted the forensic interviews, rather than 2016, when the interviewer gave the interviewer's expert opinion because the defendant asserted that, due to the interviewer's inexperience in 2012, the interviewer did not properly conduct the forensic interviews, those criticisms went to the weight and credibility of the interviewer's testimony about the opinions the interviewer reached based on the allegedly flawed interviews, which were matters for the factfinder, and not to the interviewer's qualifications as an expert in 2016. Kruel v. State, 344 Ga. App. 256, No. A17A1729, 2018 Ga. App. LEXIS 15 (2018).

Illustrations

1. Opinions Admissible

Testimony by medical examiner regarding whether injuries were accidental. — In the defendants' murder trial in which the defendants claimed a shooting was accidental as the parties struggled, because the medical examiner's testimony that the victim's injuries were inconsistent with an accidental shooting did not opine as to the defendants' mental intent for any crime or defense, there was no violation of O.C.G.A. § 24-7-704, and because the examiner's opinion was based on the examiner's specialized knowledge and training, O.C.G.A. § 24-7-707, any objection would have been meritless. Eller v. State, No. S17A1549, 2018 Ga. LEXIS 130 (Mar. 5, 2018).

Expert testimony on bullet trajectory. — Defendant was not entitled to a new trial due to ineffective assistance of trial counsel for failure to conduct a pre-trial consultation with an expert witness to utilize the evidence of the trajectory of the fatal bullet to support the defense because the defendant failed to demonstrate a reasonable probability that the trial result would have been different if counsel had made such a consultation as the undisputed evidence established that the defendant fired the first shot and was the aggressor who started the gunfight; and the fact that the defendant fired the fatal shot while trying to get away from the gunfight the defendant started did not change the analysis regarding the lack of justification as the defendant was the aggressor. Mosby v. State, 300 Ga. 450, 796 S.E.2d 277 (2017).

Child abuse accommodation syndrome. — Expert testimony by a licensed psychologist regarding child abuse accommodation syndrome was properly admitted because the expert testified regarding how the victim's demeanor was consistent with having been sexually abused and not whether the victim was telling the truth. Haithcock v. State, 320 Ga. App. 886, 740 S.E.2d 806 (2013).

Officer is an expert on narcotics investigations.

Trial court did not abuse the court's discretion during the defendant's trial for possession of cocaine with the intent to distribute in allowing the arresting officer to testify as an expert witness on the issue of the defendant's intent to distribute crack cocaine because the officer had over 900 hours of specialized training as a narcotics officer, was familiar with how crack cocaine was typically packaged and sold, and had made numerous drug-related arrests, at least 50 of which involved crack cocaine. Further, the officer's testimony was relevant to the issue of whether the defendant possessed the cocaine with the intent to distribute the cocaine and was within the scope of the officer's expertise. Thomas v. State, 321 Ga. App. 214, 741 S.E.2d 298 (2013).

Fire marshal's testimony regarding arson. — After being qualified as an expert witness, the fire marshal's testimony that the fire at the victims' residence was intentionally set did not invade the province of the jury in deciding whether the defendant had committed arson because

the testimony did not address other elements of the crime of arson or directly implicate the defendant as the perpetrator of that crime; and the conclusion that the fire was intentionally set was not one jurors would ordinarily be able to draw for themselves. Saffold v. State, 298 Ga. 643, 784 S.E.2d 365 (2016) (decided under former O.C.G.A. § 24-9-67).

Failure to identify expert before hearing not grounds to exclude testimony.

Defendant was not entitled to a new trial due to ineffective assistance of trial counsel for failure to present the testimony of an expert witness who could have established that, based upon the video, the defendant could not have inflicted the muzzle wound to the victim's right leg and that the victim accidentally shot the victim's own leg because the jury was able to determine for itself whether the defendant was ever close enough to the victim to cause a muzzle contact wound; and it was undisputed that the shot to the victim's leg was not the fatal wound. Mosby v. State, 300 Ga. 450, 796 S.E.2d 277 (2017).

Failure to retain crime scene reconstruction or firearms expert. — Defendant was not entitled to a new trial due to ineffective assistance of trial counsel for failure to consult with or retain a crime scene reconstruction or firearms expert to explain the events the video portrayed because the jury could draw its own conclusions about the events shown on the video; the defendant failed to show that the testimony of an expert witness with respect to what the expert observed on the video would have been admissible or that the jury would have accepted the expert's testimony over what the jury observed; and, even if admissible, the jurors could have disregarded the expert's testimony about what the expert saw in the video if it conflicted with what the jurors saw for themselves. Mosby v. State, 300 Ga. 450, 796 S.E.2d 277 (2017).

Testimony by expert on geo-cell phone analytics. — Testimony by the state's expert witness on geo-cell phone analytics was admissible as the defendant could not affirmatively show that the alleged error in admitting the evidence probably affected the outcome below and, thus, constituted plain error because the expert's testimony was used to indicate how the police were able to determine that, on the day of the murder — but the day before the victim's body was disposed of by being burned — the defendant's cell phone was located about 14 miles from where the victim's burned body was found; and ample evidence actually placed the defendant at the murder scene and the location where the defendant and an individual attempted to cover up the crime. Jones v. State, 299 Ga. 40, 785 S.E.2d 886 (2016).

2. Opinions Inadmissible

Romberg sobriety test subject to Harper standard. — Admissibility of the Romberg test is subject to the Harper standard as the significance of eyelid tremors or an individual's internal clock, how they may be affected by the consumption of alcohol, and particularly whether a range of five seconds above or below the actual passage of 30 seconds establishes impairment, are not matters of common sense or experience, nor are they obvious to the average lay observer. Mitchell v. State, 301 Ga. 563, 802 S.E.2d 217 (2017).

3. Witness Qualified as Expert

Forensic analyst of telephone records. — Trial court did not abuse the court's discretion in qualifying the forensic analyst as an expert or in admitting the forensic analyst's testimony regarding the telephone calls between those involved in the drug transactions because the forensic analyst was examined extensively on specific training as an analyst of telephone records and the specialized computer programs used in law enforcement data compilation, and because the correlation and analysis of large numbers of cellular telephone calls, using specialized computer programs and other tools and resources specific to forensic analysis, was a matter beyond the ken of the average layperson. Maldonado v. State, 325 Ga. App. 41, 752 S.E.2d 112 (2013).

CHAPTER 8

HEARSAY

ARTICLE 1

GENERAL PROVISIONS

24-8-801. Definitions.

Law reviews. — For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
ADMISSIBILITY
1. IN GENERAL
EVIDENCE NOT HEARSAY.
2. ORIGINAL EVIDENCE
4. EVIDENTIARY VALUE
ADMISSIONS AND CONFESSIONS
1. ADMISSIONS AND CONFESSIONS DISTINGUISHED
b. ADMISSIONS
2. ADMISSIONS OF PARTIES TO RECORD
a. IN GENERAL
b. PARTIES
d. EXAMPLES
3. ACQUIESCENCE OR SILENCE AS ADMISSION
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a. IN GENERAL
DECLARATIONS OF CONSPIRATORS
2. APPLICATION
3. CONSPIRACY DEFINED
b. PROOF OF CONSPIRACY
4. PENDENCY OF CRIMINAL PROJECT
a. IN GENERAL
INADMISSIBLE HEARSAY

General Consideration

Evidence not offered to prove truth of matter asserted.

In a felony murder while in the commission of aggravated battery in connection with the death of a child conviction, the detective's testimony about the communication with the pediatric hospital doctors regarding their beliefs that the child's injuries were not the result of an accident was not improperly admitted into evidence because the testimony was not offered for its truth that the fatal injuries were not the result of accident; because the cause of death was not the ultimate issue for the jury to determine; and because, even assuming that the testimony was hearsay and improperly admitted, the testimony was merely cumulative of other properly admitted evidence, and, thus, it was highly probable that the tes-

timony's admission did not affect the outcome at trial. Dyer v. State, 295 Ga. 173, 758 S.E.2d 301 (2014) (decided under former O.C.G.A. § 24-3-1(a)).

Because the co-defendant's statement was not offered for the truth of the matter asserted as the statement was not offered to show that the co-defendant intended to shoot the defendant if the defendant did not shoot the victim, and, instead, the testimony was admitted as the testimony was relevant to show the effect of the co-defendant's statement on the defendant and the defendant's possible motive for shooting the victim. Garner v. State, 342 Ga. App. 824, 805 S.E.2d 464 (2017).

Prior consistent statement.

Witness's recorded statement to a detective was admissible as a prior consistent statement because the witness, who was an inmate in the jail, was present at trial and was cross-examined, during which defense counsel endeavored to show that the witness had a motive to fabricate — as the witness was facing serious criminal charges — that arose subsequent to the time the witness made a statement to the detective. Franklin v. State, 298 Ga. 636, 784 S.E.2d 359 (2016).

Trial court did not err in admitting a witness's prior consistent statements because the defendant attacked the witness's veracity by suggesting there were inconsistencies between the witness's trial testimony and the witness's written statement, and that the witness fabricated the witness's testimony after giving the written statement; furthermore, because the thrust of the defendant's cross-examination was a charge that the witness fabricated a different version of events after giving the witness's written statement, the trial court did not err in admitting the witness's videotaped interview with the police. Dorsey v. State, No. S18A0121, 2018 Ga. LEXIS 293 (May 7, 2018).

Statements made by the declarants themselves are not hearsay. C & R Fin. Lenders, LLC v. State Bank & Trust Co., 320 Ga. App. 660, 740 S.E.2d 371 (2013).

Latent fingerprint card not hearsay. — Trial court did not err in overruling defendant's hearsay objection to the entry into evidence of a latent fingerprint card, which was identified by an officer other than the one who took the impression, because the card at issue simply showed an image of part of a window with fingerprints thereon, and it did not contain any representations or conclusions of a third party; thus, neither the testimony of the officer, nor the latent fingerprint card, was hearsay. Bates v. State, 322 Ga. App. 319, 744 S.E.2d 841 (2013).

Prior inconsistent statement of witness admissible. — Even if a witness's out-of-court statement to a detective was hearsay under former O.C.G.A. § 24-3-1(a), it was admissible as a prior inconsistent statement under former O.C.G.A. § 24-9-83 because the witness testified the witness did not remember meeting with the detective and the witness did not tell the detective that the witness's previous statement was incomplete. Welch v. State, 298 Ga. 320, 781 S.E.2d 768 (2016).

Upon review of a witness's testimony and prior statement, trial counsel was not ineffective in failing to object to the detective's testimony about the witness's statement as hearsay because the trial court likely would have exercised the court's discretion to admit the evidence as a prior inconsistent statement as the defendant admitted that the witness's statement to the detective was a little bit contradictory to what the witness testified to. Faust v. State, 302 Ga. 211, 805 S.E.2d 826 (2017).

Testimony as to identification. — Trial court's exclusion of testimony from one of the investigating officers that one person had failed to identify the defendant from a photographic line-up was proper because it was clear that the individual in question was not going to be called to testify; thus, the trial court properly sustained the state's hearsay objection to the detective's testimony. Dailey v. State, 297 Ga. 442, 774 S.E.2d 672 (2015).

Cited in Ryans v. State, 293 Ga. 238, 744 S.E.2d 759 (2013); Carter v. State, 324 Ga. App. 118, 749 S.E.2d 404 (2013); McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290 (2014); Parker v. State, 296 Ga. 586, 769 S.E.2d 329 (2015); Graham v. State, 331 Ga. App. 36, 769 S.E.2d 753 (2015); Alvear v. Sandy Springs Toyota, Inc., 332 Ga. App. 798, 775 S.E.2d 172

General Consideration (Cont'd)

(2015); Chase v. State, 337 Ga. App. 449, 787 S.E.2d 802 (2016); Taylor v. State, 337 Ga. App. 486, 788 S.E.2d 97 (2016); Morales v. State, 337 Ga. App. 614, 788 S.E.2d 535 (2016); Allen v. State, 300 Ga. 500, 796 S.E.2d 708 (2017); Tran v. State, 340 Ga. App. 546, 798 S.E.2d 71 (2017).

Admissibility

1. In General

Prior inconsistent statement of detective. — In a claim that the employer procured the employee's false imprisonment when the employee was arrested by a detective, although the employee offered the employee's report of the detective's question to a loss prevention officer for the employer about what to do with the employee after the employee arrived at the police station to show the truth of the matter asserted — that was, that the employer had some substantial control over the police investigation — the detective's question as reported by the employee was admissible at trial as an inconsistent statement made prior to the detective's later testimony that the detective never asked the question at all. Smith v. Wal-Mart Stores East, LP, 330 Ga. App. 340, 765 S.E.2d 518 (2014).

Testimony admissible to explain conduct.

Because an individual's statement to the state's key witness that the defendant had been looking for the witness on the night of the shooting coupled with the neighbor's statement that the neighbor had seen the defendant running away after the shooting led the witness to decide that the witness should leave immediately as the witness was likely the defendant's target, and because the trial court instructed the jury that the statement was being allowed in not because of the fact the statement might be true, but to explain the witness's conduct of leaving the scene, the trial court did not abuse the court's discretion in admitting the neighbor's statement to explain the witness's reason for leaving. Gomillion v. State, 298 Ga. 505, 783 S.E.2d 103 (2016), cert. denied, 137 S. Ct. 302, 196 L. Ed. 2d 223 (U.S. 2016) (decided under former O.C.G.A. § 24-3-2).

Family statements were prior consistent statement. — Defendant's trial counsel was not ineffective as counsel did not perform deficiently by failing to object on the grounds of hearsay and improper bolstering when two witnesses testified that the co-defendant told them within days of the shooting that the defendant shot the victim because the co-defendant's statements to the co-defendant's sister and to the mother of the co-defendant's two children were prior consistent statements, not hearsay, and were admissible to rehabilitate, rather than improperly bolster, the co-defendant's credibility. Brown v. State, 302 Ga. 454, 807 S.E.2d 369 (2017).

Evidence Not Hearsay.

Admission of mother's comments about paying victim. — Because statements by the defendant's brother about their mother's offer to pay the victim to tell the police that the brothers were not involved in the assault was nonhearsay, the trial court did not err in admitting the testimony over the defendant's objection. Brown v. State, 332 Ga. App. 635, 774 S.E.2d 708 (2015).

Evidence not offered to prove truth of matter asserted. — In a vehicle collision that resulted in the death of the plaintiffs' four-year-old child, the trial court did not abuse the court's discretion in admitting evidence of the National Highway Traffic Safety Administration Office of Defect Investigation's recall request letter because, inter alia, the recall request letter was offered, at least in part, not for the substance of the finding of defect, but to support an inference that a meeting between the defendant's chief executive officer with the head of the National Highway Traffic Safety Administration and the Secretary of the U. S. Department of Transportation led the Office of Defect Investigation (ODI) to change the opinion regarding the defect to that expressed in the ODI resume. Chrysler Group, LLC v. Walden, 339 Ga. App. 733, 792 S.E.2d 754 (2016), aff'd, No. S17G0832, 2018 Ga. LEXIS 154 (Ga. 2018).

Admission of statement made after crime not hearsay. — Trial court did not abuse the court's discretion by admitting statements that the victim allegedly made to the victim's niece, who discovered the victim on the morning after the beating, as exceptions to the rule against hearsay as present sense impressions, excited utterances, and to impeach the niece's trial testimony as, under the totality of the circumstances, the victim was still suffering under the stress of the all-night beating such that the victim's statements were admissible. Robbins v. State, 300 Ga. 387, 793 S.E.2d 62 (2016).

2. Original Evidence

Fact within witness's personal knowledge. — Questions to a witness as to whether witness had been indicted by a grand jury for the shooting for which defendant was being tried and whether the grand jury had declined to indict witness did not elicit hearsay because the questions asked for facts that were within the witness's personal knowledge. Bell v. State, 294 Ga. 443, 754 S.E.2d 327 (2014).

Testimony as to identification. Even if one officer's testimony that a witness identified the defendant as the person who had burglarized the shop where the witness worked six days earlier was hearsay under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801), it was admissible, as the witness testified and was cross-examined about the identification of the defendant as the shop's burglar. Williams v. State, 327 Ga. App. 283, 758 S.E.2d 620 (2014) (decided under former O.C.G.A. § 24-3-2).

Text message offered to show defendant's motive. — Text message that a victim sent the defendant's girlfriend, along with naked pictures of the victim, that, "yu eva lonely yu can call me;))))," was not hearsay because the text message was not offered to prove that the defendant's girlfriend could in fact call if she were lonely, but to show the message's effect on the defendant and the defendant's motive for committing the murder. Gates v. State, 298 Ga. 324, 781 S.E.2d 772 (2016).

Hearsay issue critical in medical malpractice case. — In a medical malpractice case, the trial court committed reversible error by finding that the patient waived a hearsay objection as to a defense pathologist's deposition testimony because the patient had the right to object to the testimony at trial and the testimony was inadmissible hearsay entitling the patient to a new trial since it was not harmless error in that it was critical in the case because the evidence directly addressed the core disputed issue of whether the clinic's neurosurgeon left an excessive amount of cotton in the patient's brain. Thomas v. Emory Clinic, Inc., 321 Ga. App. 457, 739 S.E.2d 138 (2013).

4. Evidentiary Value

Investigator's testimony did not bolster. — Trial court did not err in admitting testimony by the investigator because even though the state relied heavily on the co-defendant's testimony, the investigator's testimony did not give critical weight to that testimony and there was other evidence linking the defendant to the two burglaries. Silvey v. State, 335 Ga. App. 383, 780 S.E.2d 708 (2015).

Admissions and Confessions

1. Admissions and Confessions Distinguished

b. Admissions

Statements as to prior wrongs relevant to crimes committed. — Trial court properly admitted certain statements made by the defendant during telephone conversations while in custody at a jail because while the statements related to a prior wrong or act which would generally be irrelevant character evidence, the statements indicated the defendant's disdain for law enforcement intervention and a desire to seek revenge; thus, the statements were relevant to show motive and intent in committing the crimes. Summerlin v. State, 339 Ga. App. 148, 793 S.E.2d 477 (2016).

2. Admissions of Parties to Record

a. In General

What party told third party admissible. — Defendant's proffered testimony

Admissions and Confessions (Cont'd)
2. Admissions of Parties to Record (Cont'd)
a. In General (Cont'd)

about the details of a conversation with an individual, who claimed to be good friends with the property owners and who told the defendant that the owners had said anyone was welcome to what was left on the property, was not hearsay because the testimony was offered to prove what the individual told the defendant, not what the property owners told the individual. Lynn v. State, No. A17A2117, 2018 Ga. App. LEXIS 194 (Mar. 15, 2018) (decided under former O.C.G.A. § 24-3-1).

b. Parties

Statement of employee nurse of defendant. — Trial court did not abuse the court's discretion in admitting the testimony of the plaintiff's daughter over the defendant's objection as an admission by a party opponent because the statement was made by a nurse employed by the defendant and was relevant to the slip and fall case. Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 760 S.E.2d 674 (2014).

d. Examples

Text messages from defendant to victim's parent. — Trial court did not err when the court allowed the victim's parent to testify about text messages that the parent had received from the defendant during the time that the victim's whereabouts were unknown because, according to the victim's parent, the defendant's text messages invited the parent on dates and explained why the defendant was not participating in the search for the victim, and that testimony was properly admitted under the admissions by a real party in interest exception to the hearsay rule under the former evidence code; and the parent provided evidence that identified the defendant as the person who sent the text messages. Carter v. State, 302 Ga. 685, 808 S.E.2d 704 (2017) (decided under former O.C.G.A. § 24-3-34).

Testifying witness need not be co-conspirator. — Nothing in the text of O.C.G.A. § 24-8-801(d)(2)(E) requires that the testifying witness also be a co-conspirator for the exception to apply; in fact, § 24-8-801(d)(2)(E) does not necessitate that the witness testifying to a co-conspirator statement be a co-conspirator, instead only requiring that the declarant be a co-conspirator. Lawrence v. State, 342 Ga. App. 396, 802 S.E.2d 859 (2017).

Recorded telephone conversations with an informant.

Because the informant's recorded statements provided context for the defendant's portion of the telephone conversation, the informant's statements were not hearsay as the statements entailed admissions of a party opponent, and the Confrontation Clause did not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted; therefore, the trial court did not err in admitting the recording. Jones v. State, 339 Ga. App. 95, 791 S.E.2d 625 (2016).

3. Acquiescence or Silence as Admission

d. Illustrations and Applications

Statement was not an adoptive admission. — Police officer's testimony that the defendant's brother stated that the defendant was involved was hearsay and was not admissible as an adoptive admission as there was no evidence permitting an inference the defendant was present when the brother made the statement. In the Interest of E. B., 343 Ga. App. 823, 806 S.E.2d 272 (2017).

4. Admissions of Agents

a. In General

Adjuster's affidavit relied on hearsay and unauthenticated documents. — Vacancy exclusion did not bar coverage for the vandalism loss to an insured as a matter of law, and the trial court erred in failing to grant summary judgment to it on that issue because the senior field adjuster's affidavit did not include any admissible evidence regarding the status of the renovation work as the affidavit

relied on hearsay and unauthenticated documents. R&G Invs. & Holdings, LLC v. Am. Family Ins. Co., 337 Ga. App. 588, 787 S.E.2d 765 (2016), cert. denied, No. S16C1830, 2017 Ga. LEXIS 144 (Ga. 2017).

Declarations of Conspirators

2. Application

Declarations of coconspirator admissible.

Testimony by the second defendant's girlfriend that the second defendant told the girlfriend that the first defendant had shot a man while the defendants were breaking into cars was admissible under the co-conspirator exception to the hearsay rule. Billings v. State, 293 Ga. 99, 745 S.E.2d 583 (2013).

Trial court did not err in allowing into evidence a co-conspirator's hearsay testimony regarding the statement that the defendant made about having to do something just before the murder because the statement was properly admitted into evidence as a declaration against the defendant from a co-conspirator involved in the murder. Folston v. State, 294 Ga. 778, 755 S.E.2d 803 (2014).

Statements coindictee made to another person in an audiotaped conversation were admissible under former O.C.G.A. § 24-3-5 because the statements were made after the shooting and while the identity of those complicit therein were still being concealed. Hassel v. State, 294 Ga. 834, 755 S.E.2d 134 (2014) (decided under former O.C.G.A. § 24-3-5).

Because the conspiracy set forth in the indictment involved traveling between two apartment complexes for criminal purposes, a co-conspirator's statement to a witness that the co-conspirator saw the defendant walking out of the woods just after hearing a gun shot was admissible. Grissom v. State, 296 Ga. 406, 768 S.E.2d 494 (2015).

Overheard statement of a defendant's coconspirator as the two planned to "hit a lick" and, later, the coconspirator's statement to a girlfriend that the "lick went bad" were both properly admitted under the coconspirator exception to the hearsay rule, former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801(d)(2)(E)); furthermore, because the statements were not testimonial, the confrontation clause was not violated. Favors v. State, 296 Ga. 842, 770 S.E.2d 851 (2015).

Because the state established by a preponderance of the evidence that the defendant and others conspired to rob the victim, the testimony of two witnesses was admissible under the co-conspirator exception. Dublin v. State, 302 Ga. 60, 805 S.E.2d 27 (2017).

Admission of fellow gang member's testimony. — Defendants' murder convictions were upheld on appeal because the trial court did not err by admitting or refusing to strike a fellow gang member's testimony since the statements were admissible as co-conspirator statements under O.C.G.A. § 24-8-801(d)(2)(E) as the statements were found to have been made in the course of and in furtherance of a conspiracy of being a part of a criminal street gang. Kemp v. State, 810 S.E.2d 515, No. S17A1648, 2018 Ga. LEXIS 107 (2018).

Statements during concealment phase of conspiracy. — O.C.G.A. § 24-8-801(d)(2)(E) specifically provides that statements made during and in furtherance of the conspiracy are admissible, including statements made during the concealment phase; the Georgia Supreme Court has held that for purposes of the hearsay exception, a conspiracy is deemed to endure so long as the parties thereto attempt to conceal either the crime or the identity of the perpetrators. Lawrence v. State, 342 Ga. App. 396, 802 S.E.2d 859 (2017).

No ineffective counsel since statements by coconspirator admissible.

In a murder case, trial counsel did not render ineffective assistance in failing to object on confrontation grounds to the admission of a witness's testimony regarding the jailhouse statement of the co-defendant, who did not testify at trial, because the witness's testimony regarding the co-defendant's statement was admissible under the hearsay exception for statements of co-conspirators because the state clearly presented evidence of an agreement to kill the victim; an eyewitness positively identified the co-defendant

Declarations of Conspirators (Cont'd)
2. Application (Cont'd)

as the person that the eyewitness had seen commit the shooting; and the statement was made during the pendency of the conspiracy. Franklin v. State, 298 Ga. 636, 784 S.E.2d 359 (2016) (decided under former O.C.G.A. § 24-3-5).

3. Conspiracy Defined

b. Proof of Conspiracy

Statement made prior to formation of conspiracy. — Trial court did not err in admitting testimony of a coconspirator about a second coconspirator's statements to another regarding a plan to steal money from a house with the help of friends, including the defendant, as the statement was admissible under former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801(d)(2)(E)), even if the statement was made prior to the formation of the conspiracy. Peoples v. State, 295 Ga. 44, 757 S.E.2d 646 (2014) (decided under former O.C.G.A. § 24-3-5).

4. Pendency of Criminal Project

a. In General

Declarations during concealment admissible.

Argument that the co-indictee's statements to a cell mate were not made during the concealment phase of the conspiracy was without merit as the concealment phase was ongoing because the co-indictee's statements were not made to police, the investigation was ongoing, and the other conspirators were still at-large; thus, the co-indictee's statements to the cell mate were admissible. Grimes v. State, 296 Ga. 337, 766 S.E.2d 72 (2014).

Declarations made in furtherance of conspiracy admissible. — Based on the detective's testimony that the co-indictee's cell mate never told the police that the co-indictee had sent the cell mate to talk to the police, it was not clearly erroneous for the trial court to conclude that the cell mate was not sent by the co-indictee to talk to the police; the argument that the co-indictee's statements were not in the furtherance of a conspiracy because they were made with the intent that they be communicated to authorities was without merit; and the co-indictee's statements to the cell mate were admissible. Grimes v. State, 296 Ga. 337, 766 S.E.2d 72 (2014).

Co-conspirator's statement not made in furtherance of conspiracy. — Trial court's determination that certain of the statements by the co-defendant were not made "in furtherance of the conspiracy" was supported by the evidence and was not clearly erroneous and, thus, the trial court did not abuse the court's discretion in partially granting the defendant's motion in limine to exclude statements that were made implicating a co-conspirator but not in furtherance of the conspiracy. State v. Wilkins, 302 Ga. 156, 805 S.E.2d 868 (2017).

Statement made during concealment phase of conspiracy. — Trial court did not err by allowing the testimony of the defendant's girlfriend pursuant to O.C.G.A. § 24-8-801(d)(2)(E) because the statement defendant made to the girlfriend was made during the concealment phase of the conspiracy and was admissible even if the girlfriend who testified about the statement was not part of the conspiracy. Lawrence v. State, 342 Ga. App. 396, 802 S.E.2d 859 (2017).

Telephone calls in furtherance of conspiracy. — Trial court did not err when the court admitted the transcripts of phone calls between the defendant and the co-conspirators because such evidence did not constitute hearsay as the statements fell under the exception to the hearsay rule under O.C.G.A. § 24-8-801(d)(2)(E) given that the statements over the telephone were made in furtherance of the conspiracy. Hernandez-Garcia v. State, 322 Ga. App. 455, 745 S.E.2d 706 (2013).

Inadmissible Hearsay

Indictment charging unrelated defendants not admissible. — Federal indictment charging unrelated defendants with crimes and racketeering activities in association with a gang operating in Virginia was not admissible in the defendants' trial as the indictment was hearsay.

State v. Brown, 298 Ga. 878, 785 S.E.2d 510 (2016).

Information from online backup hearsay. — Defendant's motion for new trial was improperly denied as to the computer invasion of privacy charge because counsel was ineffective for failing to object to the first victim's hearsay testimony as the victim's statement about what the victim learned from an online backup system was introduced to prove that the defendant used the victim's computer to access the victim's financial information and constituted hearsay; counsel provided no reason for not objecting to that testimony; the defendant was prejudiced by counsel's deficiency as that testimony was the only evidence offered to prove the charge; and, but for counsel's deficient performance, a more than reasonable probability existed that the trial's outcome would have been different. Entwisle v. State, 340 Ga. App. 122, 796 S.E.2d 743 (2017).

RESEARCH REFERENCES

ALR. — Hearsay objections to admission of text messages or testimony thereof, 10 A.L.R.7th 4.

24-8-802. Hearsay rule.

JUDICIAL DECISIONS

Analysis

General Consideration
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1. Admissible Hearsay
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Objections
2. Admission over Objection

General Consideration

Cited in Cisneros v. State, 334 Ga. App. 659, 780 S.E.2d 360 (2015); Mashburn Constr., L.P. v. CharterBank, 340 Ga. App. 580, 798 S.E.2d 251 (2017).

Application

1. Admissible Hearsay

"Spontaneous declaration" is admissible hearsay testimony.

Trial court did not abuse the court's discretion by admitting statements that the victim allegedly made to the victim's niece, who discovered the victim on the morning after the beating, as exceptions to the rule against hearsay as present sense impressions, excited utterances, and to impeach the niece's trial testimony as, under the totality of the circumstances, the victim was still suffering under the stress of the all-night beating such that the victim's statements were admissible. Robbins v. State, 300 Ga. 387, 793 S.E.2d 62 (2016).

3. Hearsay Not Found

Recorded telephone conversation with informant. — Because the informant's recorded statements provided context for the defendant's portion of the telephone conversation, the informant's statements were not hearsay as the statements entailed admissions of a party opponent, and the Confrontation Clause did not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted, the trial court did not err in admitting the recording. Jones v. State, 339 Ga. App. 95, 791 S.E.2d 625 (2016).

Objections

2. Admission over Objection

Failure to object to hearsay. — In a plumbing company's action to recover for septic services performed, the company failed to object to the homeowners' affidavits supporting the homeowners' defense of fraud by the company and, therefore, the company waived any objection to any alleged hearsay under O.C.G.A. § 24-8-802. Shuford v. Aames Plumbing & Heating, Inc., 327 Ga. App. 844, 761 S.E.2d 395 (2014).

RESEARCH REFERENCES

ALR. — Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through interpreter — state cases, 97 A.L.R.6th 567.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter — federal cases, 91 A.L.R. Fed. 2d 187.

24-8-803. Hearsay rule exceptions; availability of declarant immaterial.

Law reviews. — For article, "Symposium on Evidence Reform: The Curious Case of Differing Literary Emphases: The Contrast Between the Use of Scientific Publications at Pretrial Daubert Hearings and at Trial," see 47 Ga. L. Rev. 837 (2013). For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013). For annual survey of evidence law, see 67 Mercer L. Rev. 63 (2015). For article, "2014 Georgia Corporation and Business Organization Case Law Developments," see 20 Ga. St. Bar. J. 26 (April 2015).

JUDICIAL DECISIONS

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General Consideration

Statements identifying assailant not within rule. — Because the hearsay exception for medical diagnosis or treatment found in the new Georgia Evidence Code did not differ substantively from its predecessor, the trial court properly relied on cases decided under the former evidence code, which held that statements made for the purpose of obtaining medical treatment were admissible to the extent that the speaker was relating the cause of the injury or condition requiring treatment, but statements identifying the person allegedly responsible for the victim's injuries were not admissible. State v. Almanza, 344 Ga. App. 38, 807 S.E.2d 517 (2017).

Cited in Mashburn Constr., L.P. v. CharterBank, 340 Ga. App. 580, 798 S.E.2d 251 (2017); Rabun v. Rabun, 341 Ga. App. 878, 802 S.E.2d 296 (2017).

Res Gestae; Present Sense Impression and Excited Utterance

3. Spontaneity

Excited utterance.

Out-of-court statements identifying the appellant as the man who beat the witness's stepson did not appear to be the most probative evidence to establish the appellant's identity as the killer because the witness's spouse testified directly to that same fact, but the statements were properly admitted under the hearsay exception for excited utterances since the statements were made just minutes after the stepson had been brutally attacked. Wilson v. State, 295 Ga. 84, 757 S.E.2d 825 (2014).

Testimony of the first victim's grandson was not inadmissible hearsay, but was admissible under the excited utterance exception, as the victim made the statements immediately after learning that the victim had been scammed into wiring the money to a man who falsely posed as the victim's grandson, and the victim was confused and distraught. Akintoye v. State, 340 Ga. App. 777, 798 S.E.2d 720 (2017).

Trial court did not abuse the court's discretion by admitting statements that the victim allegedly made to the victim's niece, who discovered the victim on the morning after the beating, as exceptions to the rule against hearsay as present sense impressions, excited utterances, and to impeach the niece's trial testimony as, under the totality of the circumstances, the victim was still suffering under the stress of the all-night beating such that the victim's statements were admissible. Robbins v. State, 300 Ga. 387, 793 S.E.2d 62 (2016).

Trial court did not err by admitting into evidence the statements that the victim allegedly made to the victim's niece on the morning after the beating as an excited utterance because the statements were made the morning after the all-night beating, while the victim was incoherent and the attacker was still there. Robbins v. State, 300 Ga. 387, 793 S.E.2d 62 (2016).

6. Application and Examples

f. Criminal Law — Defendants

When 911 caller did not testify. — Trial court did not violate the defendant's confrontation rights by admitting the 911 call without having the caller testify because the 911 call was made to avert a crime in progress or to seek assistance in a situation involving immediate danger and not to establish evidentiary facts or bear testimony against the defendant. Driskell v. State, 333 Ga. App. 886, 777 S.E.2d 717 (2015), cert. denied, No. S16C0191, 2016 Ga. LEXIS 115 (Ga. 2016).

Statements by defendants held admissible as res gestae in the following cases.

In defendant's trial for sexual exploitation of children, aggravated sodomy, child molestation, and cruelty to children, evidence that the defendant told the victim, the defendant's niece, that the defendant had been molested by the defendant's father as a child were admissible as part of the res gestae of the crimes. Wiggins v. State, 338 Ga. App. 273, 787 S.E.2d 357 (2016) (decided under former O.C.G.A. § 24-3-3).

Res Gestae; Present Sense Impression and Excited Utterance (Cont'd)
6. Application and Examples (Cont'd)

g. Criminal Law — Investigating Officers

Observations by officer held admissible.

In a suit by an injured bystander against a restaurant arising out of a gun shot by an alleged restaurant employee, a police report suggesting that the shooter was working as a bouncer was admissible under O.C.G.A. § 24-4-803(8); however, the trial court failed to address the restaurant's objection that the report was not authenticated as required by O.C.G.A. § 24-9-901(a), requiring remand. Hungry Wolf/Sugar & Spice, Inc. v. Langdeau, 338 Ga. App. 750, 791 S.E.2d 850 (2016).

Statement by defendant to officer not admissible. — Evidence of the defendant's statement to an officer that the defendant was showing the defendant's son a gun when the gun accidentally discharged was properly excluded as the statement was not an excited utterance because not only was there a passage of time sufficient for the defendant to formulate a specific version of the events to the defendant's advantage, but there was evidence supporting an inference that the defendant actually did so, when the defendant earlier asked a witness to help the defendant, and the defendant said that the defendant did not want to go to jail; and no evidence was presented that showed the defendant was actually experiencing stress or excitement at the time of the statement. Jenkins v. State, No. S17A1743, 2018 Ga. LEXIS 172 (Mar. 15, 2018).

i. Criminal Law — Victims

Statement shortly after crime occurred.

Because the victim's statements to the homeowner's daughter and the emergency medical technician (EMT) were made shortly after the rape occurred and were admissible as part of the res gestae, any objection to the testimony of the homeowner's daughter and the EMT regarding what the victim said to them would have been futile and could not provide the basis for an ineffective assistance claim. Miller v. State, 325 Ga. App. 764, 754 S.E.2d 804 (2014) (decided under former O.C.G.A. § 24-3-3).

Trial court did not abuse the court's discretion in admitting the victim's statements to the victim's neighbor as excited utterances as the statements were made shortly after the incident, when the neighbor found the victim sitting on the ground, crying and hysterical. Gregory v. State, 342 Ga. App. 411, 803 S.E.2d 367 (2017), cert. denied, No. S18C0007, 2018 Ga. LEXIS 186 (Ga. 2018).

Statements preceding crime.

Murder defendant claiming ineffective assistance of counsel failed to show that a hearsay objection to a security guard's testimony regarding the victim's statements at a nightclub shortly before the victim's murder would have been sustained because the statement could have been held admissible under O.C.G.A. § 24-8-803(1) (present-sense impression of declarant) or (3) (existing mental, emotional, or physical condition of declarant); also, counsel explained the failure to object. Morrison v. State, 300 Ga. 426, 796 S.E.2d 293 (2017).

Audiotape of 9-1-1 calls.

Because the entirety of both of the victim's 9-1-1 calls took place while the victim was perceiving the danger posed to the victim by the defendant, and because the victim only ended the second 9-1-1 call when the officers arrived on the scene and the victim only then perceived that the most immediate danger had passed, the circumstances suggested that the victim was responding throughout the incident to the victim's reasonable perception of a real and present danger, and the trial court did not abuse the court's discretion when the court concluded that the victim's 9-1-1 calls were admissible under the present-sense impression exception to the hearsay rule. Owens v. State, 329 Ga. App. 455, 765 S.E.2d 653 (2014).

Victim's statements during the 9-1-1 call did not violate the defendant's constitutional right to confront the defendant's accusers because the victim's statements in the 9-1-1 call were non-testimonial as the statements were made while the fam-

ily violence battery incident was ongoing, and the statements were made for the primary purpose of preventing the continuation of the domestic violence that was apparently occurring at that time, not for the purpose of establishing a past fact; and because the statements were admissible under the present sense impression exception to the hearsay rule. Legree v. State, 344 Ga. App. 793, No. A17A1782, 2018 Ga. App. LEXIS 139 (2018).

Testimony of officer.

Pretermitting whether the testimony of the sheriff's deputy and police investigator fell within the res gestae exception to hearsay, because the defendant could not show any prejudice resulting from the admission of the testimony in light of the properly admitted testimony of the homeowner's daughter and emergency medical technician, the failure to object to evidence which was merely cumulative of other admissible evidence did not amount to ineffective assistance of counsel. Miller v. State, 325 Ga. App. 764, 754 S.E.2d 804 (2014) (decided under former O.C.G.A. § 24-3-3).

Statements for Medical Diagnosis/Treatment

Admission of emergency room records. — Admission of hospital records that indicated the defendant presented to the emergency room intoxicated and needed to be cleared to go to jail without the one responsible for completing the forms testifying did not violate the defendant's confrontation rights because the Supreme Court of Georgia has specifically held that medical records created for treatment purposes are not testimonial; thus, the trial court properly admitted the records under O.C.G.A. § 24-8-803(6). Samuels v. State, 335 Ga. App. 819, 783 S.E.2d 344 (2016).

Statements identifying assailant not within rule. — In a child molestation, incest, aggravated sexual battery, statutory rape, and aggravated child molestation case, in which the victim and the victim's mother could not be located for the trial, the trial court did not err when the court found that those portions of the mother's statements to two doctors that identified the defendant as the perpetrator of the alleged crimes did not fall within the hearsay exception for medical diagnosis or treatment because the statements to the doctors regarding the identity of the assailant were not reasonably pertinent to the victim's diagnosis or treatment; and the identification statements were admissible under the Child Hearsay Statute, O.C.G.A. § 24-8-820. State v. Almanza, 344 Ga. App. 38, 807 S.E.2d 517 (2017).

Business Records

1. In General

Bank's computer screen shot insufficient proof of damages in loan case. — In an action on a loan, a bank did not submit sufficient evidence to prove the bank's damages because a printout of the bank's electronic records reflecting the amounts then owed, without a detailed transaction history, was a summary requiring evidence that the underlying records were too voluminous to examine in court pursuant to O.C.G.A. § 24-10-1006, not a business record under O.C.G.A. § 24-8-803(6). D'Agnese v. Wells Fargo Bank, N.A., 335 Ga. App. 659, 782 S.E.2d 714 (2016).

2. Procedural Considerations

a. Foundation for Admission

Authentication required.

Trial court erred by granting summary judgment to a condominium association for past due sums because the only evidence offered to support those claims, namely an account ledger and an affidavit with unsupported testimony from the property manager regarding the amounts owed, was inadmissible hearsay; thus, the damages sought were not sufficiently certain. Hayek v. Chastain Park Condo. Ass'n, 329 Ga. App. 164, 764 S.E.2d 183 (2014).

In a wrongful foreclosure action, the trial court did not err by admitting evidence of an affidavit from a bank official because the plaintiffs were clearly on notice that the bank sought to introduce the bank records as business records, and the official had sufficiently authenticated the bank records relied upon and attached to

Business Records (Cont'd)
2. Procedural Considerations (Cont'd)
a. Foundation for Admission (Cont'd)

the affidavit. Salas v. JP Morgan Chase Bank, N.A., 334 Ga. App. 274, 779 S.E.2d 48 (2015).

Proper foundation found.

Trial court properly admitted the bank's loan history report as a business record because the report provided a description of each transaction relating to the estate's loan from the loan's inception, along with a corresponding posting date for each transaction, the transaction amount, and any change to the principal balance resulting from the transaction, and was not a summary. Roberts v. Cmty. & S. Bank, 331 Ga. App. 364, 771 S.E.2d 68 (2015).

Fact that a witness never worked at the originating bank and did not have first-hand knowledge of the bank's record-keeping practices did not mean that the witness could not authenticate the bank's business records as the witness testified that the witness knew how the transaction statement was prepared, that the statement was made and kept in the regular course of the bank's business activity, and that it was the bank's regular business practice to make and keep such records. Matthews v. Wells Fargo Bank, N.A., 335 Ga. App. 526, 782 S.E.2d 312 (2016).

Trial court did not err in admitting cell phone records because the information was obtained from a third party and a proper foundation was laid pursuant to the business records exception. Marchman v. State, 299 Ga. 534, 787 S.E.2d 734 (2016).

3. Applications and Illustrations

Business records of predecessor entity. — Attorney-in-fact for the entity serving as manager of a lender's assignee could authenticate the business records of the lender and the assignee in support of an action to collect on three promissory notes, pursuant to O.C.G.A. § 24-8-803(6); however, as to the third note, the affidavit failed to attach the payment history, and that claim failed. Ware v. Multibank 2009-1 RES-ADC Venture, LLC, 327 Ga. App. 245, 758 S.E.2d 145 (2014).

Because the corporate victim prepared a loss prevention report in every instance of shoplifting, concerns about reliability and trustworthiness were minimized and the report was admissible as a business record. Thompson v. State, 332 Ga. App. 204, 770 S.E.2d 364 (2015), cert. denied, No. S15C1245, 2015 Ga. LEXIS 562 (Ga. 2015).

Records of debtor's account. — In a creditor's action on open account, the creditor's business records showing the debtor's account and bank records showing wire transfers made by the debtor were sufficient under O.C.G.A. § 24-8-803(6) to support its contention that it was entitled to summary judgment as to the debtor's liability; because of inconsistencies, however, further proceedings were required to determine the amount the debtor owed. SKC, Inc. v. eMag Solutions, LLC, 326 Ga. App. 798, 755 S.E.2d 298 (2014).

Cell phone records were properly admitted under former O.C.G.A. § 24-3-14(b) after the records custodian testified that one of the records at issue listed the locations of all the company's cell phone towers during a span that included the date of the crimes and the other records showed the incoming and outgoing calls for the defendant's cell phone. Kilgore v. State, 295 Ga. 729, 763 S.E.2d 685 (2014) (decided under former O.C.G.A. § 24-3-14).

Credit agreement and statements.

Trial court did not err by allowing into evidence as business records two spreadsheets regarding the alleged transactions supporting the defendant's convictions for theft by taking because the documents were created as part of the ordinary course of business and a proper foundation was laid for their admission. Raymond v. State, 322 Ga. App. 404, 745 S.E.2d 689 (2013) (decided under former O.C.G.A. § 24-3-14).

Use of a LeadsOnline application in prosecution for impersonating officer. — Defendant's conviction for impersonating a law enforcement officer was affirmed and the trial court did not err by admitting into evidence a

computer-generated record of the defendant's application to LeadsOnline because the trial court properly found that the application fell within the business records exception to the hearsay rule and had been properly authenticated as the defendant had actual notice before trial that the state intended to authenticate via a self-authentication declaration. Chase v. State, 337 Ga. App. 449, 787 S.E.2d 802 (2016).

Log sheet with handwritten intoxilyzer results admissible. — State's motion in limine to introduce a log sheet with handwritten intoxilyzer results was granted as the log sheet was admissible under the business records exception to the hearsay rule because the investigator averred that every officer at the county jail who performed intoxilyzer breath tests was required to record the officer's name, the name of the offender, the date of the test, the offender's driver's license number, the arresting officer's name, and the results of the two samples making up the test; thus, the log sheet was made at or near the time of the intoxilyzer tests, by a person with personal knowledge and a business duty to report the results, and kept in the course of the regularly conducted sheriff's office's activity. Jones v. State, 345 Ga. App. 14, No. A17A1532, 2018 Ga. App. LEXIS 169 (2018).

9-1-1 call. — 9-1-1 recording was admissible as a business record as it was made by the county 9-1-1 center and accompanied in the record by a written declaration certifying it met the requirements for admissibility and, thus, trial counsel was not ineffective for failing to challenge the recording's admission. Gregory v. State, 342 Ga. App. 411, 803 S.E.2d 367 (2017), cert. denied, No. S18C0007, 2018 Ga. LEXIS 186 (Ga. 2018).

4. Foundation for Admission

Officer's testimony admissible to prove absence of public record. — Officer's testimony about the search of the Clayton County, Georgia, database was admissible to prove the absence of a public record or entry under O.C.G.A. § 24-8-803(10) because the officer testified that the officer helped to maintain the records of crimes that occurred in Clayton County and that the officer regularly accessed the database to get information about victims and defendants used in the search. Tran v. State, 340 Ga. App. 546, 798 S.E.2d 71 (2017).

Recorded Recollections

3. Illustrations

Recollection refreshed.

Victim's statements that the victim was the person in the video, remembered giving a statement, had knowledge as to what the victim was talking about, told the truth when giving the statement, and things were fresh in the victim's mind when giving the statement were sufficient to establish that the videotaped statement concerned a matter about which the victim had knowledge but at trial had insufficient recollection. Pierce v. State, 302 Ga. 389, 807 S.E.2d 425 (2017).

Public Records and Reports

Admission of recall request letter from National Highway Traffic Safety Administration Office of Defect Investigation. — In a vehicle collision that resulted in the death of the plaintiffs' four-year-old child, the trial court did not abuse the court's discretion in admitting evidence of the National Highway Traffic Safety Administration Office of Defect Investigation's recall request letter under the public records exception to the hearsay rule because, inter alia, some of the findings in the recall request were not labeled as tentative, including the findings that the defendant was aware of the safety benefits of placing the tank in front of the rear axle; and that a 1993 study of fire related deaths in rear crashes concluded that the increasing relocation of tanks ahead of the rear axle had a substantial effect on the reduction of those deaths in rear impacts. Chrysler Group, LLC v. Walden, 339 Ga. App. 733, 792 S.E.2d 754 (2016), aff'd, No. S17G0832, 2018 Ga. LEXIS 154 (Ga. 2018).

Notice and letter of unhabitability admissible as public records. — Trial court erred in granting the landlord and property management company (defen-

Public Records and Reports (Cont'd)

dants) summary judgment on their counterclaim against the tenants because the tenants provided some evidence that the defendants failure to maintain the apartment in good repair rendered the apartment unfit for habitation, forcing the tenants to vacate the apartment, including the notice and letter from the city of unhabitability, which were admissible under the public records and reports exception to the hearsay rule. Ellis v. Hartford Run Apartments, LLC, 335 Ga. App. 118, 779 S.E.2d 103 (2015), cert. denied, No. S16C0607, 2016 Ga. LEXIS 289 (Ga. 2016).

Investigative report into public school student's death admissible. — In a suit against a public school teacher arising out of the death of a student in the teacher's classroom, evidence from an independent investigative report on the student's death was admissible on a motion for summary judgment under O.C.G.A. § 24-8-803(8)(c), given there was no reason to question its trustworthiness. Barnett v. Atlanta Indep. Sch. Sys., 339 Ga. App. 533, 792 S.E.2d 474 (2016), aff'd in part and vacated in part, 302 Ga. 845, 809 S.E.2d 813 (2018).

Investigative report into death of public school student. — In a suit by a deceased high school student's parents against a teacher for leaving the classroom unsupervised, an investigator's report was admissible in evidence under O.C.G.A. § 24-8-803(8)(c), although witnesses interviewed in the report did not testify; such factual findings resulting from an investigation made pursuant to authority granted by law were admissible unless a lack of trustworthiness was shown. Barnett v. Atlanta Independent School System, 339 Ga. App. 533, 792 S.E.2d 474 (2016), aff'd in part and vacated in part, 302 Ga. 845, 809 S.E.2d 813 (2018).

Admission of gang members' convictions. — O.C.G.A. § 16-15-9 was declared unconstitutional on the statute's face under the Sixth Amendment's confrontation clause to the extent that the statute authorized the admission of the convictions of non-testifying non-parties as evidence of a criminal street gang; further, other alleged gang members' convictions were not admissible as business records or public records because those records were testimonial. State v. Jefferson, 302 Ga. 435, 807 S.E.2d 387 (2017).

Interest in Property

3. Admissibility of Recorded Instrument

Uses of recorded deed. — In a suit asserting trespass, ejectment, and other claims, the adjoining property owner failed to object to the use of the recorded deeds and easement by the trial court under the hearsay exception of O.C.G.A. § 24-8-803(14); thus, the issue was waived on appeal. Amah v. Whitefield Acad., Inc., 331 Ga. App. 258, 770 S.E.2d 650 (2015).

RESEARCH REFERENCES

ALR. — Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through interpreter — state cases, 97 A.L.R.6th 567.

Hearsay objections to admission of text messages or testimony thereof, 10 A.L.R.7th 4.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter — federal cases, 91 A.L.R. Fed. 2d 187.

Admissibility of statement under Fed. R. Evid. 803(5), providing for recorded-recollection exception to hearsay rule, 93 A.L.R. Fed. 2d 79.

24-8-804. Hearsay rule exceptions; declarant unavailable.

JUDICIAL DECISIONS

Analysis

General Consideration
Declarations Against Interest
1. Deceased Persons
Deceased Persons
5. Procedure
b. Witnesses
Statements by Third Parties

General Consideration

Constitutional right of confrontation.

Defendant's constitutional right to confront the defendant's accusers was violated because the state failed to show that the victim and the minor child were unavailable to testify at trial; and because the victim's and minor child's out-of-court statements to the police officer at the scene were testimonial in nature as, during the time the victim and minor child were being questioned by the police officer, the defendant remained at the residence at the officer's request and posed no apparent threat to anyone; and the victim and the minor child made statements to the officer under circumstances which objectively indicated that the primary purpose of the interrogation was to establish the facts necessary for criminal prosecution. Legree v. State, 344 Ga. App. 793, No. A17A1782, 2018 Ga. App. LEXIS 139 (2018).

Applicability of new rule on retrial. — Because the new evidence statute regarding the unavailability of a witness based on a defendant's engaging or acquiescing in wrongdoing is a procedural statute and would apply to a retrial, even if the trial court erroneously admitted testimonial and non-testimonial hearsay under the prior evidence code, the same evidence would be properly admitted at a second trial due to a procedural change in the laws of evidence. Brittain v. State, 329 Ga. App. 689, 766 S.E.2d 106 (2014).

Declarations Against Interest

1. Deceased Persons

Dying declaration properly included in determination of sufficiency of evidence. — Because a statement, which qualified as a dying declaration is admissible as an exception to the hearsay rule, the testimony regarding the victim's dying declarations was properly included in the supreme court's determination of the sufficiency of the evidence, as a whole, to support the convictions. Hager v. State, 297 Ga. 112, 772 S.E.2d 692 (2015) (decided under former O.C.G.A. § 24-3-6).

Declarations held properly admitted.

Victim's non-verbal statements to the victim's sibling and the victim's wife were admissible as dying declarations under former O.C.G.A. § 24-3-6 as the victim was conscious of the victim's dire condition at the time the victim made the non-verbal statements inculpating the defendant as the shooter as the victim prayed with the victim's spouse for forgiveness and died a few days later due to complications related to the multiple serious injuries. Wiggins v. State, 295 Ga. 684, 763 S.E.2d 484 (2014) (decided under former O.C.G.A. § 24-3-6).

Deceased Persons

5. Procedure

b. Witnesses

Grandmother's testimony admissible due to forfeiture-by-wrongdoing. — Trial court did not err by admitting into evidence statements made by the defendant's grandmother to police pursuant to the forfeiture-by-wrongdoing exception to the rule against hearsay because the defendant sent correspondence to the grandmother calling the grandmother a snitch and screamed at the grandmother not to talk to the state or say anything to the point where the grandmother was shaking and claimed not to remember the statement to police. Hendrix v. State, No. S18A0382, 2018 Ga. LEXIS 207 (Apr. 16, 2018).

Statements by Third Parties

Criminal confessions.

Trial court did not abuse the court's discretion in excluding the testimony of the defendant's roommate that an inmate told the roommate that the inmate and another man committed the murder because the inmate denied that the inmate had anything to do with the murder and the inmate further denied ever making any statement to the roommate admitting to the murder; and the police conducted an independent investigation of both the inmate and the other man based on the roommate's allegations and found no relevant evidence in the men's apartments to connect them to the victim's murder, and they did not find any fingerprint evidence to connect the men to the white truck used as the getaway vehicle. Roscoe v. State, 302 Ga. 19, 805 S.E.2d 11 (2017).

Statements that conveyances had been made for purpose of support of widow. — In a widow's suit seeking to impose a constructive trust on accounts and assets conveyed by the decedent to the decedent's executor, the trial court did not err in excluding hearsay testimony of the widow's daughter and a close friend of the decedent stating that the assets had been conveyed to the executor for the care and support of the widow. The testimony was vague and was not proven to be admissible under the trustworthiness exception of O.C.G.A. § 24-8-807. Rabun v. Rabun, 341 Ga. App. 878, 802 S.E.2d 296 (2017).

RESEARCH REFERENCES

ALR. — Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through interpreter — state cases, 97 A.L.R.6th 567.

Hearsay objections to admission of text messages or testimony thereof, 10 A.L.R.7th 4.

Admissibility of testimony concerning extrajudicial statements made to, or in presence of, witness through an interpreter — federal cases, 91 A.L.R. Fed. 2d 187.

24-8-805. Hearsay within hearsay.

JUDICIAL DECISIONS

Double hearsay inadmissible in property action.

Even if the investigator's report was admissible under the business records exception to the hearsay rule, the summary of the statement of a student was not subject to an exception and, thus, both parts of the hearsay were not covered as required. Tuggle v. Rose, 333 Ga. App. 431, 773 S.E.2d 485 (2015), cert. denied, No. S15C1862, 2015 Ga. LEXIS 813 (Ga. 2015).

24-8-806. Attacking and supporting credibility of a declarant.

JUDICIAL DECISIONS

Prior inconsistent statement. — Trial court did not err in admitting extrinsic evidence of the cousin's prior inconsistent statements because the state complied with the prerequisites of O.C.G.A. § 24-6-613(b) as both the prosecutor and defense counsel examined the witness as to each of the prior inconsistent statements and the witness was afforded an opportunity to explain or to deny the prior inconsistent statements, which entitled the prosecutor to ask leading questions. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290 (2014).

24-8-807. Residual exception.

JUDICIAL DECISIONS

Necessity.

Trial counsel was not ineffective for failing to object to the admission of the victim's hearsay statements to the extent that the statements expressed the victim's opinions regarding the defendant's racial and cultural bias because trial counsel's vigorous efforts to exclude the totality of the victim's hearsay statements as ineligible for admission under the necessity exception were successful in large measure and greatly narrowed the scope of the hearsay evidence that was ultimately admitted; and the defendant could not establish prejudice from that testimony as it was cumulative of other evidence the state adduced regarding the defendant's racial and cultural bias, including, but not limited to, the damning testimony by the jailhouse informant. Rai v. State, 297 Ga. 472, 775 S.E.2d 129 (2015) (decided under former O.C.G.A. § 24-3-1(b)).

Victim's aunt, grandmother, and sister were allowed to testify about the defendant's disapproval of the relationship of the victim and the defendant's son based on racial and cultural differences, and the fact that the victim and the defendant's son moved to Atlanta to get away from the defendant and the defendant's family because the victim was unavailable to testify; the nature and extent of the defendant's negativity toward the victim, the defendant's daughter-in-law, were essential to explaining the defendant's motivation in orchestrating the victim's murder; and the statements bore sufficient indicia of trustworthiness, in that the statements were made to family members who each shared a close and confidential relationship with the victim. Rai v. State, 297 Ga. 472, 775 S.E.2d 129 (2015) (decided under former O.C.G.A. § 24-3-1(b)).

Statements admissible as trustworthy. — Admitting the victim's hearsay statements pursuant to a residual exception to the hearsay rule was not reversible error because the victim's statements to the victim's mother during the victim's hospitalization were trustworthy given the victim's close relationship with the mother. Tanner v. State, 301 Ga. 852, 804 S.E.2d 377 (2017).

Admission of necessity.

Testimony of the victim's sons and a coworker as to the statements the victim made regarding the victim's relationship with the defendant were admissible under the necessity exception to the hearsay rule as the victim enjoyed a close relationship with the victim's sons and routinely discussed personal issues with the coworker, and the statements were the only evidence of the victim's longstanding intention to leave the defendant. Faircloth v. State, 293 Ga. 134, 744 S.E.2d 52 (2013).

Trial court did not err by admitting the testimony of the victim's wife under the necessity exception of O.C.G.A. § 24-8-807 as defense counsel was permitted to recross-examine the witness to challenge the reliability of the victim's out-of-court statement and even if it were error to have admitted the wife's testimony concerning the victim's out-of-court statement about a previous fight with the

defendant over a drug debt, the Supreme Court of Georgia found that it was highly probable that the error did not contribute to the judgment since it was merely cumulative of other evidence. Bulloch v. State, 293 Ga. 179, 744 S.E.2d 763 (2013).

Hearsay statements by a murder victim were necessary

Trial court did not err in admitting hearsay statements made by the deceased victim to a girlfriend in two cell phone calls at the time of the victim's murder based on their long acquaintance (10 years) and the fact they had been living together for 11 months, under the necessity exception to the hearsay rule. Taylor v. State, 296 Ga. 761, 770 S.E.2d 805 (2015).

Deceased victim's statements to close friend. — Trial court did not abuse the court's discretion when the court allowed a witness's testimony that the victim told the witness that the victim had a fight with the defendant under the residual hearsay exception because the witness testified that, when the witness went to pick the victim up from a club, the witness saw that the victim had a busted lip, a missing tooth, and broken eyeglasses; the victim explained the victim's condition to the witness, whom the victim had known for three decades and with whom the victim had maintained a close relationship, by stating the victim was in a fight with the defendant; and the evidence was more probative of the relationship troubles between the defendant and the victim than other evidence in the case. Miller v. State, 303 Ga. 1, 810 S.E.2d 123 (2018).

Statements of deceased witness admitted.

Under former O.C.G.A. § 24-3-1, testimony by the victim's husband about a conversation with the victim just prior to the crime was admissible because the victim was deceased, the statements about who was present in the store immediately before the victim's death were relevant, and the statement was trustworthy, having been made to the victim's husband, with whom the victim often spoke daily about matters at the store. Johnson v. State, 294 Ga. 86, 750 S.E.2d 347 (2013) (decided under former O.C.G.A. § 24-3-1).

Grandchild's testimony regarding a victim's statements were admissible under the residual exception to the hearsay rule, because the victim died prior to trial, the statements to the grandson provided a material fact, that the victim wired money under a false pretense, the circumstances provided sufficient guarantees of trustworthiness due to the close relationship, there were no other comparable evidence that the transfer was induced by fraud, and the state gave pretrial notice to the defendant. Akintoye v. State, 340 Ga. App. 777, 798 S.E.2d 720 (2017).

Requirement of trustworthiness satisfied. — In a malice murder case, the victim's statements to friends were admissible under the residual hearsay exception because the statements were trustworthy as the statements consistently spoke to the defendant's abusive, controlling, and violent behavior towards the victim during their marriage and during the victim's efforts to leave the defendant; and the victim's statements about the abusive threats that the defendant made to the victim, that harm to the victim would not be caused by the victim, and the victim's fears that the defendant might do something to the victim were trustworthy and admissible as those statements also stemmed from the domestic abuse about which the victim had been informing the victim's close confidantes. Jacobs v. State, No. S17A1892, 2018 Ga. LEXIS 144 (Mar. 5, 2018).

Evidence admissible under necessity exception.

When the defendant was convicted of various offenses for denying the defendant's relationship with the man who murdered the defendant's husband, the trial court did not err by admitting into evidence under the necessity exception to the hearsay rule a witness's testimony regarding non-testimonial statements made to the witness by the man about the man's relationship with the defendant because there were circumstantial guarantees of trustworthiness; the statements were evidence of a material fact and more probative than other evidence the state could procure; and the evidentiary rules and the interests of justice were best served by admission of the statements. Sneiderman v. State, 336 Ga. App. 153,

784 S.E.2d 18 (2016), overruled on other grounds by Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

Pursuant to the necessity exception, the hearsay statement of the first victim's cousin that the first victim stated that the defendant was asking the first victim some questions about the defendant's girlfriend, the second victim, and stated that the defendant thought the first victim was messing around with the defendant's girlfriend, and that the first victim did not feel safe around the defendant was admissible because the first victim was clearly unavailable as the defendant had killed the first victim; the first victim's statement was relevant to the defendant's motive for shooting the first victim; and the first victim's statement bore significant indicia of trustworthiness. Williams v. State, 299 Ga. 209, 787 S.E.2d 187 (2016) (decided under former O.C.G.A. § 24-3-1(b)).

Requirements of necessity and guaranty of trustworthiness satisfied.

Trial court did not err in allowing the victim's cousin and the cousin's girlfriend to testify at trial about prior difficulties between the victim and the defendant pursuant to the necessity exception to the rule excluding hearsay, and the testimony did not violate the defendant's right to confrontation, because the trial court concluded the proffered testimony of the witnesses was reliable and trustworthy as it found the victim was like a sibling to the witnesses, and because any alleged harm from the admission of that testimony was mitigated by the fact that both witnesses testified the victim and the defendant continued to be friends in spite of their prior difficulties. Thompson v. State, 294 Ga. 693, 755 S.E.2d 713 (2014) (decided under former O.C.G.A. § 24-3-1(b)).

Statements failed to meet necessity exception.

Out-of-court statements identifying the appellant as the man who beat the witness's stepson did not appear to be the most probative evidence to establish the appellant's identity as the killer because the witness's spouse testified directly to that same fact, but the statements were properly admitted under the hearsay exception for excited utterances since the statements were made just minutes after the stepson had been brutally attacked. Wilson v. State, 295 Ga. 84, 757 S.E.2d 825 (2014).

Trial court did not abuse the court's discretion in ruling that the police reports about the three separate incidents of violence allegedly committed by the co-indictee in Baltimore in 1998 were inadmissible under the necessity exception to the hearsay rule because, even assuming that the authors of the police reports and the victims and witnesses whose statements were recounted in two of the reports were all outside Georgia and thus unavailable, the defendants failed to establish the necessary guarantees of trustworthiness as the only information about violent acts contained in the police reports of the first two incidents was double hearsay, and there was no reliable evidence that the co-indictee was the person identified in the police reports. Brown v. State, 295 Ga. 804, 764 S.E.2d 376 (2014) (decided under former O.C.G.A. § 24-3-1(b)).

Trial court did not err in excluding a witness's hearsay statement under the necessity exception to the hearsay rule because the witness's statement was not the only evidence that could establish that the co-indictee's gun was actually capable of firing as two eyewitnesses testified that the witnesses believed the co-indictee actually fired shots, and the witness's statement did not prove that the co-indictee's gun was capable of firing because the witness never said that the witness saw the gun fire. Brown v. State, 295 Ga. 804, 764 S.E.2d 376 (2014) (decided under former O.C.G.A. § 24-3-1(b)).

Requirements of necessity and guaranty of trustworthiness not satisfied.

In a widow's suit seeking to impose a constructive trust on accounts and assets conveyed by the decedent to the decedent's executor, the trial court did not err in excluding hearsay testimony of the widow's daughter and a close friend of the decedent stating that the assets had been conveyed to the executor for the care and support of the widow. The testimony was vague and was not proven to be admissible under the trustworthiness exception of

O.C.G.A. § 24-8-807. Rabun v. Rabun, 341 Ga. App. 878, 802 S.E.2d 296 (2017).

Cited in Thompson v. State, 302 Ga. 533, 807 S.E.2d 899 (2017).

ARTICLE 2

ADMISSIONS AND CONFESSIONS

24-8-820. Testimony as to child's description of sexual contact or physical abuse.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION

General Consideration

Admission of out-of-court outcry statement. — It is not error for a trial court to admit an out-of-court outcry statement that meets the statutory requirements of O.C.G.A. § 24-8-820. Latta v. State, 341 Ga. App. 696, 802 S.E.2d 264 (2017).

Viewing of video during deliberations. — Trial court did not err in permitting the jury to view the video tape of the victim's forensic interview as the jury was entitled to consider the victim's out-of-court statements as substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-3-16. State v. Martinez-Palomino, 329 Ga. App. 304, 764 S.E.2d 886 (2014) (decided under former O.C.G.A. § 24-3-16).

Application

Spontaneous statement admissible. In a case decided under former O.C.G.A. § 24-3-16, a victim's out-of-court statements to a forensic interviewer in group therapy and to the victim's family members had sufficient indicia of reliability as the statements appeared to be fairly spontaneous, without coaching, and, thus, the statements were properly admitted. Bowman v. State, 332 Ga. App. 766, 774 S.E.2d 805 (2015) (decided under former O.C.G.A. § 24-3-16).

Evidence admissible although child available to testify.

Defendant's conviction for aggravated child molestation under O.C.G.A. § 16-6-4 was affirmed because the trial court did not err by admitting the victim's prior out-of-court statement made in the initial interview with the police investigator, pursuant to O.C.G.A. § 24-8-820, that the victim believed that the bleeding from the victim's vagina had been caused by the defendant. Robinson v. State, 342 Ga. App. 624, 805 S.E.2d 103 (2017).

Testimony by the mother of a child-molestation victim, etc.

State complied with former O.C.G.A. § 24-3-16 by having the eight-year-old sexual molestation victim present at the courthouse and the trial court found indicia of reliability in a video interview of the child and the mother's testimony as to what the child told her when she interrupted the defendant with his pants down in a closed room with the child; the defendant did not object on Confrontation Clause grounds, waiving that issue. Matabarahona v. State, 335 Ga. App. 25, 780 S.E.2d 731 (2015), cert. denied, No. S16C0507, 2016 Ga. LEXIS 220 (Ga. 2016) (decided under former O.C.G.A. § 24-3-16).

Cumulative testimony concerning victim's statements held harmless error.

Habeas court properly denied the appel-

lant relief based on ineffective assistance because the appellant did not question appellate counsel regarding that allegation and so there was no record of why appellate counsel did not pursue the specific issue at the motion for new trial stage or on direct appeal; plus, the habeas court resolved the allegation by determining the admission of the child's videotaped forensic interview was harmless because it was cumulative of the child's trial testimony. Cobb v. Hart, 295 Ga. 89, 757 S.E.2d 840 (2014) (decided under former O.C.G.A. § 24-3-16).

Effective assistance of counsel.

Trial counsel was not ineffective in failing to object to the testimony of the victim's friend to whom the victim first reported that the defendant had raped the victim, to the testimony of the legal guardian's daughter who relayed a similar outcry, or to the testimony of the victim's legal guardian, who described the conversation in which the victim finally disclosed the abuse, because each of the conversations transpired before the victim turned 16 years old, the statements were admissible under the Child Hearsay Statute, and any objection by counsel would not have been sustained. Brown v. State, 336 Ga. App. 428, 785 S.E.2d 84 (2016).

Trial counsel was not ineffective for failing to object to testimony from the victim's mother and father about the victim's statements to them about the defendant's actions as the Child Hearsay Statute, O.C.G.A. § 24-8-820, permitted evidence of the victim's outcry statements and forensic interview to be admitted even though it was bolstering because the victim was younger than 16 years old when the victim made the out-of-court statements; the statements described acts of sexual contact performed on the victim or in the victim's presence by the defendant; the state provided the defendant with notice prior to trial of the stae's intention to use the out-of-court statements; the victim testified at trial; and the mother and father were subject to cross-examination. Jackson v. State, 344 Ga. App. 618, 810 S.E.2d 672 (2018).

Statement to doctors on identity of assailant. — In a child molestation, incest, aggravated sexual battery, statutory rape, and aggravated child molestation case, in which the victim and the victim's mother could not be located for the trial, the trial court did not err when the court found that those portions of the mother's statements to two doctors that identified the defendant as the perpetrator of the alleged crimes did not fall within the hearsay exception for medical diagnosis or treatment because the statements to the doctors regarding the identity of the assailant were not reasonably pertinent to the victim's diagnosis or treatment; and the identification statements were admissible under the Child Hearsay Statute, O.C.G.A. § 24-8-820. State v. Almanza, 344 Ga. App. 38, 807 S.E.2d 517 (2017).

Statements admissible.

Admission of testimony from the victim's mother and a police officer as to what the victim told them about the defendant's inappropriate contact with the victim was proper as the victim was only 10 years old, the victim testified about the abuse, and both the mother and the officer were available for cross-examination about the out-of-court statements. McMurtry v. State, 338 Ga. App. 622, 791 S.E.2d 196 (2016).

Trial court did not err in allowing testimony of the victim's aunt, the victim's mother, and the investigating detective regarding statements the victim made to them regarding the defendant's abuse as such evidence was admissible under the Child Hearsay Statute (see now O.C.G.A. § 24-8-820). Laster v. State, 340 Ga. App. 96, 796 S.E.2d 484 (2017) (decided under former O.C.G.A. § 24-3-16).

24-8-821. Admissions in pleadings.

JUDICIAL DECISIONS

Admissions of fact in the pleadings can always be taken advantage of, etc.

Mesothelioma plaintiff's allegations in the plaintiff's complaint that the plaintiff was exposed to asbestos manufactured or distributed by numerous companies were admissible as admissions in judicio under O.C.G.A. § 24-8-821, even when withdrawn, and the manufacturers remaining in the suit could use these admissions as evidence that fault should be apportioned. Georgia-Pacific, LLC v. Fields, 293 Ga. 499, 748 S.E.2d 407 (2013).

Rule only applies to factual admissions.

Doctor's withdrawn admission that the doctor executed the guaranty did not create a genuine issue of material fact as to whether the doctor was personally bound by it as the doctor's withdrawn admission that the doctor guaranteed payment of all sums owing under the lease was only an opinion or conclusion as to the legal effect of that instrument and could not be used to the lessor's advantage. Citrus Tower Blvd. Imaging Ctr. v. David S. Owens, MD, PC, 325 Ga. App. 1, 752 S.E.2d 74 (2013).

Cannot take judicial notice of matters subject to proof. — Trial court did not err in denying the defendant's request to take judicial notice of certain findings of fact and conclusions of law made by the trial court in the portion of the court's order granting the defendant's summary judgment motion regarding the plaintiff's premises liability claim because the trial court could not take judicial notice of matters that were the subject of proof in the case. Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 760 S.E.2d 674 (2014).

Withdrawal of admission by amendment of pleadings.

Plaintiff's motion for partial summary judgment was improperly granted on the plaintiff's claim regarding breach of the stockholders' guaranties because the guaranties did not reference the corporate debtor, but, rather, referenced its doing business as designation; strictly construing the guaranties, the stockholders were not obligated to guarantee the debt of the corporate debtor; the trial court erred in relying on the withdrawn admissions as the admissions went to the legal effect of the guaranties and were not evidence of whether the written guaranties complied with the statute of frauds or the requirement that the debtor be identified; and the plaintiff's claim for attorney fees was improperly granted as the guaranties were unenforceable. Lynchar, Inc. v. Colonial Oil Industries, Inc., 341 Ga. App. 489, 801 S.E.2d 576 (2017).

Admissions in brief used to find contempt. — In a child custody dispute and contempt proceeding arising out of the parent's refusal to participate in a court-ordered custody evaluation, the trial judge could find the parent in contempt based on the parent's response to the motion in which the parent expressly defied the evaluation order and declared to be justified in refusing to sign the required documents. Murphy v. Murphy, 330 Ga. App. 169, 767 S.E.2d 789 (2014).

Cited in Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC, 325 Ga. App. 694, 754 S.E.2d 655 (2014); First Citizens Bank & Trust, Inc. v. Ruddell, 330 Ga. App. 82, 766 S.E.2d 538 (2014); Ga. Ports Authority v. Lawyer, 342 Ga. App. 161, 803 S.E.2d 94 (2017).

24-8-822. Right to have whole conversation heard.

JUDICIAL DECISIONS

All of confession must be admitted.

Because the earlier exculpatory portions of the defendant's transcribed statement were relevant as to both whether the

defendant committed the rape and whether the defendant's statement was voluntary, the trial court violated the rule of completeness and abused the court's discretion when the court excluded those earlier portions of that statement; however, the error was harmless because the admitted and improperly excluded evidence showed overwhelmingly that the defendant was guilty of rape, whether principally or as a party to the crime, rendering it highly probable that any error in failing to admit the earlier portions of the defendant's statement did not contribute to the jury's verdict. Morales v. State, 337 Ga. App. 614, 788 S.E.2d 535 (2016).

Admission of partial statement upheld.

State's introduction of a partial recording of a phone call that the defendant made to the defendant's mother did not violate the rule of completeness because the portion of the call in which the defendant told the mother about a potential plea offer was unrelated to the later conversation about the defendant's uncle, who was an eyewitness to the shooting. Jackson v. State, 301 Ga. 866, 804 S.E.2d 367 (2017).

Trial court did not err by allowing the state to introduce the defendant's recorded interrogation into evidence with the defendant's statements that the victim told the defendant that the victim was almost 18 years old and that the defendant would not have had sex with the victim if the defendant had known that the victim was younger redacted as the defendant's belief as to the victim's age was not relevant because it was not an essential element of either statutory rape or child molestation; mistake of fact regarding the victim's age was not a defense to either crime; and any statement the victim might have given regarding the victim's age was not admissible for impeachment purposes. West v. State, 344 Ga. App. 274, 808 S.E.2d 914 (2017).

Death of party making statements.

At the defendant's trial for DUI and battery, the trial court did not err in excluding admission of the sheriff's return call to the homeowner, who then admitted that punching the defendant's spouse was accidental, as hearsay, because the emergency leading to the homeowner's two 911 calls had then abated, making the statement testimonial, and the homeowner had later died. Further, the defendant was acquitted of the battery charge. Danley v. State, 342 Ga. App. 61, 802 S.E.2d 851 (2017).

Refusal to utilize remainder of statements.

Trial court erred in excluding testimony from a witness that, during a lengthy conversation with the defendant after the defendant killed the defendant's wife, the defendant told the witness the wife had been unfaithful, that the defendant did not mean for the wife's death to happen, and the defendant loved the wife, because such testimony was admissible under the rule of completeness. Allaben v. State, 299 Ga. 253, 787 S.E.2d 711 (2016).

24-8-823. Admissions and confessions received with care; no conviction on uncorroborated confession.

JUDICIAL DECISIONS

Analysis

Corroboration
Instructions

Corroboration

Sufficiency of corroboration.

Evidence was sufficient to convict the defendant of armed robbery because the defendant admitted to committing the armed robbery and there was sufficient evidence corroborating the defendant's confession as the victim was working at a gas station; the defendant, with whom the victim was familiar with as a repeat customer, entered the gas station and asked

Corroboration (Cont'd)

the victim to retrieve something from behind the counter; when the victim turned the victim's back to the counter, the defendant, who was not disguised, was pointing a gun at the victim; the defendant threatened to kill the victim and demanded that the victim give the defendant the cash from the register; the victim complied; and the victim identified the defendant from a photo line-up and in court. Spratlin v. State, 336 Ga. App. 872, 785 S.E.2d 427 (2016).

Evidence demonstrating that the defendant shot and killed the victim did not consist only of the defendant's uncorroborated confessions to the defendant's aunt and ex-wife because the defendant did not make confessions, but made admissions; and, even if the defendant's statements were confessions, the corroborating evidence was ample as the victim obtained a protective order because the victim feared the defendant; the defendant stated that if the defendant could not have the victim no one could; the defendant argued with the victim only minutes before the defendant shot the victim; and the defendant followed the victim as the victim left a close friend's place of employment and continued to do so as the victim drove down Washington Street. McMullen v. State, 300 Ga. 173, 794 S.E.2d 118 (2016).

Evidence was sufficient to convict the defendant of felony murder in connection with the shooting death of the defendant's accomplice in an attempted armed robbery because the defendant told the accomplice's brother that the defendant, the accomplice, and another individual went to an apartment complex with the intent to rob the putative armed robbery victim, that the defendant knew the accomplice was armed, and that the accomplice was shot during the confrontation with the putative victim; the defendant admitted to being a party to the attempted armed robbery; and there was evidence corroborating the defendant's confession, including participation with the accomplice in renting the car found at the crime scene. Muckle v. State, 302 Ga. 675, 808 S.E.2d 713 (2017).

Evidence was sufficient to convict the defendant of malice murder, aggravated assault, and possession of a firearm in commission of a felony because, whether the defendant's three statements that the defendant shot two people amounted to confessions or merely admissions, other evidence sufficiently corroborated the defendant's participation in the crimes as one witness saw the defendant don a mask and jacket and take out a gun immediately before the shooting; a mask and jacket were recovered from the scene, with the defendant's keys in the pocket; and a trash bag outside of the defendant's former apartment contained a box of the same brand and caliber of ammunition used in the murder, along with personal papers in the defendant's name. Mitchell v. State, No. S18A0193, 2018 Ga. LEXIS 204 (Apr. 16, 2018) (decided under former O.C.G.A. § 24-3-53).

Confession found to be sufficiently corroborated.

Evidence was sufficient to convict the defendant of necrophilia because the state presented evidence corroborating the defendant's confession; the victim's body was found in the room registered to the defendant at the hotel where the defendant told the police the defendant took the victim; and the physical evidence found at the crime scene and testimony from the medical examiner corroborated the defendant's statements about the manner in which the defendant killed the victim, the items used to kill the victim, and the multiple days the defendant spent with the victim's body after the defendant killed the victim. Norman v. State, 298 Ga. 344, 781 S.E.2d 784 (2016) (decided under former O.C.G.A. § 24-3-53).

Instructions

Failure to give instruction.

Failure to give a jury charge regarding the corroboration of confessions did not constitute plain error because the defendant's statements were admissions, not confessions, as the defendant did not confess to the murder or the arson; and, even if the defendant's statements to the witnesses were confessions, the defendant did not show that the error affected the outcome of the proceedings as there was ample corroborating evidence, including a

witness's testimony that the defendant was alone with the victim shortly before the murder; testimony that a neighbor saw the defendant flee through the neighbor's yard, and the defendant's request on a recorded tape that two witnesses fabricate an alibi defense for the defendant for the time of the crime. English v. State, 300 Ga. 471, 796 S.E.2d 258 (2017) (decided under former O.C.G.A. § 24-3-53).

24-8-824. Only voluntary confessions admissible.

JUDICIAL DECISIONS

Analysis

Voluntariness
Procedural Considerations
1. Use as Evidence
3. Instructions
4. Review

Voluntariness

Totality of the circumstances.

Trial court did not err when the court admitted evidence of a custodial statement that the defendant gave after being arrested as under the totality of the circumstances the recording of the interview supported the trial court's finding that the defendant's statement was not given as a result of any promise of reduced criminal punishment as the defendant continued to deny involvement and there was no showing that the defendant interpreted the detective's statement as an offer of reduced punishment. Finley v. State, 298 Ga. 451, 782 S.E.2d 651 (2016).

Hope of reward or fear of punishment which renders confession inadmissible, etc.

Defendant juvenile's incriminating statements to police were improperly admitted as the statements were not voluntary because, in the second interview, the detective grew frustrated with the defendant's denials of involvement in any other burglaries; and the detective told the defendant to tell the truth about those burglaries, explicitly threatening the defendant that the defendant would be charged with the other burglaries if the defendant did not tell the truth, and promising the defendant not to do anything if the defendant did tell the truth; thus, the defendant's confession was induced by another by the slightest hope of benefit as the defendant was told that confessing to the crime would result in not being charged at all. Jones v. State, 344 Ga. App. 774, No. A17A1204, 2018 Ga. App. LEXIS 135 (2018).

Offer to obtain psychologist.

Trial court did not err in suppressing the defendant's statements during the first two interviews because those statements were induced by promises related to the potential criminal charges the defendant faced. State v. Chulpayev, 296 Ga. 764, 770 S.E.2d 808 (2015).

Hope of benefit not created by explanation of consecutive and concurrent sentences. — Trial court did not err in denying the defendant's motion to exclude the defendant's statement as being induced by hope of benefit because the investigator's explanation of consecutive versus concurrent sentences and the options available to the district attorney's office merely emphasized the seriousness of the charges and amounted to no more than a permissible admonition to tell the truth. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

Hope of benefit not created.

Defendant's motion to suppress several statements made to the investigators was properly denied because the assurances made to the defendant, that the defendant could go home if the defendant told the truth and that investigators had no intention of charging the defendant, did not amount to a "hope of benefit" rendering the statements involuntary. Edenfield v. State, 293 Ga. 370, 744 S.E.2d 738 (2013) (decided under former O.C.G.A. §§ 24-3-50 and 24-3-51).

Voluntariness (Cont'd)

Trial court erred in suppressing the defendant's custodial statement pursuant to former O.C.G.A. § 24-3-50 because it was not induced by a "hope of benefit" promised from the state; the defendant's statement was not actually induced by a belief that the defendant would not be charged with forcible rape, not be thrown in jail, and not have to register as a sex offender if the defendant confessed to having sex with the victim. State v. Munoz, 324 Ga. App. 386, 749 S.E.2d 48 (2013) (decided under former O.C.G.A. § 24-3-50).

Officer did not improperly induce the defendant's custodial statement when, in response to the defendant's plea to "help me out," the detective stated: "All right. What I've got to do before I can talk to you is read you your rights, OK?" This statement was not a promise that rendered the defendant's statement involuntary under O.C.G.A. § 24-8-824. Wilson v. State, 293 Ga. 508, 748 S.E.2d 385 (2013).

In defendant's felony murder trial, the defendant's statement to police was admissible because the sheriff's statement that no one was going to come after the defendant for getting rid of a dead body the defendant found in the defendant's home and that the most the defendant could be charged with would be disposing of a body was merely an exhortation to tell the truth and not a promise of benefit under O.C.G.A. § 24-8-824. Currier v. State, 294 Ga. 392, 754 S.E.2d 17 (2014).

Record did not support the defendant's claim that the defendant's confession was induced by the hope of benefit as the detective denied promising anything to the defendant and the officers' comments regarding punishment amounted to explanation of the seriousness of the situation and admonitions to tell the truth. Lucas v. State, 331 Ga. App. 455, 771 S.E.2d 142 (2015).

The fact that the defendant might have hoped the police would offer the defendant something more if the defendant confessed did not render the statement inadmissible as the detective did not make an offer of a hope of benefit. Eason v. State, 331 Ga. App. 59, 769 S.E.2d 772 (2015).

Defendant's statements to police were voluntary and properly admitted at trial because none of the interview techniques utilized by the interrogating officers were impermissible; there was no evidence that the officers ever offered the defendant any leniency in charges or sentencing such as would amount to an improper hope of benefit; and there was no evidence of excessively lengthy interrogation, physical deprivation, brutality, or other such hallmarks of coercive police activity. Drake v. State, 296 Ga. 286, 766 S.E.2d 447 (2014) (decided under former O.C.G.A. § 24-3-50).

Defendant's custodial statements were voluntary and admissible, although the defendant was only 19, the defendant was held in isolation for over an hour prior to being read the defendant's rights, and the defendant was videotaped while the defendant waited. Giving the defendant water and a cigarette was not a "hope of benefit" that prevented the confession from being admissible. Browner v. State, 296 Ga. 138, 765 S.E.2d 348 (2014) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in denying the defendant's motion to suppress the defendant's statement because the court did not err when the court concluded that the defendant's confession was voluntary as the officer's statements to the defendant were mere exhortations that the defendant should tell the truth as no hope of benefit sprung from the officer's statements. Morales v. State, 337 Ga. App. 614, 788 S.E.2d 535 (2016).

Detectives' statements to the defendant, acknowledging that the defendant wanted a deal and perhaps could get some arrangement, were not the type of promise that would render the defendant's statements to the detectives involuntary. Shepard v. State, 300 Ga. 167, 794 S.E.2d 121 (2016).

After the defendant was convicted of three malice murders and conspiracy to traffic in cocaine, the trial court did not err when the court denied the defendant's motion to suppress the defendant's custodial statement because the trial court did not clearly err when the court found that no improper hope of benefit was raised by the statement about the defendant being

present for the defendant's children as the children grew up or by the statement that the truth would set the defendant free. Huff v. State, 299 Ga. 801, 792 S.E.2d 368 (2016).

Defendant's statement was voluntary and was not induced by another by the slightest hope of benefit because the officer's statements were aimed at encouraging the defendant to come to the homicide office, not to give a statement to police; the officer's statement to the defendant over the phone before the defendant came to the homicide office that the shooting looked like self-defense did not amount to a representation that the defendant would not be arrested or charged or that coming to the homicide office would lead to a reduction in charges or sentencing; and the officer informed the defendant of the charges the defendant was facing before the defendant gave a statement. McCray v. State, 301 Ga. 241, 799 S.E.2d 206 (2017) (decided under former O.C.G.A. § 24-3-50).

Trial court did not err in denying the defendant's motion to suppress the statement the defendant gave to police because a review of the taped interview revealed that the interview lasted for approximately 24 minutes and that the complained of comments by the detective indicating that the detective would let the district attorney know of the defendant's cooperation did not occur until over 16 minutes into the interview; any of the defendant's incriminating statements that came prior to the detective's comments were not actually induced by those comments; and the defendant did not identify any specific incriminating statements made after the detective's comments that should have been suppressed as being induced by a hope of benefit. Kaye v. State, 341 Ga. App. 846, 801 S.E.2d 922 (2017) (decided under former O.C.G.A. § 24-3-50).

Trial court properly found, under former O.C.G.A. § 24-3-50 (see now O.C.G.A. § 24-8-824), that the defendant's confession was not made due to a promise of probation as the defendant was read Miranda rights and voluntarily waived the rights and the defendant confirmed that no one had made any promises in exchange for the defendant's statement. Thompson v. State, 345 Ga. App. 20, No. A17A1628, 2018 Ga. App. LEXIS 167 (2018) (decided under former O.C,G.A. § 24-3-50).

Officer's incomplete explanation of Miranda rights meant defendant's waiver was not voluntary. — In the defendant's malice murder trial, the trial court erred in allowing incriminating statements the defendant made in custody because it was clear from the defendant's restatement of the warnings that the defendant did not understand the rights, and although the officer then explained the right to remain silent, the officer did not explain the remaining rights. Without knowledge of the rights, the defendant's waiver was not voluntary. Benton v. State, 302 Ga. 570, 807 S.E.2d 450 (2017).

Statements by victim's parent impacting confession. — Trial court did not err in finding that the defendant's statements were voluntarily made (and not improperly induced by anything said to the defendant by the victim's parent) because the defendant did not point to any evidence indicating that the defendant was threatened by the statement that the victim's parent made, that the defendant believed the parent had any power to prevent the defendant from getting out of jail, or that the parent was acting as an agent of the state when the parent made that statement; and the defendant did not make any incriminating statements on October 4 after speaking to the victim's parent. Carter v. State, 302 Ga. 685, 808 S.E.2d 704 (2017) (decided under former O.C.G.A. § 24-3-50).

Finding defendant was not in custody was erroneous. — Trial court's determinations that the defendant was not in custody when the defendant made a pre-Miranda statement, and that the statement was voluntary, were based at least partly on a material factual finding that was clearly erroneous, that being that the defendant drove to the police station, as the testimony indicated that the defendant was taken there by law enforcement officers. Stallings v. State, 343 Ga. App. 135, 806 S.E.2d 613 (2017).

Voluntariness (Cont'd)

Statements neither coerced nor hope induced.

Trial court did not err in admitting the defendant's statements because the statements were voluntary as the officer did not tell the defendant that the defendant could not leave until the officer heard what the officer wanted, and the detective's statements that the defendant's friend and mother could be arrested if the evidence showed they were involved in the crime were mere truisms or recounting of facts rather than a threat of injury or promise of benefit. Moore v. State, 325 Ga. App. 749, 754 S.E.2d 792 (2014) (decided under former O.C.G.A. § 24-3-50).

Hope of lighter punishment, induced by other person, is usually "hope of benefit", etc.

Trial court did not err in finding that a portion of the defendant's police interview was inadmissible because it was induced by an officer's statement that "the person that cooperates is the person that gets help," made after the defendant and two accomplices were arrested, and the statement indicated that if the defendant cooperated truthfully, the defendant would get a lighter sentence than the accomplices. State v. Robinson, 326 Ga. App. 63, 755 S.E.2d 869 (2014).

Statement that cooperation would be noted in court not hope of benefit.

Defendant's confession was voluntary and admissible because the investigators framed the investigators' inquiries in terms of what they wanted to be able to tell the judge, and any suggestions of a possible benefit were either nonspecific (e.g., "help yourself") or along the lines of allowing the defendant to have more credibility with the jury for being honest; the promises did not relate to the charges or sentence the defendant was facing so as to render the confession inadmissible under O.C.G.A. § 24-8-824. Baughns v. State, 335 Ga. App. 600, 782 S.E.2d 494 (2016).

Withholding medical attention from defendant, etc.

Officer's statement that the defendant would not be taken to jail if the defendant submitted to a drug recognition examination did not amount to an improper hope of benefit in violation of former O.C.G.A. § 24-3-50 and, thus, the trial court did not err in failing to suppress evidence of the drug recognition exam. Edison v. State, 327 Ga. App. 366, 759 S.E.2d 247 (2014) (decided under former O.C.G.A. § 24-3-50).

Juvenile's statement involuntary. — Habeas court properly granted the petition on the basis that the petitioner juvenile's trial counsel was ineffective for failing to advise the petitioner that inculpatory custodial statements by the petitioner could have been suppressed as involuntary because the petitioner was 14 years old at the time of the police interview, and had not yet entered high school, having failed the eighth grade; law enforcement's interview of the petitioner was a relatively lengthy two-and-a-half hours, and petitioner was held in the interrogation room for more than four hours; the officers used aggressive interrogation methods; and some of the officers' statements arguably constituted assurances creating a hope of a benefit. Oubre v. Woldemichael, 301 Ga. 299, 800 S.E.2d 518 (2017).

Facts sufficient to support voluntariness.

Trial court did not err in finding that the defendant freely and voluntarily made a statement to police admitting that the defendant knew methamphetamine was being manufactured in the garage a few feet from the defendant's three-month-old child because the defendant was advised of the Miranda rights, waived the right to counsel, and agreed to speak with the investigator and during that conversation made the admission. Blackwell v. State, 337 Ga. App. 173, 786 S.E.2d 552 (2016).

Defendant was not in custody for purposes of Miranda, etc.

In action decided under former O.C.G.A. § 24-3-50, a detective's false claim that the defendant's DNA was found on the brass knuckles did not affect the admissibility of the defendant's confession, made after the defendant knowingly and voluntarily waived Miranda rights. Johnson v. State, 295 Ga. 421, 761 S.E.2d 13 (2014) (decided under former O.C.G.A. § 24-3-50).

Defendant's statement was not involuntary, etc.

Defendant's statements during a second interview with police were voluntary and admissible as the investigator's statements did not concern a charge or sentence facing the defendant and did not constitute physical or mental torture. Turner v. State, 296 Ga. 394, 768 S.E.2d 458 (2015) (decided under former O.C.G.A. § 24-3-50).

Trial court did not clearly err in denying the defendant's motion to suppress evidence of the defendant's confession because, while the detective interviewing the defendant told the defendant that the defendant might garner sympathy by being honest and forthcoming, the officer did not promise a lighter sentence or reduced charges; and a detective's statement that the detective was getting "pissed off" did not amount to a threat of injury that rendered the defendant's confession inadmissible. Burden v. State, 332 Ga. App. 811, 775 S.E.2d 183 (2015) (decided under former O.C.G.A. § 24-3-50).

Procedural Considerations

1. Use as Evidence

Statement made during plea negotiations. — Trial court erred by allowing the defendant's pre-trial statement, made without the defendant being advised under Miranda, to be used for impeachment purposes because the statement was made as part of plea negotiations and was not the product of the defendant's own mind or a tactical decision of defense counsel. Babbitt v. State, 337 Ga. App. 553, 789 S.E.2d 205 (2016), cert. denied, No. S16C1806, 2017 Ga. LEXIS 114 (Ga. 2017).

3. Instructions

Jury instruction not applicable to testimony of witness other than defendant. — Trial court did not err by denying the defendant's request to instruct the jury regarding the voluntariness of an eyewitness's prior inconsistent statement to police in which the eyewitness, the defendant's girlfriend, implicated the defendant in the victim's murder because the charge requested was based on a statute regarding the admissibility of a confession; and the charge requested was not applicable to the testimony of a witness other than the defendant. Poellnitz v. State, 296 Ga. 134, 765 S.E.2d 343 (2014) (decided under former O.C.G.A. § 24-3-50).

4. Review

Ineffective assistance of counsel for failing to suppress statements to detectives. — Trial counsel did not provide ineffective assistance by not moving to suppress incriminating statements that the defendant made to detectives at the defendant's house because the defendant did not show, inter alia, a reasonable probability that the outcome of the trial would have been different had the statements been suppressed based on the other incriminating evidence against the defendant. Lucas v. State, 328 Ga. App. 741, 760 S.E.2d 257 (2014).

CHAPTER 9

AUTHENTICATION AND IDENTIFICATION

ARTICLE 1

GENERAL PROVISIONS

24-9-901. Requirement of authentication or identification.

JUDICIAL DECISIONS

Analysis

General Consideration
Proof of Authenticity of Writing
Letters
Authentication by Expert Witnesses
Authentication by Nonexpert Witnesses

General Consideration

Authentication of police report required even if admissible as public record. — In a suit by an injured bystander against a restaurant arising out of a gun shot by an alleged restaurant employee, a police report suggesting that the shooter was working as a bouncer was admissible under O.C.G.A. § 24-4-803(8); however, the trial court failed to address the restaurant's objection that the report was not authenticated as required by O.C.G.A. § 24-9-901(a), requiring remand. Hungry Wolf/Sugar & Spice, Inc. v. Langdeau, 338 Ga. App. 750, 791 S.E.2d 850 (2016).

Proof of Authenticity of Writing

Consideration of print out of e-mail. — Trial court's evidentiary ruling was reversed because the trial court failed to exercise the court's discretion in ruling on the admissibility of Exhibit 3, a printout of an e-mail regarding the terms of the lease, as the record showed that the trial court failed to consider the wide variety of means by which the guarantor could authenticate the writing, including that the trial court refused to consider circumstantial evidence of its authenticity such as the appearance, contents, and substance of the document, and the fact that the lessor produced the document in response to the guarantor's discovery requests. Koules v. SP5 Atl. Retail Ventures, 330 Ga. App. 282, 767 S.E.2d 40 (2014).

Compilation of text messages from cell phone. — In the defendant's murder trial, the state introduced a compilation of text messages between the defendant and the defendant's friend (on whom the defendant blamed the murder) on the night of the murder; the friend, as a participant in the text conversation, properly authenticated the document's contents pursuant to O.C.G.A. § 24-9-901(b)(1). Hodges v. State, 302 Ga. 564, 807 S.E.2d 856 (2017).

Loan documents properly authenticated. — Limited liability company and its individual members were properly held liable to a bank following their failure because there was ample undisputed evidence that the bank was the company's successor-in-interest under the credit line agreements as various documents allowed judicial notice that the bank had acquired the company's assets and the loan documents were properly authenticated. Jaycee Atlanta Dev., LLC v. Providence Bank, 330 Ga. App. 322, 765 S.E.2d 536 (2014).

Letters

Authentication sufficient.

Letter written by the defendant was sufficiently authenticated by admissible evidence, and even absent the challenged

testimony about the letter, the state presented sufficient evidence from which the jury could have inferred the letter was from the defendant. Brown v. State, 332 Ga. App. 635, 774 S.E.2d 708 (2015).

Trial court properly admitted a letter in the defendant's trial for convictions in connection with a drive-by shooting because the state properly authenticated the letter as authored by the defendant since the letter was given to the prosecution by defense counsel and was properly introduced as evidence of the defendant's guilty consciousness relating to the shooting and the letter's relevance was substantially outweighed by any danger of unfair prejudice. Amey v. State, 337 Ga. App. 480, 788 S.E.2d 80 (2016).

Trial court did not err in admitting into evidence the defendant's handwritten letters because the state provided sufficient evidence to establish a prima facie case that the defendant wrote the letters, including the co-indictee's testimony that the co-indictee was familiar with the defendant's handwriting and identifying the handwriting in the letters as the defendant's handwriting. Smith v. State, 300 Ga. 538, 796 S.E.2d 666 (2017).

Authentication by Expert Witnesses

Adjuster's affidavit relied on unauthenticated documents. — Vacancy exclusion did not bar coverage for the vandalism loss to an insured as a matter of law, and the trial court erred in failing to grant summary judgment to the insured on that issue because the senior field adjuster's affidavit did not include any admissible evidence regarding the status of the renovation work as it relied on hearsay and unauthenticated documents. R&G Invs. & Holdings, LLC v. Am. Family Ins. Co., 337 Ga. App. 588, 787 S.E.2d 765 (2016), cert. denied, No. S16C1830, 2017 Ga. LEXIS 144 (Ga. 2017).

Officer unable to authenticate video recording of defendant's statement to officers. — Trial court did not err in suppressing the video recordings of any statement the defendant made to law enforcement officers while in custody because although the investigator testified that the investigator had auditioned a disc and that it reflected everything that occurred during the defendant's interview, on cross-examination, the investigator admitted that the investigator did not view the entire video in the judge's chambers; and, although the investigator testified that the disc that the investigator watched in chambers was the one the investigator had reviewed earlier and placed in a binder and gave to the prosecutor, the investigator acknowledged the disc had no identifying markers on the disc that would confirm that fact. State v. Smith, 299 Ga. 901, 792 S.E.2d 677 (2016).

Authentication by Nonexpert Witnesses

Basis for testimony of nonexpert witness.

Although the witnesses to a will were deceased, the lawyer who prepared the will and the lawyer's paralegal were not permitted to testify that the signature on the will was the decedent's because the lawyer and paralegal did not demonstrate a familiarity with the decedent's signature. Ammons v. Clouds, 295 Ga. 225, 758 S.E.2d 282 (2014).

Authentication of text messages by police officer. — Data taken from the defendant's cell phone was properly authenticated as an officer testified that the officer observed another officer recover and download the text messages taken from the phone, which messages were printed out, and which contained the defendant's first name at least twice. Glispie v. State, 335 Ga. App. 177, 779 S.E.2d 767 (2015), aff'd in part and rev'd in part, 300 Ga. 128 793 S.E.2d 381 (Ga. 2016).

Trial court did not err in finding photographs of text messages on a second victim's phone were properly authenticated as a lieutenant testified that the images were fair and accurate representations of what appeared on the second victim's cell phone screen and the second victim testified that the phone number on the screen was the defendant's phone number as confirmed by a text from the defendant saying it was the defendant. Pierce v. State, 302 Ga. 389, 807 S.E.2d 425 (2017).

Authentication of messages on social media website. — Because the defendant's only objection to the messages

Authentication by Nonexpert Witnesses (Cont'd)

on a social media website was that they were prejudicial and not probative, the defendant waived any objection that the messages were not properly authenticated; however, even if the defendant did not waive the authentication objection, the victim's mother properly authenticated the messages as the mother knew the defendant went by the name "Bucky Raw" because the mother had seen videos that the defendant had posted — and in which the defendant appeared — on another website using that alias; and the mother was able to discern the defendant's identity through the conversations the mother had with the defendant on the accounts that the mother and the mother's friend had set up. Cotton v. State, 297 Ga. 257, 773 S.E.2d 242 (2015).

RESEARCH REFERENCES

ALR. — Hearsay objections to admission of text messages or testimony thereof, 10 A.L.R.7th 4.

24-9-902. Self-authentication.

JUDICIAL DECISIONS

Analysis

Certificate and Seal
Attestation
Treatment of Specific Records
1. In General

Certificate and Seal

Cited in Roberts v. Cmty. & S. Bank, 331 Ga. App. 364, 771 S.E.2d 68 (2015); Samuels v. State, 335 Ga. App. 819, 783 S.E.2d 344 (2016).

Attestation

Contents of record.

Defendant's conviction for impersonating a law enforcement officer was affirmed and the trial court did not err by admitting into evidence a computer-generated record of the defendant's application to LeadsOnline because the trial court properly found that the application fell within the business records exception to the hearsay rule and had been properly authenticated as the defendant had actual notice before trial that the state intended to authenticate via a self-authentication declaration. Chase v. State, 337 Ga. App. 449, 787 S.E.2d 802 (2016).

Treatment of Specific Records

1. In General

Loan documents. — Limited liability company and its individual members were properly held liable to a bank following their failure because there was ample undisputed evidence that the bank was the company's successor-in-interest under the credit line agreements as various documents allowed judicial notice that the bank had acquired the company's assets and the loan documents were properly authenticated. Jaycee Atlanta Dev., LLC v. Providence Bank, 330 Ga. App. 322, 765 S.E.2d 536 (2014).

In a wrongful foreclosure action, the trial court did not err by admitting evidence of an affidavit from a bank official because the plaintiffs were clearly on notice that the bank sought to introduce the bank records as business records and the official had sufficiently authenticated the

bank records relied upon and attached to the affidavit. Salas v. JP Morgan Chase Bank, N.A., 334 Ga. App. 274, 779 S.E.2d 48 (2015).

Log sheet with handwritten intoxilyzer results admissible. — In a case in which the original intoxilyzer printouts could not be located, because the investigator was a former deputy who averred that the investigator was familiar with the procedures of the sheriff's office regarding the handling of the intoxilyzer printout cards, and that the investigator asked for the intoxilyzer log sheet with handwritten intoxilyzer results, after the investigator was unsuccessful in locating the intoxilyzer printout cards, and explained the procedure for completing and maintaining the log book at the jail facility in detail, the trial court did not err in determining that the investigator was a qualified person under O.C.G.A. § 24-9-902 to properly authenticate the log book entry. Jones v. State, 345 Ga. App. 14, No. A17A1532, 2018 Ga. App. LEXIS 169 (2018).

Adjuster's affidavit relied on unauthenticated documents. — Vacancy exclusion did not bar coverage for the vandalism loss to an insured as a matter of law, and the trial court erred in failing to grant summary judgment to the insured on that issue because the senior field adjuster's affidavit did not include any admissible evidence regarding the status of the renovation work as the affidavit relied on hearsay and unauthenticated documents. R&G Invs. & Holdings, LLC v. Am. Family Ins. Co., 337 Ga. App. 588, 787 S.E.2d 765 (2016), cert. denied, No. S16C1830, 2017 Ga. LEXIS 144 (Ga. 2017).

Recording of 9-1-1 call was properly admitted as a self-authenticating business record. Gregory v. State, 342 Ga. App. 411, 803 S.E.2d 367 (2017), cert. denied, No. S18C0007, 2018 Ga. LEXIS 186 (Ga. 2018).

ARTICLE 2

SPECIFIC TYPES OF RECORDS AND EVIDENCE

24-9-920. Authentication of Georgia state and county records.

JUDICIAL DECISIONS

ANALYSIS

PUBLIC OFFICERS

Public Officers

Ineffective assistance of counsel for failing to object to officer's hearsay testimony. — Appellate court reversed the trial court's denial of the defendant's motion for a new trial with respect to the two misdemeanor traffic violations because the prejudice from trial counsel's failure to object was clear since the officer's hearsay testimony was the only evidence offered to prove the elements of the traffic offenses and had the evidence been excluded, there would not have been sufficient evidence to convict on those offenses. Taylor v. State, 337 Ga. App. 486, 788 S.E.2d 97 (2016).

24-9-921. Identification of medical bills; expert witness unnecessary.

JUDICIAL DECISIONS

Admission of medical bills. — No error occurred in admitting the edited medical bills over the defendant's objection because the plaintiff provided lay

testimony that the edited bills admitted into evidence were related solely to the injury at issue in the present litigation and the defendant elected not to cross-examine the witness regarding those bills. Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 760 S.E.2d 674 (2014).

24-9-922. Proof of laws, records, nonjudicial records, or books of other states, territories, or possessions; full faith and credit.

JUDICIAL DECISIONS

Analysis

Full Faith and Credit Granted

Full Faith and Credit Granted

Judicial records and proceedings. Trial court properly denied the applicants' motion to terminate a father's parental rights and denied the applicants' adoption petition because a State of Alabama paternity order obtained by the father was substantially equivalent to a Georgia legitimation order such that the father had not lost his right to contest the adoption and the father properly domesticated the Alabama order with the trial court. Park v. Bailey, 329 Ga. App. 569, 765 S.E.2d 721 (2014).

24-9-923. Authentication of photographs, motion pictures, video recordings, and audio recordings when witness unavailable.

JUDICIAL DECISIONS

Analysis

General Consideration
Audiotapes
Videotapes

General Consideration

Cited in Rodriguez-Nova v. State, Ga., S.E.2d (2014).

Audiotapes

9-1-1 call admissible. Although the 9-1-1 operator did not speak Spanish, because the operator reviewed the recording, identified the recording as a fair and accurate reproduction of the call with no additions or deletions, recognized the operator's own voice, and identified the interpreter's voice, the trial court did not abuse the court's discretion when the court admitted the recording of the 9-1-1 call, regardless of the operator's inability to understand the Spanish portions of the recorded conversation. Rodriguez-Nova v. State, 295 Ga. 868, 763 S.E.2d 698 (2014) (decided under former O.C.G.A. § 24-4-48).

Proper foundation for admission of automated recording. — Evidence of a recording of a phone call made from the county jail in which the defendant admitted that the defendant was at the house where the victim was shot at the time of the murder was admissible as competent evidence tended to show reliably that the automated recording was in fact a recording of the phone call that the defendant made from jail because the state showed, through the testimony of a lieutenant that the jail recording system accurately recorded phone calls and that the system recorded the defendant's phone call at the time that the call was made; and an in-

vestigator with the Georgia Bureau of Investigation, who knew the defendant's voice, testified that the man in the recording sounded like the defendant. Jones v. State, 299 Ga. 40, 785 S.E.2d 886 (2016).

Videotapes

Evidence sufficient to authenticate videotape.

Video recording was properly admitted as the complaining witness testified that the witness personally transferred the video from the victim's home security system to the disc the witness presented to the court and that the video accurately depicted the incident on the date in question. Birdsong v. Barnett, 334 Ga. App. 120, 778 S.E.2d 372 (2015).

Surveillance videotape was properly admitted, etc.

Trial court did not abuse the court's discretion in admitting a videotape after a detective testified that the detective retrieved the video using a system for which the detective certified that the system appeared to be working properly except that the date-time stamp was inaccurate by a time period the detective was able to determine. Brannon v. State, 298 Ga. 601, 783 S.E.2d 642 (2016).

Trial court did not abuse the court's discretion by admitting the video because the dispatcher testified as to the circumstances and was personally at the sheriff's department when the video was captured and the state's failure to produce the original recording and the dispatcher's failure to testify impacted the weight and not the admissibility of the video. Yancey v. State, 342 Ga. App. 294, 802 S.E.2d 702 (2017).

24-9-924. Admissibility of records of Department of Driver Services; admissibility of computer transmitted records.

JUDICIAL DECISIONS

Ineffective assistance of counsel for failing to object to officer's hearsay testimony. — Appellate court reversed the trial court's denial of the defendant's motion for a new trial with respect to the two misdemeanor traffic violations because the prejudice from trial counsel's failure to object was clear since the officer's hearsay testimony was the only evidence offered to prove the elements of the traffic offenses and had the evidence been excluded, there would not have been sufficient evidence to convict on those offenses. Taylor v. State, 337 Ga. App. 486, 788 S.E.2d 97 (2016).

CHAPTER 10

BEST EVIDENCE RULE

24-10-1001. Definitions.

Law reviews. — For article, "The Best Evidence Rule Made Better: A Glimpse into Georgia's New Evidence Code," see 19 Ga. St. B.J. 12 (Aug. 2013). For annual survey on evidence law, see 66 Mercer L. Rev. 81 (2014).

24-10-1002. Requirement of original.

JUDICIAL DECISIONS

Analysis

General Consideration
Application
Acceptable Evidence

General Consideration

Cited in Jaycee Atlanta Dev., LLC v. Providence Bank, 330 Ga. App. 322, 765 S.E.2d 536 (2014).

Application

Transcript of online conversations. — With regard to the defendant's conviction for criminal attempt to commit child molestation and related crimes, the trial court did not err in admitting into evidence transcripts of all of the online conversations between the defendant and a detective, posing as the 15-year-old victim, because the detective testified that the detective participated in all of the online conversations with the defendant; that the detective created the transcripts by copying the text exactly as the text appeared on the computer screen, without making any additions, omissions, or other alterations to that text; and that the transcript reflected the exact words used in the conversation, as well as the online names used by the persons who typed those words, which was sufficient to authenticate the transcript. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

Existence of writing.

Trial court erred in granting summary judgment to a rehabilitation company based on a contractual exculpatory clause because the material provisions of the agreement at issue were illegible, and given that an affidavit was insufficient to establish a basis for the admission of the alleged exemplar, the company failed to show that the agreement signed by the participant contained an exculpatory clause waiving and releasing the company from liability for the company's own negligence. Sanchez v. Atlanta Union Mission Corp., 329 Ga. App. 158, 764 S.E.2d 178 (2014).

Still photographs taken from videotape. — Admission of photographs taken from a surveillance tape did not violate the best evidence rule, as the tape was also admitted. Hafeez v. State, 339 Ga. App. 467, 793 S.E.2d 632 (2016).

Acceptable Evidence

Failure to present evidence of permits. — Trial court erred in denying the appellants' motion for summary judgment because the appellees failed to present evidence sufficient to create a jury issue as to whether the appellants had a duty to inspect the exhaust vent since no permits were produced as evidence and the appellants were only required to inspect if a permit was issued. Martin v. Ledbetter, 342 Ga. App. 208, 802 S.E.2d 432 (2017).

Log sheet with handwritten intoxilyzer results admissible. — Because the original intoxilyzer printouts could not be located even after the investigator conducted a multi-source search, and the defendant did not point the appellate court to any evidence in the record suggesting any bad faith on the part of the state in connection with the missing documents, the trial court did not abuse the court's discretion in finding that admission of a log sheet with handwritten intoxilyzer results would not violate the best evidence rule. Jones v. State, 345 Ga. App. 14, No. A17A1532, 2018 Ga. App. LEXIS 169 (2018).

RESEARCH REFERENCES

ALR. — Application of best evidence rule to electronic evidence, including text messages and e-mail, 12 A.L.R.7th 1.

24-10-1003. Admissibility of duplicates.

JUDICIAL DECISIONS

Analysis

Application
1. In General

Application

1. In General

Transcript of online conversations. — With regard to the defendant's conviction for criminal attempt to commit child molestation and related crimes, the trial court did not err in admitting into evidence transcripts of all of the online conversations between the defendant and a detective, posing as the 15-year-old victim, because the detective testified that the detective participated in all of the online conversations with the defendant; that the detective created the transcripts by copying the text exactly as the text appeared on the computer screen, without making any additions, omissions, or other alterations to that text; and that the transcript reflected the exact words used in the conversation, as well as the online names used by the persons who typed those words, which was sufficient to authenticate the transcript. Castaneira v. State, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

Copies accurate duplicates in pimping prosecution. — When the defendant was convicted of pimping a person under the age of 18, contributing to the delinquency of a minor, and trafficking a person for sexual servitude, the copies of the birth certificate and social security card found in the victim's purse were admissible as there was never any issue raised that the copies of the documents entered into evidence were not accurate duplicates of those documents; and, although the victim at one time denied being the person identified in the documents, that did not bear on the admissibility of the copies as an accurate representation of what was found in the victim's purse. Mackey v. State, 342 Ga. App. 791, 805 S.E.2d 596 (2017).

Photograph of cell phone screen. — Digital photographs of what appeared on the screen of the victim's cell phone were duplicates and admissible to the same extent as the original. Pierce v. State, 302 Ga. 389, 807 S.E.2d 425 (2017).

Failure to present evidence on permits. — Trial court erred in denying the appellants' motion for summary judgment because the appellees failed to present evidence sufficient to create a jury issue as to whether the appellants had a duty to inspect the exhaust vent since no permits were produced as evidence and the appellants were only required to inspect if a permit was issued. Martin v. Ledbetter, 342 Ga. App. 208, 802 S.E.2d 432 (2017).

RESEARCH REFERENCES

ALR. — Application of best evidence rule to electronic evidence, including text messages and e-mail, 12 A.L.R.7th 1.

24-10-1004. Admissibility of other evidence of contents of a writing, recording, or photograph.

JUDICIAL DECISIONS

Analysis

Application
1. In General
3. Criminal Matters

Application

1. In General

Illegible writing as part of contract. — Trial court erred in granting summary judgment to a rehabilitation company based on a contractual exculpatory clause because the material provisions of the agreement at issue were illegible, and given that an affidavit was insufficient to establish a basis for the admission of the alleged exemplar, the company failed to show that the agreement signed by the participant contained an exculpatory clause waiving and releasing the company from liability for the company's own negligence. Sanchez v. Atlanta Union Mission Corp., 329 Ga. App. 158, 764 S.E.2d 178 (2014).

Proving lost antenuptial agreement. — In a divorce case, applying the preponderance of the evidence standard, and deferring to the trial court's finding that both a husband and a wife believed their opposing positions regarding the contents of a lost antenuptial agreement, the husband failed to prove the terms of the lost agreement, and the agreement could not be enforced. Coxwell v. Coxwell, 296 Ga. 311, 765 S.E.2d 320 (2014).

Failure to present evidence on permits. — Trial court erred in denying the appellants' motion for summary judgment because the appellees failed to present evidence sufficient to create a jury issue as to whether the appellants had a duty to inspect the exhaust vent since no permits were produced as evidence and the appellants were only required to inspect if a permit was issued. Martin v. Ledbetter, 342 Ga. App. 208, 802 S.E.2d 432 (2017).

3. Criminal Matters

Log sheet with handwritten intoxilyzer results admissible. — Because the original intoxilyzer printouts could not be located even after the investigator conducted a multi-source search, and the defendant did not point the appellate court to any evidence in the record suggesting any bad faith on the part of the state in connection with the missing documents, the trial court did not abuse the court's discretion in finding that admission of a log sheet with handwritten intoxilyzer results would not violate the best evidence rule. Jones v. State, 345 Ga. App. 14, No. A17A1532, 2018 Ga. App. LEXIS 169 (2018).

Evidence lost 13 years after use at earlier trial. — Although a note that the defendant left after stabbing the defendant's ex-wife 13 years earlier could not be located, the state explained that the state had attempted to locate the note in the prior prosecutor's file and it was believed destroyed. At the defendant's trial for the slaying of an ex-female friend, at which the defendant left a similar note, an officer was properly allowed to testify as to the officer's recollection of the first note's contents. Hooks v. State, 295 Ga. 835, 764 S.E.2d 409 (2014) (decided under former O.C.G.A. §§ 24-5-4 and 24-5-21).

Perjury proven through witness testimony.

When the defendant was convicted of three counts of computer or electronic pornography and child exploitation, the trial court did not plainly err in admitting a retired police officer's testimony during the trial about the retired officer's investigation of an alleged similar transaction in 2008 because it was undisputed that the relevant videos and photographs from the 2008 investigation were destroyed when the hard drive used in that investigation crashed; there was no evidence that the state intentionally destroyed the

videos and photographs in bad faith; and the admission of the retired officer's identification testimony did not affect the outcome of the trial as the evidence of the defendant's guilt was overwhelming. Patch v. State, 337 Ga. App. 233, 786 S.E.2d 882 (2016).

RESEARCH REFERENCES

ALR. — Application of best evidence rule to electronic evidence, including text messages and e-mail, 12 A.L.R.7th 1.

24-10-1005. Public records.

JUDICIAL DECISIONS

Failure to present evidence on permits. — Trial court erred in denying the appellants' motion for summary judgment because the appellees failed to present evidence sufficient to create a jury issue as to whether the appellants had a duty to inspect the exhaust vent since no permits were produced as evidence and the appellants were only required to inspect if a permit was issued. Martin v. Ledbetter, 342 Ga. App. 208, 802 S.E.2d 432 (2017).

24-10-1006. Summaries.

JUDICIAL DECISIONS

Loan history report properly admitted. — Trial court properly admitted the bank's loan history report as a business record because the report provided a description of each transaction relating to the estate's loan from the loan's inception, along with a corresponding posting date for each transaction, the transaction amount, and any change to the principal balance resulting from the transaction, and was not a summary. Roberts v. Cmty. & S. Bank, 331 Ga. App. 364, 771 S.E.2d 68 (2015).

Bank's computer screen shot insufficient proof of damages in loan case. — In an action on a loan, a bank did not submit sufficient evidence to prove the bank's damages because a printout of the bank's electronic records reflecting the amounts then owed, without a detailed transaction history, was a summary requiring evidence that the underlying records were too voluminous to examine in court pursuant to O.C.G.A. § 24-10-1006, not a business record under O.C.G.A. § 24-8-803(6). D'Agnese v. Wells Fargo Bank, N.A., 335 Ga. App. 659, 782 S.E.2d 714 (2016).

24-10-1007. Testimony or written admission of party.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Cited in Martin v. Ledbetter, 342 Ga. App. 208, 802 S.E.2d 432 (2017).

CHAPTER 12

MEDICAL AND OTHER CONFIDENTIAL INFORMATION

Article 3

AIDS Information

Sec.
24-12-21. Disclosure of AIDS confidential information.

Article 4

Other Confidential Information

24-12-31. Confidential nature of veterinarian records; disclosure of rabies vaccination record.

ARTICLE 1

RELEASE OF MEDICAL INFORMATION AND CONFIDENTIALITY OF RAW RESEARCH DATA

24-12-1. When medical information may be released by physician, hospital, health care facility, or pharmacist; immunity from liability; waiver of privilege; psychiatrists and hospitals excepted.

JUDICIAL DECISIONS

Defendant placed mental state in issue. — Trial court did not err when the court denied a motion in limine and allowed a psychiatrist who examined the defendant in jail to testify because the defendant placed the defendant's mental capacity in issue when the defendant filed a notice of intent to pursue a defense of not guilty by reason of insanity, which constituted a waiver of any state constitutional right of privacy or statutory privilege in the defendant's mental health records. Armstead v. State, 293 Ga. 243, 744 S.E.2d 774 (2013) (decided under former O.C.G.A. § 24-9-40).

ARTICLE 3

AIDS INFORMATION

24-12-21. Disclosure of AIDS confidential information.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) Except as otherwise provided in this Code section:

(1) No person or legal entity which receives AIDS confidential information pursuant to this Code section or which is responsible for

recording, reporting, or maintaining AIDS confidential information shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity; and

(2) No person or legal entity which receives AIDS confidential information which that person or legal entity knows was disclosed in violation of paragraph (1) of this subsection shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity.

(c) AIDS confidential information shall be disclosed to the person identified by that information or, if that person is an incompetent person, to that person's legal guardian. AIDS confidential information may be disclosed to such person's parent or legal guardian if that person is a minor.

(d) AIDS confidential information shall be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the person identified by that information or, if that person is a minor or incompetent person, by that person's parent or legal guardian.

(e) AIDS confidential information shall be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if that information is authorized or required by law to be reported to that agency or department.

(f) The results of an HIV test shall be disclosed to the person, or that person's designated representative, who ordered such tests of the body fluids or tissue of another person.

(g) When the patient of a physician has been determined to be infected with HIV and that patient's physician reasonably believes that the spouse or sexual partner or any child of the patient, spouse, or sexual partner is a person at risk of being infected with HIV by that patient, the physician may disclose to that spouse, sexual partner, or child that the patient has been determined to be infected with HIV, after first attempting to notify the patient that such disclosure is going to be made.

(h)(1) An administrator of an institution licensed as a hospital by the Department of Community Health or a physician having a patient who has been determined to be infected with HIV may disclose to the Department of Public Health:

(A) The name and address of that patient;

(B) That such patient has been determined to be infected with HIV; and

(C) The name and address of any other person whom the disclosing physician or administrator reasonably believes to be a person at risk of being infected with HIV by that patient.

(2) When mandatory and nonanonymous reporting of confirmed positive HIV tests to the Department of Public Health is determined by that department to be reasonably necessary, that department shall establish by regulation a date on and after which such reporting shall be required. On and after the date so established, each health care provider, health care facility, or any other person or legal entity which orders an HIV test for another person shall report to the Department of Public Health the name and address of any person thereby determined to be infected with HIV. No such report shall be made regarding any confirmed positive HIV test provided at any anonymous HIV test site operated by or on behalf of the Department of Public Health.

(3) The Department of Public Health may disclose that a person has been reported, under paragraph (1) or (2) of this subsection, to have been determined to be infected with HIV to the board of health of the county in which that person resides or is located if reasonably necessary to protect the health and safety of that person or other persons who may have come in contact with the body fluids of the HIV infected person. The Department of Public Health or county board of health to which information is disclosed pursuant to this paragraph or paragraph (1) or (2) of this subsection:

(A) May contact any person named in such disclosure as having been determined to be an HIV infected person for the purpose of counseling that person and requesting therefrom the name of any other person who may be a person at risk of being infected with HIV by that HIV infected person;

(B) May contact any other person reasonably believed to be a person at risk of being infected with HIV by that HIV infected person for the purposes of disclosing that such infected person has been determined to be infected with HIV and counseling such person to submit to an HIV test; and

(C) Shall contact and provide counseling to the spouse of any HIV infected person whose name is thus disclosed if both persons

are reasonably likely to have engaged in sexual intercourse or any other act determined by the Department of Public Health likely to have resulted in the transmission of HIV between such persons within the preceding seven years and if that spouse may be located and contacted without undue difficulty.

(h.1) The Department of Public Health may disclose AIDS confidential information regarding a person who has been reported, under paragraph (1) or (2) of subsection (h), to be infected with HIV to a health care provider licensed pursuant to Chapter 11, 26, or 34 of Title 43 whom that person has consulted for medical treatment or advice.

(i) Any health care provider authorized to order an HIV test may disclose AIDS confidential information regarding a patient thereof if that disclosure is made to a health care provider or health care facility which has provided, is providing, or will provide any health care service to that patient and as a result of such provision of service that health care provider or facility:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(j) A health care provider or any other person or legal entity authorized but not required to disclose AIDS confidential information pursuant to this Code section shall have no duty to make such disclosure and shall not be liable to the patient or any other person or legal entity for failing to make such disclosure. A health care provider or any other person or legal entity which discloses information as authorized or required by this Code section or as authorized or required by law or rules or regulations made pursuant thereto shall have no civil or criminal liability therefor.

(k) When any person or legal entity is authorized or required by this Code section or any other law to disclose AIDS confidential information to a person at risk of being infected with HIV and that person at risk is a minor or incompetent person, such disclosure may be made to any parent or legal guardian of the minor or incompetent person, to the minor or incompetent person, or to both the minor or incompetent person and any parent or legal guardian thereof.

(l) When an institutional care facility is the site at which a person is at risk of being infected with HIV and as a result of that risk a disclosure of AIDS confidential information to any person at risk at that site is authorized or required under this Code section or any other law,

such disclosure may be made to the person at risk or to that institutional care facility's chief administrative or executive officer, or such officer's designee, in which case that officer or designee shall be authorized to make such disclosure to the person at risk.

(m) When a disclosure of AIDS confidential information is authorized or required by this Code section to be made to a physician, health care provider, or legal entity, that disclosure may be made to employees of that physician, health care provider, or legal entity who have been designated thereby to receive such information on behalf thereof. Those designated employees may thereafter disclose to and provide for the disclosure of that information among such other employees of that physician, health care provider, or legal entity, but such disclosures among those employees shall only be authorized when reasonably necessary in the ordinary course of business to carry out the purposes for which that disclosure is authorized or required to be made to that physician, health care provider, or legal entity.

(n) Any disclosure of AIDS confidential information authorized or required by this Code section or any other law and any unauthorized disclosure of such information shall in no way destroy the confidential nature of that information except for the purpose for which the authorized or required disclosure is made.

(o) Any person or legal entity which violates subsection (b) of this Code section shall be guilty of a misdemeanor.

(p) Nothing in this Code section or any other law shall be construed to authorize the disclosure of AIDS confidential information if that disclosure is prohibited by federal law, or regulations promulgated thereunder, nor shall anything in this Code section or any other law be construed to prohibit the disclosure of information which would be AIDS confidential information except that such information does not permit the identification of any person.

(q) A public safety agency or prosecuting attorney may obtain the results from an HIV test to which the person named in the request has submitted under Code Section 15-11-603, 17-10-15, 42-5-52.1, or 42-9-42.1, notwithstanding that the results may be contained in a sealed record.

(r) Any person or legal entity required by an order of a court to disclose AIDS confidential information in the custody or control of such person or legal entity shall disclose that information as required by that order.

(s) AIDS confidential information shall be disclosed as medical information pursuant to Code Section 24-12-1 or pursuant to any other law which authorizes or requires the disclosure of medical information if:

(1) The person identified by that information:

(A) Has consented in writing to that disclosure;

(B) Has been notified of the request for disclosure of that information at least ten days prior to the time the disclosure is to be made and does not object to such disclosure prior to the time specified for that disclosure in that notice; or

(C) Is suspected of being mentally ill and is the subject of an order issued pursuant to Code Section 37-3-41 when the court issuing such order finds in an in camera hearing by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this subparagraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal; or

(2) A superior court in an in camera hearing finds by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this paragraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal.

(t)(1) A superior court of this state may order a person or legal entity to disclose AIDS confidential information in its custody or control to:

(A) A prosecutor in connection with a prosecution for the alleged commission of reckless conduct under subsection (c) of Code Section 16-5-60;

(B) Any party in a civil proceeding; or

(C) A public safety agency or the Department of Public Health if that agency or department has an employee thereof who has, in the course of that employment, come in contact with the body fluids of the person identified by the AIDS confidential information sought

in such a manner reasonably likely to cause that employee to become an HIV infected person and provided the disclosure is necessary for the health and safety of that employee,

and, for purposes of this subsection, the term "petitioner for disclosure" means any person or legal entity specified in subparagraph (A), (B), or (C) of this paragraph.

(2) An order may be issued against a person or legal entity responsible for recording, reporting, or maintaining AIDS confidential information to compel the disclosure of that information if the petitioner for disclosure demonstrates by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests.

(3) A petition seeking disclosure of AIDS confidential information under this subsection shall substitute a pseudonym for the true name of the person concerning whom the information is sought. The disclosure to the parties of that person's true name shall be communicated confidentially, in documents not filed with the court.

(4) Before granting any order under this subsection, the court shall provide the person concerning whom the information is sought with notice and a reasonable opportunity to participate in the proceedings if that person is not already a party.

(5) Court proceedings as to disclosure of AIDS confidential information under this subsection shall be conducted in camera unless the person concerning whom the information is sought agrees to a hearing in open court.

(6) Upon the issuance of an order that a person or legal entity be required to disclose AIDS confidential information regarding a person named in that order, that person or entity so ordered shall disclose to the ordering court any such information which is in the control or custody of that person or entity and which relates to the person named in the order for the court to make an in camera inspection thereof. If the court determines from that inspection that the person named in the order is an HIV infected person, the court shall disclose to the petitioner for disclosure that determination and shall impose appropriate safeguards against unauthorized disclosure which shall specify the persons who may have access to the information, the purposes for which the information shall be used, and appropriate prohibitions on future disclosure.

(7) The record of the proceedings under this subsection shall be sealed by the court.

(8) An order may not be issued under this subsection against the Department of Public Health, any county board of health, or any anonymous HIV test site operated by or on behalf of that department.

(u) A health care provider, health care facility, or other person or legal entity who, in violation of this Code section, unintentionally discloses AIDS confidential information, notwithstanding the maintenance of procedures thereby which are reasonably adopted to avoid risk of such disclosure, shall not be civilly or criminally liable, unless such disclosure was due to gross negligence or wanton and willful misconduct.

(v) AIDS confidential information may be disclosed when that disclosure is otherwise authorized or required by Code Section 42-1-6, if AIDS or HIV infection is the communicable disease at issue, or when that disclosure is otherwise authorized or required by any law which specifically refers to "AIDS confidential information," "HIV test results," or any similar language indicating a legislative intent to disclose information specifically relating to AIDS or HIV.

(w) A health care provider who has received AIDS confidential information regarding a patient from the patient's health care provider directly or indirectly under the provisions of subsection (i) of this Code section may disclose that information to a health care provider which has provided, is providing, or will provide any health care service to that patient and as a result of that provision of service that health care provider:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(x) Neither the Department of Public Health nor any county board of health shall disclose AIDS confidential information contained in its records unless such disclosure is authorized or required by this Code section or any other law, except that such information in those records shall not be a public record and shall not be subject to disclosure through subpoena, court order, or other judicial process.

(y) The protection against disclosure provided by Code Section 24-12-20 shall be waived and AIDS confidential information may be disclosed to the extent that the person identified by such information, his or her heirs, successors, assigns, or a beneficiary of such person,

including, but not limited to, an executor, administrator, or personal representative of such person's estate:

(1) Files a claim or claims other entitlements under any insurance policy or benefit plan or is involved in any civil proceeding regarding such claim;

(2) Places such person's care and treatment, the nature and extent of his or her injuries, the extent of his or her damages, his or her medical condition, or the reasons for his or her death at issue in any judicial proceeding; or

(3) Is involved in a dispute regarding coverage under any insurance policy or benefit plan.

(z) AIDS confidential information may be collected, used, and disclosed by an insurer in accordance with the provisions of Chapter 39 of Title 33.

(aa) In connection with any judicial proceeding in which AIDS confidential information is disclosed as authorized or required by this Code section, the party to whom that information is thereby disclosed may subpoena any person to authenticate such AIDS confidential information, establish a chain of custody relating thereto, or otherwise testify regarding that information, including, but not limited to, testifying regarding any notifications to the patient regarding results of an HIV test. The provisions of this subsection shall apply to records, personnel, or both of the Department of Public Health or a county board of health notwithstanding Code Section 50-18-72, but only as to test results obtained by a prosecutor under subsection (q) of this Code section and to be used thereby in a prosecution for reckless conduct under subsection (c) of Code Section 16-5-60.

(bb) AIDS confidential information may be disclosed as a part of any proceeding or procedure authorized or required pursuant to Chapter 3, 4, or 7 of Title 37, regarding a person who is alleged to be or who is mentally ill, developmentally disabled, or alcoholic or drug dependent, or as a part of any proceeding or procedure authorized or required pursuant to Title 29, regarding the guardianship of a person or that person's estate, as follows:

(1) Any person who files or transmits a petition or other document which discloses AIDS confidential information in connection with any such proceeding or procedure shall provide a cover page which contains only the type of proceeding or procedure, the court in which the proceeding or procedure is or will be pending, and the words "CONFIDENTIAL INFORMATION" without in any way otherwise disclosing thereon the name of any individual or that such petition or other document specifically contains AIDS confidential information;

(2) AIDS confidential information shall only be disclosed pursuant to this subsection after disclosure to and with the written consent of the person identified by that information, or that person's parent or guardian if that person is a minor or has previously been adjudicated as being incompetent, or by order of court obtained in accordance with subparagraph (C) of paragraph (3) of this subsection;

(3) If any person files or transmits a petition or other document in connection with any such proceeding or procedure which discloses AIDS confidential information without obtaining consent as provided in paragraph (2) of this subsection, the court receiving such information shall either obtain written consent as set forth in that paragraph (2) for any further use or disclosure of such information or:

(A) Return such petition or other document to the person who filed or transmitted same, with directions against further filing or transmittal of such information in connection with such proceeding or procedure except in compliance with this subsection;

(B) Delete or expunge all references to such AIDS confidential information from the particular petition or other document; or

(C)(i) If the court determines there is a compelling need for such information in connection with the particular proceeding or procedure, petition a superior court of competent jurisdiction for permission to obtain or disclose that information. If the person identified by the information is not yet represented by an attorney in the proceeding or procedure in connection with which the information is sought, the petitioning court shall appoint an attorney for such person. The petitioning court shall have both that person and that person's attorney personally served with notice of the petition and time and place of the superior court hearing thereon. Such hearing shall not be held sooner than 72 hours after service, unless the information is to be used in connection with an emergency guardianship proceeding under Code Section 29-4-14, in which event the hearing shall not be held sooner than 48 hours after service.

(ii) The superior court in which a petition is filed pursuant to division (i) of this subparagraph shall hold an in camera hearing on such petition. The purpose of the hearing shall be to determine whether there is clear and convincing evidence of a compelling need for the AIDS confidential information sought in connection with the particular proceeding or procedure which cannot be accommodated by other means. In assessing compelling need, the superior court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by

the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this subparagraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal; and

(4) The court having jurisdiction over such proceeding or procedure, when it becomes apparent that AIDS confidential information will likely be or has been disclosed in connection with such proceeding or procedure, shall take such measures as the court determines appropriate to preserve the confidentiality of the disclosed information to the maximum extent possible. Such measures shall include, without being limited to, closing the proceeding or procedure to the public and sealing all or any part of the records of the proceeding or procedure containing AIDS confidential information. The records of any appeals taken from any such proceeding or procedure shall also be sealed. Furthermore, the court may consult with and obtain the advice of medical experts or other counsel or advisers as to the relevance and materiality of such information in such proceedings or procedures, provided that the identity of the person identified by such information is not thereby revealed. (Code 1981, § 24-12-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942; Ga. L. 2013, p. 294, § 4-42/HB 242; Ga. L. 2014, p. 814, § 1/SB 342; Ga. L. 2015, p. 598, § 1A-1/HB 72; Ga. L. 2016, p. 735, § 5/HB 1058.)

The 2014 amendment, effective July 1, 2014, added subsection (h.1).

The 2015 amendment, effective July 1, 2015, in paragraph (s)(1), deleted "or" at the end of subparagraph (A) and added subparagraph (s)(1)(C).

The 2016 amendment, effective July 1, 2016, in subsection (c), substituted "an incompetent person, to that person's" for "a minor or incompetent person, to that person's parent or", and added the last sentence.

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 63 (2015).

JUDICIAL DECISIONS

Failure to inform patient of HIV status. — Patient's claim against a doctor and hospital for failure to report the positive results of the patient's HIV test to the patient as required under O.C.G.A. § 31-22-9.2 was a classic medical malpractice claim despite the patient's claim that it was ordinary negligence; because the claim was brought eight years after the test, the claim was barred by the five-year statute of repose, O.C.G.A. § 9-3-71(b). Piedmont Hospital, Inc. v. D. M., 335 Ga. App. 442, 779 S.E.2d 36 (2015).

ARTICLE 4

OTHER CONFIDENTIAL INFORMATION

24-12-31. Confidential nature of veterinarian records; disclosure of rabies vaccination record.

(a) No veterinarian licensed under Chapter 50 of Title 43 shall be required to disclose any information concerning the veterinarian's care of an animal except on written authorization or other waiver by the veterinarian's client or on appropriate court order or subpoena. Any veterinarian releasing information under written authorization or other waiver by the client or under court order or subpoena shall not be liable to the client or any other person. The confidentiality provided by this Code section shall be waived to the extent that the veterinarian's client places the veterinarian's care and treatment of the animal or the nature and extent of injuries to the animal at issue in any judicial proceeding. As used in this Code section, the term "client" means the owner of the animal or, if the owner of the animal is unknown, the person who presents the animal to the veterinarian for care and treatment.

(b) Notwithstanding the provisions of subsection (a) of this Code section, a veterinarian shall disclose the rabies vaccination history of any animal within such veterinarian's care within 24 hours of receipt of a written request by the physician of any person bitten by such animal. (Code 1981, § 24-12-31, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2018, p. 770, §§ 2, 4/HB 956.)

The 2018 amendment, effective July 1, 2018, designated the existing provisions of this Code section as subsection (a); substituted "animal or, if the owner of the animal is unknown, the person" for "animal; or if the owner of the animal is unknown, client means the person" in the last sentence of subsection (a); and added subsection (b).

CHAPTER 13

SECURING ATTENDANCE OF WITNESSES AND PRODUCTION AND PRESERVATION OF EVIDENCE

Article 6

Depositions to Preserve Testimony in Criminal Proceedings

Sec.
24-13-132. Appointment of counsel; payment of costs and expenses.

ARTICLE 2

SUBPOENAS AND NOTICE TO PRODUCE

24-13-23. Subpoena for production of documentary evidence; motion to quash or modify.

JUDICIAL DECISIONS

Request to modify subpoena properly denied. — Trial court did not abuse the court's discretion in denying the motion to modify the subpoena, particularly in light of the wide latitude given to make complete discovery possible, the burden on the hospital to show more than that the materials would not themselves be admissible at trial, and the fact that the hospital did not argue that the material was privileged or that the discovery request was burdensome. WellStar Kennestone Hosp. v. Roman, 344 Ga. App. 375, 810 S.E.2d 600 (2018).

Subpoena for information on certification of drug dog. — Trial court improperly granted the state's motion to quash the defendant's subpoena for all records and documents pertaining to the drug detection dog and the dog's handler involved in the detection of drugs in the defendant's luggage because the appellate court could not determine from the existing record whether the training materials were relevant to the issue of reliability of the drug dog as certification of the drug dog on the day of the alert did not preclude a challenge to its reliability; other than the blanket assertion that training materials were irrelevant to show reliability, the state offered no other basis for the state's objection to the subpoena; and the trial court had the discretion to modify the subpoena if the subpoena was overly broad. Harris v. State, 341 Ga. App. 831, 802 S.E.2d 708 (2017).

Post-judgment discovery.

Judgment creditor was authorized to seek bank records of the debtor's wife in post-judgment discovery because the creditor was entitled to seek information that would lead to any property or other sources of income of the debtor; further, the wife had begun paying the husband's country club dues from her bank accounts after the judgment was entered. Hickey v. RREF BB SBL Acquisitions, LLC, 336 Ga. App. 411, 785 S.E.2d 72 (2016).

Motion to quash properly denied to probationer. — Probationer, who was prohibited from obtaining an investigative file from a sheriff's office by way of a subpoena duces tecum in anticipation of a probation-revocation hearing and, thus, since the probationer met the initial burden of showing that the documents sought were relevant and the subpoena was not unreasonable and oppressive, the trial court did not abuse the court's discretion by denying the motion to quash. In re Whittle, 339 Ga. App. 83, 793 S.E.2d 123 (2016).

Motion to quash properly granted. — Because the allegations in the affidavits of title simply described either the relationship of the parties or other objective facts or circumstances affecting title to the property, and nearly all of those allegations were asserted or confirmed by the property owner either in the property owner's answer to the bank's complaint, the property owner's counterclaim or the property owner's brief on appeal, the trial court did not abuse the court's discretion in effectively granting the motion to quash the subpoena for the bank's counsel and refusing to allow the property owner to question the bank's counsel. Cronan v. JP Morgan Chase Bank, N.A., 336 Ga. App. 201, 784 S.E.2d 57 (2016).

Cited in Walker v. State, 323 Ga. App. 558, 747 S.E.2d 51 (2013); Connor v. Oconee Fed. S&L Ass'n, 338 Ga. App. 632, 791 S.E.2d 207 (2016); Martin v. Ledbetter, 342 Ga. App. 208, 802 S.E.2d 432 (2017).

24-13-25. Fees and mileage; when tender required.

JUDICIAL DECISIONS

Tender of fee and mileage.

While a witness fee and mileage expenses might not have been a prerequisite to the production of documents, the subpoena and letter served upon the Georgia Department of Corrections' legal counsel instructed that "you are hereby required to be and appear" and listed the documents and evidence the Department was to bring to the hearing. Thus, pursuant to former O.C.G.A. § 24-10-24, the attendant witness fee and mileage expense were required. Williams v. Russo, 322 Ga. App. 654, 745 S.E.2d 842 (2013) (decided under former O.C.G.A. § 24-10-24).

24-13-26. Enforcement of subpoenas; continuance; secondary evidence of books, papers, or documents.

JUDICIAL DECISIONS

Contempt order insufficiently definite. — Contempt order was not sufficiently specific enough to allow a post-judgment debtor to determine what documents to produce to purge the debtor of contempt because the order referred to "any documents that have been requested" and not produced, and there were multiple requests; further, the self-executing nature of the order violated the debtor's due process rights. Rocker v. First Bank of Dalton, 343 Ga. App. 501, 806 S.E.2d 884 (2017).

Cited in 915 Indian Trail, LLC v. State Bank & Trust Co., 328 Ga. App. 524, 759 S.E.2d 654 (2014).

24-13-27. Notice to produce.

JUDICIAL DECISIONS

Analysis

Criminal Cases
3. Items Subject to Notice to Produce

Criminal Cases

3. Items Subject to Notice to Produce

Cited in 915 Indian Trail, LLC v. State Bank & Trust Co., 328 Ga. App. 524, 759 S.E.2d 654 (2014).

ARTICLE 4

UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE

Cross references. — Procedure for testimony of out of state witnesses in guardianship or conservatorship proceeding, § 29-11-6.

24-13-90. Short title.

Law reviews. — For annual survey of evidence law, see 67 Mercer L. Rev. 63 (2015).

JUDICIAL DECISIONS

Cited in Young v. State, 324 Ga. App. 127, 749 S.E.2d 423 (2013).

24-13-94. Criminal or grand jury proceeding in this state — Issuance of certificate; how long witness detained; punishment.

JUDICIAL DECISIONS

Witness not material. — Trial court properly concluded that an out-of-state witness, who could have testified as to source codes for the breath testing device, was not "material" as the defendant presented no evidence mouth alcohol was present during a breath test such that an error message should have been generated that was not; the mere possibility that alcohol remained in the defendant's mouth due to a surgical implant and retainer was not evidence pointing to actual existence of excess alcohol in the mouth. Cronkite v. State, 293 Ga. 476, 745 S.E.2d 591 (2013) (decided under former O.C.G.A. § 24-10-94).

Out-of-state corporation.

In 10 driving under the influence cases, because the defendants failed to present any evidence of facts supporting the existence of an error in their breath test results as required by case law, the trial court did not abuse the court's discretion when the court determined that the defendants failed to show that the machine's manufacturer was a material witness under the Uniform Act to Secure Attendance of an Out-of-State Witness, O.C.G.A. § 24-13-94(a). Young v. State, 324 Ga. App. 127, 749 S.E.2d 423 (2013).

Continuance of case properly denied. — Trial court did not abuse the court's discretion by denying the defendant's request for a continuance because the court had granted a certificate pursuant to O.C.G.A. § 24-13-94 to permit the defense an opportunity to obtain the information and witnesses from the breathalyzer manufacturer set the case with enough time for the defense to do so, and, after the Kentucky court issued an order denying the request, which order was entitled to full faith and credit, required the defendant to proceed to trial. Phillips v. State, 324 Ga. App. 728, 751 S.E.2d 526 (2013).

Full faith and credit given to out-of-state order. — Trial court did not err by requiring defendant to proceed to trial without the source code and other requested information because it had granted a certificate pursuant to O.C.G.A. § 24-13-94 to permit the defense an opportunity to obtain the information from the manufacturer located in Kentucky, set the case with enough time to do so, and, after the Kentucky court issued an order denying the request, which order was entitled to full faith and credit, required defendant to proceed to trial. Phillips v. State, 324 Ga. App. 728, 751 S.E.2d 526 (2013).

ARTICLE 6

DEPOSITIONS TO PRESERVE TESTIMONY IN CRIMINAL PROCEEDINGS

24-13-132. Appointment of counsel; payment of costs and expenses.

(a) If an accused is financially unable to employ counsel, the court shall appoint counsel as provided in Chapter 12 of Title 17, unless the accused elects to proceed without counsel.

(b) Whenever a deposition is taken at the instance of the state, the cost of any such deposition shall be paid by the state by the Prosecuting Attorneys' Council of the State of Georgia out of such funds as may be appropriated for the operations of the district attorneys.

(c) Depositions taken at the instance of an accused shall be paid for by the accused; provided, however, that, whenever a deposition is taken at the instance of an accused who is eligible for the appointment of counsel as provided in Chapter 12 of Title 17, the court shall direct that the reasonable expenses for the taking of the deposition and of travel and subsistence of the accused and the accused's attorney for attendance at the examination, not to exceed the limits established pursuant to Article 2 of Chapter 7 of Title 45, be paid for out of the fine and bond forfeiture fund of the county where venue is laid. (Code 1981, § 24-13-132, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2015, p. 693, § 3-33/HB 233.)

The 2015 amendment, effective July 1, 2015, substituted "fine and bond forfeiture fund" for "fine and forfeiture fund" near the end of subsection (c). See Editor's notes for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

Law reviews. — For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 1 (2015).

CHAPTER 14

PROOF GENERALLY

RESEARCH REFERENCES

ALR. — Construction and application of standard for reviewing challenges to sufficiency of evidence supporting conviction — Supreme Court cases, 76 A.L.R. Fed. 2d 295.

ARTICLE 1

GENERAL PROVISIONS

24-14-1. On whom burden of proof lies.

JUDICIAL DECISIONS

Analysis

General Considerations
Jury Instructions

General Considerations

Failure to consider student's affirmative defense of self-defense by local board. — Judgment upholding the decision of a local board of education (local board) expelling a student for fighting was reversed because the record fully supported that the student properly raised the issue of self-defense before the local board and that the board failed to apply the proper law and make the board's own findings of fact on the issue. Henry County Bd. of Educ. v. S. G., 301 Ga. 794, 804 S.E.2d 427 (2017).

Jury Instructions

Charge as to apportionment. — In a personal injury case, the defendant's apportionment claim was an affirmative defense, thus, the defendant had the burden of showing by a preponderance of the evidence that the nonparty tractor-trailer driver was negligent and that the driver's negligence proximately caused all or some portion of damages to the plaintiff, thus, the trial court committed no error in charging the jury to that effect. Brown v. Tucker, 337 Ga. App. 704, 788 S.E.2d 810 (2016).

24-14-3. Amount of mental conviction required; preponderance of evidence in civil cases.

JUDICIAL DECISIONS

Analysis

Civil Cases

Civil Cases

Preponderance standard establishing terms of lost document. — In a divorce case, applying the preponderance of the evidence standard, and deferring to the trial court's finding that both a husband and a wife believed their opposing positions regarding the contents of a lost antenuptial agreement, the husband

failed to prove the terms of the lost agreement, and the agreement could not be enforced. Coxwell v. Coxwell, 296 Ga. 311, 765 S.E.2d 320 (2014).

24-14-6. When conviction may be had on circumstantial evidence.

JUDICIAL DECISIONS

Analysis

General Consideration
Exclusion of Reasonable Hypothesis
Instructions
Sufficiency of Circumstantial Evidence

General Consideration

Witness credibility does convert direct evidence into circumstantial evidence. — Appellate court rejected the defendant's argument that the evidence presented at trial was legally insufficient to support the defendant's convictions based on the state's two key witnesses being so unreliable that the witnesses' testimony should be considered circumstantial rather than direct evidence because direct evidence from a witness who observed a crime does not convert into circumstantial evidence by the witness's credibility or lack thereof. Lewis v. State, 296 Ga. 259, 765 S.E.2d 911 (2014).

Cited in Rodriguez-Nova v. State, 295 Ga. 868, 763 S.E.2d 698 (2014) (decided under former O.C.G.A. § 24-4-6); Walker v. State, 329 Ga. App. 369, 765 S.E.2d 599 (2014); Villegas v. State, 334 Ga. App. 108, 778 S.E.2d 363 (2015); Martinez v. State, 337 Ga. App. 374, 787 S.E.2d 308 (2016); Jones v. State, 299 Ga. 377, 788 S.E.2d 477 (2016); In the Interest of T. W., 344 Ga. App. 338, 810 S.E.2d 582 (2018).

Exclusion of Reasonable Hypothesis

Consideration of defendant's explanation.

Evidence presented at trial was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt of felony murder based on the testimony of several witnesses that the defendant hit the victim in the back of the head with a brick and, despite the defendant asserting that another individual hit the victim, it was for the jury to determine the credibility of the witnesses and the weight of the evidence. Wilson v. State, 295 Ga. 84, 757 S.E.2d 825 (2014).

Evidence raising an inference of a defendant's innocence improperly excluded.

Although evidence was sufficient to find the defendant guilty of the murder of the defendant's girlfriend's adopted child, the conviction was reversed because the defendant was prevented from introducing testimony from the girlfriend's ex-husband that the girlfriend had slapped her infant in the face for refusing to eat and threatened the children. Gilreath v. State, 298 Ga. 670, 784 S.E.2d 388 (2016).

Hypothesis considered by jury.

Sufficient evidence supported the defendant's convictions for felony murder and two aggravated assaults because despite no eyewitness able to say who fired the shot that fatally wounded the victim, the defendant was among a group that fired at least three handguns, one of which fatally wounded the victim, and the state was not required to prove that the defendant personally fired the fatal shot, so long as it proved that the defendant was a party to the fatal shooting. Pyatt v. State, 298 Ga. 742, 784 S.E.2d 759 (2016).

Although a murder defendant admitted beating the victim for looking at the defendant's girlfriend, the defendant claimed that the victim died due to the victim's intoxication and falling and striking the victim's head on the bumper of a van; however, the jury was not required to

Exclusion of Reasonable Hypothesis (Cont'd)

accept this hypothesis because the medical examiner testified that it was unlikely that such a fall caused the victim's death. Gibson v. State, 300 Ga. 494, 796 S.E.2d 712 (2017).

Instructions

Only when the case is wholly dependent on circumstantial evidence, etc.

Because the state presented direct evidence that the defendant committed a drive-by shooting and the defendant did not request the full circumstantial evidence instruction in writing, the trial court did not commit reversible error; the trial court instructed the jury on the definition of circumstantial evidence and gave a full instruction on reasonable doubt. Walker v. State, 295 Ga. 688, 763 S.E.2d 704 (2014).

When charge not required.

Because the defendant's admissions of guilt following the killing were direct evidence of the defendant's guilt, the state's case was not based solely on circumstantial evidence and the additional circumstantial evidence charge requested by the defendant was not required. Rodriguez-Nova v. State, 295 Ga. 868, 763 S.E.2d 698 (2014) (decided under former O.C.G.A. § 24-4-6).

Failure to charge reversible error.

Trial court's refusal to give the defendant's requested charge on circumstantial evidence amounted to plain error because the charges as given failed to provide the jury with the proper guideline for determining the defendant's guilt or innocence and, thus, the error likely affected the outcome of the trial. Stroud v. State, 344 Ga. App. 827, No. A17A1679, 2018 Ga. App. LEXIS 148 (2018) (decided under former O.C.G.A. § 24-4-6).

Instruction held not erroneous.

Since the state's case was based upon direct as well as circumstantial evidence, the trial court did not err under former O.C.G.A. § 24-4-6 by sua sponte charging the jury on the standard of proof necessary to convict an accused on circumstantial evidence. Cupe v. State, 327 Ga. App. 642, 760 S.E.2d 647 (2014) (decided under former O.C.G.A. § 24-4-6).

Sufficiency of Circumstantial Evidence

Evidence sufficient for armed robbery conviction.

Defendant's armed robbery conviction was not based on insufficient circumstantial evidence based on the fact that the victim could not identify the defendant as one of the men who robbed the victim because the state presented evidence that two men, one taller and one shorter, used handguns to take property from the victim, and within minutes the police located the defendant's vehicle, which matched the victim's description and contained the victim's stolen belongings as well as two handguns; and, when stopped, the defendant spontaneously stated that the defendant committed the crime. Demps v. State, 337 Ga. App. 657, 788 S.E.2d 525 (2016) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for armed robbery conviction.

Several counts of the defendant's robbery and burglary convictions and one count of criminal attempt to commit armed robbery were reversed because the finding of the proceeds of some of the robberies at an apartment did not show that the defendant was in possession of the property taken and no witness testified connecting the defendant with some of the home invasions; thus, the evidence did not exclude the reasonable possibility that the defendant did not participate in some of the crimes. Cisneros v. State, 334 Ga. App. 659, 780 S.E.2d 360 (2015), aff'd, 792 S.E.2d 326 (Ga. 2016).

Evidence sufficient for conviction of sexual exploitation.

Evidence was sufficient to convict the defendant of 15 counts of sexual exploitation of children based on the child pornography found on the defendant's girlfriend's computer because a Georgia Bureau of Investigation expert in computer forensics explained that there was no evidence that a virus had downloaded any of the illegal files, and that there was no evidence that anyone had hacked into the computer; the defendant's mother, the

defendant's girlfriend, and the defendant's girlfriend's mother and brothers testified that they did not download the illegal files onto the computer; and the downloads began just one month after the defendant moved in with the defendant's girlfriend and only on days when the defendant was not incarcerated. Beaver v. State, 330 Ga. App. 496, 767 S.E.2d 503 (2014) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession with intent to distribute.

Appellate court refused to disturb the jury's verdict convicting defendant of possession of drugs with the intent to distribute because after hearing the evidence and having the opportunity to judge the credibility of the witnesses, the jury properly concluded that the only reasonable hypothesis was that defendant possessed the drugs found hidden in the kitchen, despite defendant's argument that others had equal access. King v. State, 325 Ga. App. 777, 755 S.E.2d 22 (2014).

Although circumstantial, evidence of the defendant's behavior in attempting to obtain the package including questioning the recipient about whether the recipient contacted police and opened the package, use of a false name to conceal identity, and prior convictions for conspiracy to sell marijuana and possession of cocaine was sufficient for a jury to conclude that the defendant had knowledge of the presence of the marijuana in the package and the power and intent to control the package. Murray v. State, 335 Ga. App. 634, 782 S.E.2d 694 (2016), cert. denied, No. S16C0916, 2016 Ga. LEXIS 435 (Ga. 2016) (decided under former O.C.G.A. § 24-4-6).

Evidence insufficient for burglary conviction.

Evidence was sufficient to convict defendant of the burglary of two residences where defendant's shoe prints and tire tracks were found; both tire tracks and shoe prints connected defendant to these burglaries, and defendant was caught by the police wearing the same shoes and driving the same car while in the process of participating in the burglary of a third residence, located near the first two residences. Wise v. State, 325 Ga. App. 377, 752 S.E.2d 628 (2013) (decided under former O.C.G.A. § 24-4-6).

Burglary conviction.

Circumstantial evidence that a cigarette butt with the defendant's DNA on the butt was found in a burglary victim's home, that the defendant was seen standing in a neighbor's yard, that the defendant was wet and muddy, and that some of the stolen items were also wet and near a creek near the victim's home was sufficient to support the defendant's burglary conviction. Stokes v. State, 327 Ga. App. 511, 759 S.E.2d 585 (2014).

Defendant's convictions for burglary and smash and grab burglary under O.C.G.A. §§ 16-7-1(c) and 16-7-2(b) were supported by circumstantial evidence, including cell phone evidence that the defendant was near the scenes of the two burglaries and DNA evidence from a cigarette butt found in a very similar burglary days after the charged crimes. Nations v. State, 345 Ga. App. 92, No. A17A1444, 2018 Ga. App. LEXIS 176 (2018).

Malice murder.

Evidence was sufficient to find the defendant guilty of the malice murder because the defendant and the victim had a domestic dispute over the money that the defendant had borrowed from the victim; two days later, human body parts that were later identified as the victim's were found scattered around a secluded, wooded area near a house owned by the defendant; a coroner examined the remains and determined that the cause of death was homicide by unknown cause; the defendant never reported the victim missing; the defendant told conflicting stories about the victim's disappearance and the defendant's activities around that time; and the defendant towed the victim's car to a hotel parking lot and left the car. Benson v. State, 294 Ga. 618, 754 S.E.2d 23 (2014).

Circumstantial evidence was sufficient to convict the defendant of malice murder and possession of a firearm in the commission of a felony because an eyewitness identified the defendant as the man leaving the victim's apartment wearing a camouflage jacket and with a gun in the defendant's hand; video from the

Sufficiency of Circumstantial Evidence (Cont'd)

convenience store at the time the defendant and the co-defendant encountered the victim showed the defendant wearing a camouflage jacket; the same or a similar jacket was later given to police by the defendant's aunt; and the defendant's own testimony placed the defendant at the scene, even though the defendant initially denied having been present and attempted to hide from police. Neely v. State, 302 Ga. 121, 805 S.E.2d 18 (2017).

Circumstantial evidence was sufficient to convict the defendant of the malice murder of a girlfriend's nine-month-old child because the medical examiner concluded that the cause of the child's death was blunt force injuries to the child's head and extremities, with the bleeding in the child's brain causing the child's organs to shut down and stop the child's breathing; the defendant was alone with the child just before the child's death; the medical examiner concluded that the child's injuries did not likely occur the way the defendant described; and the jury was authorized to reject the defendant's hypothesis that the child's mother caused the child's death. Bennett v. State, 301 Ga. 874, 804 S.E.2d 360 (2017).

Evidence sufficient for spouse's felony murder conviction arising out of killing officer. — Defendant's conviction for felony murder arising out of the defendant's spouse's shooting and killing a police officer was supported by circumstantial evidence that the defendant was a party to the spouse's crime of possessing a firearm as a convicted felon and that the crime was the proximate cause of the officer's death. Lebis v. State, 302 Ga. 750, 808 S.E.2d 724 (2017).

Evidence sufficient to support conviction of trafficking in methamphetamine.

Evidence was sufficient to convict the defendant of trafficking in methamphetamine because the defendant was in joint constructive possession of methamphetamine found under the seat of the vehicle the defendant was driving, and the jury was entitled to reject the defendant's alternative hypothesis that the defendant believed the defendant was simply delivering a vehicle to a motel as the jury could have found that, given the high street value of the methamphetamine, the defendant would not have been permitted to drive the vehicle alone to the motel unless the defendant was a trusted accomplice. Garcia-Maldonado v. State, 324 Ga. App. 518, 751 S.E.2d 149 (2013) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for felony murder but insufficient for rape. — In the defendants' joint trial for rape, murder, and other crimes against three separate victims, the evidence supported the felony murder verdict against one defendant because witnesses placed the defendants together prior to the murder, text messages on the defendant's phone discussed robbing the victim, and the defendant fled the state after the murder; but the evidence as to the rape merely placed the defendant at the scene, requiring reversal. Thomas v. State, 300 Ga. 433, 796 S.E.2d 242 (2017).

Evidence not entirely circumstantial.

Evidence was sufficient to support the defendant's convictions because the state did not rely solely on circumstantial evidence as there was substantial direct evidence including the witnesses identifying the defendant as one of their assailants, and the defendant admitting to the defendant's participation in the home invasion to the deceased accomplice's older brother; furthermore, direct evidence from a witness who observed a crime was not converted into circumstantial evidence by the witness's credibility or lack thereof, and the totality of the circumstantial evidence presented was sufficient for the jury to reject any other reasonable theory except that the defendant was guilty as charged. Hill v. State, 297 Ga. 675, 777 S.E.2d 460 (2015) (decided under former O.C.G.A. § 24-4-6).

Evidence held sufficient to support murder conviction. — Although circumstantial, the evidence was sufficient to convict the defendant of murder, armed robbery, and related crimes in connection with the death of the victim because the defendant was identified by a witness as the person the witness saw coming upstairs from the victim's apartment just

before the witness discovered the crimes; the defendant's fingerprints were found on the car used in the crimes; and the defendant's own statements, both via text message and in person, corroborated the defendant's participation in the murder and robbery. Babbage v. State, 296 Ga. 364, 768 S.E.2d 461 (2015) (decided under former O.C.G.A. § 24-4-6).

Evidence held sufficient to support conviction.

Evidence presented was sufficient to authorize a rational jury to find that the state had excluded every reasonable hypothesis except that of appellant's guilt with regard to the felony murder of a two-year-old child left in appellant's care based on the child being healthy when left in appellant's care, died as the result of blunt force trauma to the head which could not have resulted from the normal activities of a child or a fall down the stairs, and appellant was alone with the child. Alexander v. State, 294 Ga. 345, 751 S.E.2d 408 (2013).

Evidence that the defendant, the child's mother, and the child's father were the child's sole caregivers and were the only ones with access to the child in the timeframe of the fatal injury, that the defendant was the primary caregiver, that the fatal blow would have caused immediate and visible symptoms, that the child suffered many additional injuries, and that the defendant did not seek medical care for the child was sufficient to support convictions for felony murder and cruelty to children. Akhimie v. State, 297 Ga. 801, 777 S.E.2d 683 (2015).

Defendant's conviction for child molestation was affirmed because the testimony of the victim through the victim's description and use of dolls to demonstrate the acts the defendant took toward the victim was sufficient to show that the defendant had shown the victim a pornographic video and had touched the victim and had engaged in sexual activity. Chamblee v. State, 333 Ga. App. 749, 777 S.E.2d 41 (2015).

Although circumstantial, the evidence was sufficient to convict the defendant of burglary because the blood pools and drag marks found at the crime scene indicated that the victims were shot before being dragged inside their home, and the medical examiner testified to the absence of soot in one of the victim's lungs showing that that victim was not breathing during the fire; thus, the jury could reasonably infer that the defendant entered the home without the victims' consent and that the defendant did so with the intention of committing the felony of arson once inside. Saffold v. State, 298 Ga. 643, 784 S.E.2d 365 (2016) (decided under former O.C.G.A. § 24-4-6).

Although circumstantial, the evidence was sufficient to convict the defendant of theft of a motor vehicle because the victims' missing vehicle was found with one of the victim's blood on it and abandoned on railroad tracks near where the defendant's girlfriend picked the defendant up on the night of the murders. Saffold v. State, 298 Ga. 643, 784 S.E.2d 365 (2016) (decided under former O.C.G.A. § 24-4-6).

Although circumstantial, the evidence was sufficient to convict the defendant of murder, arson, and possession of a firearm during the commission of a crime because the defendant and an associate visited the victims on the night that the victims were shot to death and the victims' trailer home was deliberately set on fire; the defendant's girlfriend picked the defendant up on a nearby highway about three hours after the neighbors heard gunshots at the victims' residence; the defendant admitted to the girlfriend that the defendant and an associate had fought with and shot at someone in the area where the victims lived and had set fire to a house; and DNA from both murder victims was found on the defendant's tennis shoes. Saffold v. State, 298 Ga. 643, 784 S.E.2d 365 (2016) (decided under former O.C.G.A. § 24-4-6).

Appellant's conviction for vehicular homicide was affirmed because the verdict led to the strong inference that the appellant, while driving under the influence, killed the victim with a vehicle appellant was driving at a high rate of speed and there was no other evidence that another car or anything else struck the victim while alive with such force as to kill. Taylor v. State, 337 Ga. App. 486, 788 S.E.2d 97 (2016).

While the victim could not identify the gunman, the combined testimony of the

Sufficiency of Circumstantial Evidence (Cont'd)

other witnesses was sufficient to enable a rational jury to find the defendant guilty beyond a reasonable doubt as the perpetrator of the charged crimes, including armed robbery and aggravated battery, and to exclude every reasonable hypothesis except that of the defendant's guilt. Epperson v. State, 340 Ga. App. 25, 796 S.E.2d 1 (2016).

Evidence sufficient for forgery conviction. — Sufficient circumstantial evidence supported the defendant's conviction for forgery based on the reasonable inferences arising from the evidence showing that a check was drawn on an account of a roofing company for which the defendant never worked; thus, the inference arose that the defendant knew that the company did not owe any money to the defendant and that the defendant was not authorized to present the check for payment. Bettes v. State, 329 Ga. App. 13, 763 S.E.2d 366 (2014).

Evidence sufficient for murder conviction.

Circumstantial evidence, including that there was no evidence that the victim died from a cause other than asphyxia due to strangulation, the fact that the victim tested negative for drugs at the time of death, negating any theory about a lethal combination of alcohol and drugs, and the lack of evidence of forced entry to a room that the defendant and the victim shared was sufficient to support the defendant's murder conviction. Simpson v. State, 293 Ga. 131, 744 S.E.2d 49 (2013).

Circumstantial evidence was sufficient to convict the defendant of murder as the victim's daughter saw that the victim had about $600 in the victim's wallet the day before the murder; after the murder, the victim's purse had no cash in it; the defendant's girlfriend identified the knife handle and blade found near the victim's body as the steak knife with a loosened handle that the girlfriend had used in cooking at the defendant's apartment; and the defendant admitted to another prisoner that the defendant stabbed the victim. Bates v. State, 293 Ga. 855, 750 S.E.2d 323 (2013).

Jury could reasonably infer from the evidence that the defendant called the defendant's gang members to retrieve the defendant from an apartment where someone was threatening the defendant, as well as the defendant's celebrating with the gang that evening after the shooting, that the defendant was a party to the crime under O.C.G.A. § 16-2-20(b)(4) by advising, encouraging, counseling, or procuring others to commit the crime. Slaton v. State, 296 Ga. 122, 765 S.E.2d 332 (2014).

Evidence sufficient for malice murder conviction.

Evidence was sufficient to convict the defendant as a party to the crimes of malice murder, voluntary manslaughter, and aggravated assault because the evidence showed that, during a drug deal and the subsequent shootings, the defendant was in the apartment and the defendant's blood was found there; witnesses saw two men matching the defendant's and the codefendant's descriptions leaving quickly; ammunition of the type used to kill the victim was found in a car that was owned by the codefendant with whom the defendant was living; and the defendant denied knowing any of the other defendants and fabricated a story that the defendant had been shot in a confrontation at a gas station. Dixon v. State, 298 Ga. 200, 779 S.E.2d 290 (2015) (decided under former O.C.G.A. § 24-4-6).

Circumstantial evidence was sufficient to convict the defendant of directly committing the crimes of malice murder and concealing the death of another or that the defendant was a party to the crimes because there was evidence of prior difficulties between the defendant and the victim, including evidence that the defendant had acted violently against the victim a few months before the victim's body was found; evidence that days before the victim's body was found, the defendant's son used the victim's cell phone to call their relatives; and evidence that the police found the victim's personal items, including items which could have been used to inflict the fatal injuries to the victim's body, inside the defendant's bags. Miller v. State, 303 Ga. 1, 810 S.E.2d 123 (2018).

Evidence sufficient for felony murder conviction.

Circumstantial evidence was sufficient to convict the defendant of felony murder predicated upon aggravated assault because the evidence at the crime scene showed there had been a struggle; the victim's injuries were consistent with strangulation; male DNA taken from the victim's body was later matched to the defendant's DNA; no other male DNA was found in the samples taken from the victim's body; and the state excluded all reasonable hypotheses except that of the defendant's guilt. Reeves v. State, 294 Ga. 673, 755 S.E.2d 695 (2014) (decided under former O.C.G.A. § 24-4-6).

Evidence held insufficient to support conviction.

Circumstantial evidence was sufficient to convict the defendant of misdemeanor fleeing or attempting to elude a police officer because a deputy identified the defendant as the driver; another officer followed the defendant out of the parking lot when the defendant refused to stop; and the officer activated the vehicle's lights and siren but lost sight of the speeding car moments before a car of the same color struck another vehicle just ahead; however, the evidence was insufficient to convict the defendant of felony fleeing or attempting to elude as no evidence was presented that the defendant was attempting to elude arrest for a non-traffic violation when the defendant struck the other vehicle. Johnson v. State, 337 Ga. App. 622, 788 S.E.2d 559 (2016).

24-14-8. Number of witnesses required generally; exceptions; effect of corroboration.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
SUFFICIENCY OF CORROBORATING EVIDENCE
EVIDENCE CONSTITUTING CORROBORATION
PERJURY
JURY

General Consideration

Testimony of single witness to establish fact.

Evidence was sufficient to find the defendant guilty of armed robbery and possession of a firearm during the commission of a felony even though it was based on the victim's identifications of the defendant's eyes. Jones v. State, 329 Ga. App. 478, 765 S.E.2d 657 (2014).

Victim's testimony sufficient.

Evidence from a victim that the defendant robbed the victim of cash, cell phones, and a GPS unit at knifepoint was sufficient pursuant to O.C.G.A. § 24-14-8 to establish that the defendant committed armed robbery with a knife in violation of O.C.G.A. §§ 16-8-41(a) and 16-11-106(b)(1), although the defendant testified that the victim gave the defendant these items for drugs. Sanders v. State, 324 Ga. App. 4, 749 S.E.2d 14 (2013).

Evidence was sufficient to convict the defendant of three counts of aggravated assault, one count of burglary, and several firearms charges because: (1) both victims testified that the defendant was their assailant; and (2) the victims' testimony alone was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of the charged offenses. Smith v. State, 325 Ga. App. 739, 754 S.E.2d 783 (2014) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of rape because the victim testified that the defendant forced the victim to have vaginal intercourse with the defendant against the victim's will; the victim's testimony, standing alone, was suffi-

General Consideration (Cont'd)

cient to sustain the conviction; and testing showed that DNA found on the swabs taken from the victim as part of the sexual assault kit matched the defendant's DNA profile. Miller v. State, 325 Ga. App. 764, 754 S.E.2d 804 (2014) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence supported the defendant's convictions for aggravated assault with the intent to rape, aggravated sexual battery, and burglary based on the testimony of the victim that at approximately 4:00 a.m. the victim was in bed asleep when a man got into the victim's bed and began choking the victim, that it was not consensual, and that the perpetrator indicated watching the victim for some time and inserted two fingers into the victim's vagina. Davis v. State, 326 Ga. App. 778, 757 S.E.2d 443 (2014).

Evidence was sufficient to convict the defendant of armed robbery, kidnapping with bodily injury, hijacking a motor vehicle, possession of a firearm during the commission of a felony, financial-transaction-card fraud, battery, and possession of a firearm by a convicted felon during a crime because the victim identified the defendant as the perpetrator who sat with the victim in the backseat of the car and threatened to shoot the victim in the victim's side; the testimony of a single witness was generally sufficient to establish a fact; the defendant was overheard saying on the night in question that the defendant wanted to commit a robbery; and the defendant attempted to persuade an acquaintance to provide the defendant with a false alibi. Belcher v. State, 344 Ga. App. 729, No. A17A1982, 2018 Ga. App. LEXIS 126 (2018).

Corroboration of accomplice not necessary, etc.

Even though the prosecution was initiated as one seeking felony punishment, the factfinder was empowered to determine that the value of the property taken was less than the felony value, and when that was the decision the factfinder reached, the case was not a "felony case" for purposes of the accomplice corroboration requirement and the testimony of a single witness accomplice did not have to be corroborated. Heatherly v. State, 301 Ga. 386, 801 S.E.2d 827 (2017).

Independent evidence of defendant's involvement. — Evidence showed that a witness's testimony was sufficiently corroborated to prove the defendant's involvement in the attempted robbery and murder of the victim because independent evidence showed that the defendant knew that the victim had lots of money; that the shooter planned and participated in the robbery with the defendant; that the defendant sent a driver to pick the shooter up on the night that the victim was shot; that the defendant threatened one of the defendant's escorts with a gun after the murder when the defendant suspected that the escort had spoken to police; and that the defendant fled Atlanta when the defendant knew that police could have been looking for the defendant in connection with the victim's murder. Rutledge v. State, 298 Ga. 37, 779 S.E.2d 275 (2015) (decided under former O.C.G.A. § 24-4-8).

Cited in Stephens v. State, 323 Ga. App. 699, 747 S.E.2d 711 (2013); Propst v. State, 299 Ga. 557, 788 S.E.2d 484 (2016); Cooper v. State, 342 Ga. App. 351, 801 S.E.2d 589 (2017).

Sufficiency of Corroborating Evidence

Corroboration by other accomplices. — Evidence was sufficient to convict the defendant of murder as the defendant used a knife to stab the victim in the neck; a jailhouse informant testified that the defendant had admitted that the defendant and a juvenile had beat the victim with a pan, strangled the victim with a belt, and stabbed the victim in the neck; and, even if the supreme court were to assume that the only evidence of the defendant's guilt was the testimony of accomplices, because more than one accomplice testified at trial, the testimony of one accomplice could be corroborated by the testimony of the others. Ramirez v. State, 294 Ga. 440, 754 S.E.2d 325 (2014) (decided under former O.C.G.A. § 24-4-8).

Trial court did not commit plain error by failing to sua sponte instruct the jury that corroboration was required of an accomplice's testimony because there was

evidence to corroborate the testimony that the defendant was involved with the crimes because two other witnesses testified that the defendant contacted the witnesses before the burglary. Barney v. State, 333 Ga. App. 807, 777 S.E.2d 490 (2015).

Connection of defendant with crime.

Trial court did not err by denying the defendant's motion for a new trial based on the defendant's contention that the evidence was insufficient to corroborate the accomplice testimony implicating the defendant in the robbery because the testimony of the victim identified the defendant as the perpetrator and was sufficient corroboration of the accomplice's testimony. Vann v. State, 322 Ga. App. 148, 742 S.E.2d 767 (2013).

With regard to the defendant's murder conviction, the defendant's contention on appeal that the accomplice testimony used to convict was not corroborated was found meritless because there was slight evidence from an extraneous source identifying the defendant as a participant in the crime; specifically, authorities found the defendant's blood and palm print on the car used during the crime which evidence corroborated the accomplice's testimony that the defendant was injured on the broken glass of the window the men used to gain entry to the victim's house. Lewis v. State, 293 Ga. 110, 744 S.E.2d 21 (2013).

With regard to the defendant's robbery conviction, contrary to the defendant's contention that the testimony of an accomplice was uncorroborated and thus insufficient to support the conviction, there was no conflict in the testimony that the defendant was a participant; thus, the corroborating evidence was more than slight and was sufficient to authorize the jury to find that the accomplice's testimony was corroborated. Carter v. State, 324 Ga. App. 118, 749 S.E.2d 404 (2013).

Sufficient evidence supported the defendant's conviction for armed robbery based on the victim identifying the defendant as the person who hit the victim on the head, an accomplice's testimony, the victim's car keys were found in a bag that the defendant had been holding when stopped by an officer, and the defendant fled from the officers when the officers attempted to arrest. Brooks v. State, 323 Ga. App. 681, 747 S.E.2d 688 (2013).

There was ample corroboration of the accomplice's testimony, including evidence that the murder weapon was found in the defendant's home, a cap and t-shirt like the ones that the victim said the defendant discarded near the murder scene were found near there, and the defendant's DNA was found on a cap found in the vehicle where the victims were shot. Bradshaw v. State, 296 Ga. 650, 769 S.E.2d 892 (2015).

Since the accomplice's testimony was corroborated by phone records, physical evidence, and the testimony of other witnesses, including the defendant's own statements to police, under former O.C.G.A. § 24-4-8, the evidence was sufficient to support the defendant's convictions. McDonald v. State, 296 Ga. 643, 770 S.E.2d 6 (2015) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support the appellant's conviction as a party to the crime of violating O.C.G.A. § 40-6-395(a) for fleeing and eluding because the appellant testified and admitted shoplifting, admitted to having a prior record of shoplifting, had only recently been released from prison, and that getting caught on the day of the events would be a parole violation that would send the appellant back to prison. McNeely v. State, 296 Ga. 422, 768 S.E.2d 751 (2015).

Trial court properly denied the defendant's motion for a directed verdict based on the testimony of the victim that the defendant repeatedly had sexual intercourse and engaged in other sexual acts with the victim, who was younger than 16, as well as the wife's testimony that the defendant admitted to having sex with the victim. Jones v. State, 333 Ga. App. 796, 777 S.E.2d 480 (2015).

The testimony of the victim's brother, identifying the defendant as the shooter, was sufficient to support the convictions because two other eyewitnesses to the shooting corroborated the brother's description of the car driven by the shooter, and another witness corroborated the brother's description of the shooter get-

Sufficiency of Corroborating Evidence (Cont'd)

ting out of the distinctive car a few days after the shooting at the apartment complex where the defendant was soon after arrested. Moss v. State, 298 Ga. 613, 783 S.E.2d 652 (2016).

Victim's testimony that she had sex, including oral sex, with the defendant, her stepfather, beginning when she was 12 years old was corroborated by, among other things, the defendant's admissions and, therefore, the evidence was sufficient to support the statutory rape, child molestation, aggravated child molestation, and incest convictions. Jackson v. State, 339 Ga. App. 313, 793 S.E.2d 201 (2016).

While the co-murderer's statement to police did make up a significant portion of the testimony connecting the defendant to the murders, it was not the only evidence against the defendant as cell phone evidence indicated the defendant was near the victims' home near the time the crimes took place and direct testimony established that the defendant recruited at least one participant in the robbery scheme that resulted in the murders. Thompson v. State, 302 Ga. 533, 807 S.E.2d 899 (2017).

Evidence was sufficient to convict the defendant of, inter alia, malice murder, felony murder, and aggravated assault with a deadly weapon because, assuming that the first witness was an accomplice, there was evidence independent of the first witness's testimony connecting the defendant to the crimes as cell phone records showed the defendant's cell phone was near the towing company where the victim worked around the time of the shooting; a second witness heard gunshots and saw a blue truck with a man standing outside and a man hanging out of a window with the man's arms formed as if shooting; and a third witness reported to police that the defendant and the co-indictee admitted to the third witness that they had killed the victim. Parks v. State, 302 Ga. 345, 806 S.E.2d 529 (2017).

Testimony of other witnesses sufficient.

Evidence was sufficient to support the defendant's convictions as the getaway driver's testimony about the heights of the defendant and the codefendant was consistent with the gas station clerk's comparison of their heights, and there was evidence that the defendant, who had no job, was spending significant amounts of money on cars and expensive clothing. Harrell v. State, 322 Ga. App. 115, 744 S.E.2d 105 (2013) (decided under former O.C.G.A. § 24-4-8).

Defense counsel was not ineffective for failing to request a charge on accomplice corroboration because the accomplice was not the only witness; thus, there was no error in failing to give the accomplice corroboration charge since the state relied on other evidence apart from the accomplice's testimony. Lane v. State, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

In a case decided under former O.C.G.A. § 24-4-8, the testimony of an accomplice implicating the defendant was corroborated by evidence that the defendant believed the victim stole the defendant's cocaine, witnesses identified the defendant as being involved in dragging a man into a vehicle, and the victim's blood was found in the defendant's sister's basement. McKibbins v. State, 293 Ga. 843, 750 S.E.2d 314 (2013) (decided under former O.C.G.A. § 24-4-8).

Testimony of the victim's cousin was sufficient, under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), to corroborate the accomplice's identification of the defendant as the shooter. Sutton v. State, 295 Ga. 350, 759 S.E.2d 846 (2014) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the first defendant of felony murder, two counts of aggravated assault, and possession of a firearm during the commission of a crime because the testimony of the fourth defendant's ex-girlfriend placed the first defendant at the scene of the shooting when the shooting occurred, which corroborated the testimony of the state's witness, who was a participant in the crimes, that the witness saw the first defendant at the scene shooting a gun and then fleeing with the other defendants. Grimes v. State, 296 Ga. 337, 766 S.E.2d 72 (2014).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment,

and possession of a firearm during the commission of a felony in violation of O.C.G.A. §§ 16-8-41, 16-5-21, 16-5-41, and 16-11-106, based on testimony from witnesses inside the bank, the defendant's clothing, a text message between the defendant and the defendant's accomplice, and the defendant's accomplice's testimony, which was corroborated as required by O.C.G.A. § 24-14-8. Odle v. State, 331 Ga. App. 146, 770 S.E.2d 256 (2015).

While the victim could not identify the gunman, the combined testimony of the other witnesses was sufficient to enable a rational jury to find the defendant guilty beyond a reasonable doubt as the perpetrator of the charged crimes, including armed robbery and aggravated battery, and to exclude every reasonable hypothesis except that of the defendant's guilt. Epperson v. State, 340 Ga. App. 25, 796 S.E.2d 1 (2016).

Circumstantial evidence presented at trial sufficient to corroborate testimony of accomplice.

Sufficient corroborating evidence enabled the jury to conclude that the defendant was a party to the robbery based on testimony that the defendant and an accomplice met before and immediately following the robbery, defendant's own testimony of being in the drug business, cellular phone records indicating the defendant was in the vicinity of the robbery when the robbery occurred, eyewitness testimony, and evidence that the defendant sent the amount of money taken from the victim to another. Jackson v. State, 294 Ga. 34, 751 S.E.2d 63 (2013).

There was adequate corroboration.

Evidence that the defendant was linked to the getaway vehicle, and that the defendant was present the next morning at a hotel with the vehicle, the co-indictee, the first defendant, the marijuana, and the cash was sufficient corroborating evidence to support the defendant's convictions for felony murder and other crimes related to the armed robbery of the four victims and the subsequent shootings that killed the first victim and injured the second victim. Cowart v. State, 294 Ga. 333, 751 S.E.2d 399 (2013).

Evidence sufficiently corroborated the victim's testimony that the defendant, along with the three co-defendants, kidnapped the victim for ransom because the proprietor of a business located in the same strip mall as the victim's clothing store saw the victim being forcibly taken away; on conversations monitored from one of the co-defendant's telephones, the victim was overheard pleading that the defendants not kill the victim; the victim was overheard asking the victim's family for money; after an investigatory stop, the defendant was found in the back seat, along with the victim and a hidden gun; and the victim stated that the victim's life had been threatened. Deleon-Alvarez v. State, 324 Ga. App. 694, 751 S.E.2d 497 (2013).

Evidence was sufficient to convict the defendant of five counts of obtaining a controlled substance by fraud because, although only the defendant's alleged accomplice testified that the defendant possessed the requisite criminal intent to obtain possession of the controlled substances by fraud and deception, the state presented evidence of corroborating circumstances that proved the defendant's intent as the defendant went to the pharmacy on one occasion to pick up a medication that was clearly labeled as having been dispensed for the defendant, purportedly on the authority of a doctor who had never provided care for the defendant. Hopkins v. State, 328 Ga. App. 844, 761 S.E.2d 896 (2014).

Complaining witness's testimony that the defendant violated the 12-month stalking protective order by repeatedly shining a light on the witness when the witness took out the trash, shining the light into the witness's house, and yelling obscenities at the witness was sufficient to establish that the defendant violated the protective order where video evidence supplemented such testimony. Birdsong v. Barnett, 334 Ga. App. 120, 778 S.E.2d 372 (2015).

Evidence was sufficient to convict the first defendant of felony murder of two of the victims, the aggravated assault of another two victims, conspiracy to commit armed robbery, and conspiracy to possess cocaine because the accomplice's testimony that the first defendant participated in the crimes was corroborated both by an

Sufficiency of Corroborating Evidence (Cont'd)

assault victim's identification of the first defendant at trial as well as the rap lyrics the first defendant composed in jail which referenced the use of an AK-47 that resulted in the first defendant becoming a co-defendant of the shooter. Taylor v. State, 297 Ga. 132, 772 S.E.2d 630 (2015) (decided under former O.C.G.A. § 24-4-8).

Evidence corroborating an accomplice's testimony, including evidence that all three participating were members of a gang and text messages regarding the removal of fingerprints, was sufficient to satisfy the requirements of former O.C.G.A. § 24-4-8. Veal v. State, 298 Ga. 691, 784 S.E.2d 403 (2016) (decided under former O.C.G.A. § 24-4-8).

In addition to accomplice testimony, evidence that the defendant was in possession of the murder weapon in the days preceding the crimes, placed calls from the vicinity of the crime scene in the early morning hours on the day of the crimes, and was with the victim the night before and the morning of the crimes was sufficient to convict the defendant of malice murder, possession of a firearm during the commission of a felony and possession of a firearm by a first offender probationer. McCain v. State, 300 Ga. 400, 794 S.E.2d 58 (2016).

Evidence was sufficient to convict the second defendant of felony murder, violations of the Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., and other offenses because the second defendant was a member of a local street gang; the accomplice's testimony was sufficiently corroborated as there was a recorded cell phone call in which the second defendant stated that the second defendant was carrying weapons and seeking a criminal opportunity; the second defendant was tied to the first set of crimes in which the second defendant's victim was killed through ballistic evidence; and the second defendant's involvement in the second set of crimes was corroborated by the second defendant's own statements to a cousin. Daniels v. State, 302 Ga. 90, 805 S.E.2d 80 (2017) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of, inter alia, malice murder, two counts of felony murder, and attempted armed robbery as the state presented ample evidence corroborating an accomplice's testimony because a witness testified that the defendant was present when the victim opened the victim's wallet to reveal a large amount of cash; the defendant agreed to do a controlled phone call with the accomplice, which was recorded by police and played for the jury; and, in that phone call, the defendant made incriminating statements regarding the location of the murder weapon, retrieving the weapon, and getting their story straight. Robinson v. State, No. S17A1903, 2018 Ga. LEXIS 171 (Mar. 15, 2018).

After the defendants were convicted of two counts of armed robbery and three counts of aggravated assault stemming from a late-evening robbery of a pizzeria, in addition to the testimony of the getaway driver, who the state believed to be the defendants' accomplice, the testimony of the two store employees and DNA evidence presented by the state allowed the jury to infer that, during the robbery, the first defendant was wearing a black ski mask and a letterman-style jacket and carrying a revolver, while the second defendant was dressed in a Halloween mask and carrying a set of brass knuckles; thus, the state presented sufficient evidence to corroborate the testimony presented by the defendants' accomplice. Hughes v. State, 345 Ga. App. 107, No. A17A1414, 2018 Ga. App. LEXIS 179 (2018).

Adequate corroboration for malice murder conviction.

Evidence was sufficient to convict the defendant of malice murder because, when the victim turned the victim's back on the defendant, and started walking away, the defendant pulled out a gun, put it to the back of the victim's head, and fatally shot the victim; the first co-defendant saw the defendant running back to the car with a gun in the defendant's hand; the second co-defendant testified that the defendant shot the victim; the testimony of the victim's friend supported the testimony of the two co-defendants, though the friend was un-

able to unequivocally identify the defendant as the shooter; and, although some of the evidence was conveyed through the testimony of co-defendants, that evidence was properly corroborated. Fisher v. State, 299 Ga. 629, 791 S.E.2d 58 (2016).

Adequate corroboration for armed robbery conviction.

Evidence was sufficient to convict the defendant of armed robbery because, even if the driver was the defendant's accomplice, there was sufficient evidence to corroborate the driver's testimony that the defendant stated that the defendant robbed the victim as video surveillance images corroborated the driver's testimony that the driver drove the defendant to the scene to buy two pounds of marijuana; the discovery of a packet of marijuana on the victim's body corroborated the nature of the deal; and neither the two pounds of marijuana corroborated by another person's testimony nor the $2,400 confirmed by the defendant, was found in the car with the victim after the defendant shot and killed the victim and returned to the driver's car. Ngumezi v. State, 300 Ga. 764, 798 S.E.2d 229 (2017) (decided under former O.C.G.A. § 24-4-8).

Testimony corroborated in murder trial.

Contrary to the defendant's claim, the defendant's convictions did not rest solely on the uncorroborated testimony of an accomplice as the timing and circumstances supported the identity of the defendant as the mastermind. The defendant had ample motive to kill the victim to prevent the victim from testifying against the defendant and the plain inference that the defendant was responsible for menacing phone calls was uncontradicted. Lindsey v. State, 295 Ga. 343, 760 S.E.2d 170 (2014) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of felony murder and the unlawful possession of a firearm during the commission of a felony because the defendant and the accomplice planned to rob the victim; the accomplice heard two gunshots, and the defendant ran back to the car and pulled out some cash and a bank card with the victim's name on it; the victim later died; and the accomplice's testimony was sufficiently corroborated as the defendant had financial problems and, thus, had a motive for robbery; and, in a recorded phone call, the defendant told the accomplice that the defendant had not used the bank card, which amounted to at least slight evidence that the defendant possessed the victim's property. Edwards v. State, 299 Ga. 20, 785 S.E.2d 869 (2016) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of felony murder and the unlawful possession of a firearm during the commission of a felony as a party because the witness testified that the witness was sleeping in the co-defendant's car when the witness awoke to the sound of gunshots, the co-defendant returned to the car and put down a revolver, and the witness jumped out of the car, saw the victim's body, and ran; and, if the witness was an accomplice, the witness's testimony was corroborated by other evidence as, inter alia, a jailhouse informant described a conversation in which the co-defendant complained that the witness was telling everything about a drug sale that went wrong, and the co-defendant admitted to shooting the victim. Anderson v. State, 299 Ga. 193, 787 S.E.2d 202 (2016) (decided under former O.C.G.A. § 24-4-8).

Accomplice's testimony corroborated.

Evidence was sufficient to convict the defendant of malice murder, aggravated assault, and possession of a firearm during the commission of a felony following a drug deal in which the victim took pills without paying for the pills because the shooter's testimony as an accomplice or party to the crime was not the only evidence identifying the defendant as a participant as the defendant's statement to police placed the defendant on the scene; the defendant's witnesses testified that the defendant engaged in the pursuit; the shooter testified that the defendant told the shooter to take a pistol from the front console and recover the pills, or else the defendant would kill the shooter; and the shooter fired multiple rounds, killing the victim. Huff v. State, 300 Ga. 807, 796 S.E.2d 688 (2017).

Sufficiency of Corroborating Evidence (Cont'd)

Accomplice's testimony not sufficiently corroborated.

Accomplice's testimony that the second defendant participated in the crimes of felony murder of two of the victims, the aggravated assault of another two victims, conspiracy to commit armed robbery, and conspiracy to possess cocaine was not sufficiently corroborated to sustain the second defendant's convictions because the testimony of the shooter's girlfriend that the girlfriend saw the second defendant in a vehicle with the first defendant and the shooter on the evening after the murder did nothing to indicate that the second defendant actually participated in the crimes. Taylor v. State, 297 Ga. 132, 772 S.E.2d 630 (2015) (decided under former O.C.G.A. § 24-4-8).

Evidence Constituting Corroboration

Evidence of conduct as corroboration may be circumstantial or direct.

Evidence presented at trial was sufficient to authorize the defendant's conviction as a party to the crimes charged as it was established that the defendant and the accomplice entered the store together, the defendant watched the accomplice brandish a gun and reach toward the cash drawer, a witness observed the pair running out of the store in the same direction together, and it was a reasonable inference for the jury to conclude that the defendant lied to police about knowing the accomplice. Daniels v. State, 339 Ga. App. 837, 795 S.E.2d 94 (2016).

Modus operandi evidence in the case was sufficient to corroborate a witness's testimony identifying the appellant as a participant in two additional home invasion crimes because the perpetrators were all Spanish speaking and conducted themselves the same way as to all four home invasions that occurred and each happened over the course of only three weeks and were committed within the same county. Cisneros v. State, 299 Ga. 841, 792 S.E.2d 326 (2016).

Perjury

Sufficiency of corroboration.

State satisfied the corroboration requirement as to the defendant's perjury conviction based on the defendant's denial that the defendant and the man who murdered the defendant's husband had a romantic relationship because the state produced testimony from a bartender at a night club who saw the defendant and the man at the club on the dance floor pressing their bodies together while the man cupped the defendant's buttocks and they engaged in passionate kissing; and the state produced corroborating circumstances in the form of romantic email messages between the man and the defendant and evidence that they shared hotel rooms on out-of-town business trips. Sneiderman v. State, 336 Ga. App. 153, 784 S.E.2d 18 (2016), overruled on other grounds by Quiller v. State, 338 Ga. App. 206, 789 S.E.2d 391 (2016).

Jury

Charge on corroboration required.

— Because there was evidence to support a finding that the witness was an accomplice, the trial court erred, pursuant to former O.C.G.A. § 24-4-8, in refusing to give the defendant's requested instruction on the need for corroboration of an accomplice's testimony. Hamm v. State, 294 Ga. 791, 756 S.E.2d 507 (2014) (decided under former O.C.G.A. § 24-4-8).

Trial court committed plain error by not providing a jury charge on the necessity of corroboration of the accomplice's testimony because by failing to give the required accomplice corroboration charge and instead charging the jury that the testimony of a single witness, if believed, was generally sufficient to establish a fact, the trial court impermissibly empowered the jury to find the defendant guilty based solely on the accomplice's testimony; while there was sufficient corroborating evidence to support a verdict, that evidence was in no way overwhelming; the outcome of the trial court proceedings was likely affected by the error; and the error seriously affected the fairness, integrity, or public reputation of the proceedings. Stanbury v. State, 299 Ga. 125, 786 S.E.2d

672 (2016) (decided under former O.C.G.A. § 24-4-8).

Defendant demonstrated prejudice resulting from trial counsel's failure to request an instruction regarding the corroboration of an accomplice's testimony as to the defendant's identity as the shooter, as the accomplice's identification of the defendant as the sole shooter was directly contradicted by the testimony of the bank manager, who identified the accomplice as the shooter, and other circumstantial evidence pointing to the accomplice. Burns v. State, No. A17A0333, 2017 Ga. App. LEXIS 316 (June 27, 2017).

When charge on corroboration not required.

Trial court did not err in failing to instruct the jury that the testimony of an accomplice had to be corroborated because, pretermitting whether the failure to instruct the jury on corroboration was error, the defendant could not successfully demonstrate that it was plain error as evidence from multiple witnesses, including the defendant's witnesses and the defendant personally, corroborated the shooter's testimony. Huff v. State, 300 Ga. 807, 796 S.E.2d 688 (2017).

Jury instruction proper.

Jury charge regarding corroboration of an accomplice's testimony as given properly informed the jury of what corroboration was required; and the jury was instructed on reasonable doubt, participation in a crime, mere presence at the scene of a crime, and that grave suspicion did not authorize a conviction; thus, there was no likelihood that the failure to instruct the jury using the complete language of the suggested pattern jury instructions affected the outcome of the trial, and there was no plain error. Daniels v. State, 302 Ga. 90, 805 S.E.2d 80 (2017).

Failure to request accomplice corroboration instruction. — Defendant received constitutionally ineffective assistance of counsel because counsel was deficient in failing to request an accomplice corroboration instruction regarding the testimony of the state's witness as the admission of the involvement of the state's witness with the defendant in the events before, during, and after the shooting, along with the initial lies of the state's witness to the police at the crime scene, could support a finding that the state's witness was an accomplice and not merely present for the crimes; and defense counsel's deficient performance prejudiced the defendant as the lynchpin of the state's case against the defendant was the credibility of the state's witness. Fisher v. State, 299 Ga. 478, 788 S.E.2d 757 (2016).

Instruction on slight evidence.

Trial court did not err when the court charged the jury on a dictionary definition of "corroborating evidence" in response to the jury's question asking for a definition of the term "slight corroboration" as the jury was properly instructed on the full scope of accomplice testimony; the definition of "corroborating evidence" given by the trial court was an accurate statement consistent with the law; the instruction on accomplice testimony was devoid of the term "slight corroboration" but rather used the terms "supporting evidence" and "slight evidence from another source." Grimes v. State, 296 Ga. 337, 766 S.E.2d 72 (2014).

Failure to request instruction amounted to ineffective assistance of counsel. — Trial counsel's failure to request a jury instruction regarding the requirement that accomplice testimony be corroborated amounted to ineffective assistance as it was error and prejudiced the defendant as the accomplice's identification of the defendant as the sole shooter was directly contradicted by the testimony of the bank manager who affirmatively identified the accomplice as the shooter. Burns v. State, 342 Ga. App. 379, 803 S.E.2d 79 (2017).

ARTICLE 2

PRESUMPTIONS AND ESTOPPEL

24-14-22. Presumption from failure to produce evidence.

Law reviews. — For note, "Spoliating the Adverse Inference Instruction: The Impact of the 2015 Amendment to Federal Rule of Civil Procedure 37(E)," see 51 Ga. L. Rev. 917 (2017).

JUDICIAL DECISIONS

Analysis

General Consideration
Illustrations

General Consideration

Duty to preserve evidence if litigation reaonably foreseeable. — Duty to preserve relevant evidence arises when litigation is reasonably foreseeable to the party in control of that evidence, and thus while actual notice of litigation would clearly make such litigation foreseeable, other circumstances may show that the defendant or alleged tortfeasor actually or reasonably should have anticipated litigation, even without notice of a claim being provided; the court could consider any internal investigation and the reasons for notification of counsel and insurers. Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596 (2015).

Spoliation of evidence, etc.

Visitor's claim that the trial court erred by finding that the visitor was not entitled to a presumption of spoliation lacked merit as the visitor failed to show that there was a factual dispute as to whether the subject elevator was removed from service and, thus, that there existed spoliation. Jones v. Med. Ctr. of Cent. Ga., Inc., 341 Ga. App. 888, 802 S.E.2d 286 (2017).

Rules of spoliation triggered.

In a software design company's claim alleging that the appellants improperly copied the company's software products, the appellants' answer was properly struck on the ground that spoliation of evidence occurred because the appellants knew that they had an affirmative duty to preserve the images of their hard drives as that evidence was clearly relevant to the pending litigation; the relief the company prayed for was, inter alia, that all hard drives belonging to the appellants be imaged immediately; and the temporary restraining order expressly prohibited the appellants from destroying, deleting or removing from any computers any data or software before the hard drives of each computer were imaged for inspection and analysis by a special master. Delphi Communs. v. Advanced Computing Techs., 336 Ga. App. 435, 784 S.E.2d 802 (2016).

Illustrations

In a medical malpractice action, etc.

In a medical malpractice case involving the birth of a baby with serious defects due to lack of oxygen, in which the hospital destroyed the paper strips containing records of the fetal heart monitoring pursuant to its usual practice, the trial court could consider whether the hospital reasonably should have anticipated litigation, even without notice of a claim, considering the seriousness of the injury, the likelihood of litigation arising, and other factors. Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596 (2015).

Trial court did not err in failing to instruct the jury on the law pertaining to spoliation of evidence because there was no evidence that the doctor had notice that the patient and the patient's spouse were contemplating litigation when the manufacturer replaced the device used on the patient. Hand v. S. Ga. Urology Ctr.,

P.C., 332 Ga. App. 148, 769 S.E.2d 814 (2015), cert. denied, No. S15C1304, 2015 Ga. LEXIS 594 (Ga. 2015), overruled in part by Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596 (2015).

24-14-29. Equitable estoppel.

JUDICIAL DECISIONS

ANALYSIS

ILLUSTRATIONS

Illustrations

Equitable estoppel defense not available to defending trustee in action at law. — In a trust administration dispute, the trial court's ruling that a trustee's attempt to rely on the equitable defenses of unclean hands, laches, and equitable estoppel failed was proper because the challenging beneficiary filed an action at law against the trustee seeking only money damages; thus, because it was an action at law, the equitable defenses of laches and unclean hands had no application to the case. Hasty v. Castleberry, 293 Ga. 727, 749 S.E.2d 676 (2013).

Actual knowledge did not entitle party to equitable estoppel. — Trial court did not err in finding the lending company failed to comply with the foreclosure notice provisions of O.C.G.A. § 44-14-162.2 because the company's attorney failed to offer any reasonable explanation as to why, despite knowing that the debtor was the record owner of the properties, it only sent the notices to the predecessor in interest, and its agent, and the lending company was not entitled to equitable estoppel despite actual notice to the debtor. DIP Lending I, LLC v. Cleveland Ave. Props., LLC, No. A17A1411, 2018 Ga. App. LEXIS 189 (Mar. 14, 2018).

ARTICLE 3

PARTICULAR MATTERS OF PROOF

24-14-40. Evidence of identity; burden in civil proceedings.

JUDICIAL DECISIONS

Evidence sufficient.

Sufficient evidence established the juvenile's identity beyond a reasonable doubt because, when the juvenile court called the case for hearing, the judge used the juvenile's full first and last names to identify the case, and announced for the record that the juvenile was present; during the officer's testimony, the officer used the juvenile's surname, to identify the juvenile at the apartment complex who fled when the officer approached, causing the officer to give chase; and the record contained no evidence of any other juvenile with the same last name being at the scene of the July 18 incident or in the courtroom at the time of the hearing. In the Interest of A. A., 334 Ga. App. 37, 778 S.E.2d 28 (2015).

24-14-44. American Experience Mortality Tables.

Law reviews. — For article, "Calculating Economic Damages in Georgia Personal Injury and Wrongful Death Cases," see 22 Ga. St. Bar. J. 18 (Feb. 2017).

24-14-45. Other mortality tables.

Law reviews. — For article, "Calculating Economic Damages in Georgia Personal Injury and Wrongful Death Cases," see 22 Ga. St. Bar. J. 18 (Feb. 2017).

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